Law of the Sea: State Practice in Zones of Special Jurisdiction

Edited by
Thomas A. Clingan, Jr.

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SESION INAUGURAL

El Centro de Estudios Económicos y Sociales del Tercer Mundo les da la más cordial bienvenida.

Ahora, voy a tener el gusto de presentarles a los distinguidos miembros del Presidium. En primer lugar, tenemos al licenciado embajador Manuel Tello Macías, quien, en representación del señor Secretario de Relaciones Exteriores, Jorge Castañeda, hará la inauguratoria de la reunión. Después, tenemos a la doctora Gloria Caballero, Secretaria General del Centro de Estudios Económicos y Sociales del Tercer Mundo; al doctor John P. Craven, Director del Instituto del Derecho del Mar de la Universidad de Hawaii; al doctor Scott Allen, Director Asistente del Instituto del Derecho del Mar de la Universidad de Hawaii, y al doctor Jorge A. Vargas, coordinador de la reunión.

Ahora, hará uso de la palabra la doctora Gloria Caballero, en nombre del doctor Viviano Osorio Taffal, para dar la bienvenida. Gracias.

"Señor Manuel Tello, Subsecretario de Relaciones Exteriores y representante personal del señor Canciller de México; señor doctor John P. Craven, Director del Instituto del Derecho del Mar de la Universidad de Hawaii; señores participantes, colegas y amigos, a nombre del señor Director de este Centro, doctor Viviano Osorio Taffal, quien por razones de salud no está aquí entre nosotros, es un honor para mi dirigir a ustedes estas palabras de bienvenida:

Para el Centro de Estudios Económicos y Sociales del Tercer Mundo es de sumo interés esta reunión, porque considera tema de gran importancia el estudio de los problemas que presenta el derecho del espacio oceánico, ya que este Centro está dedicado a investigar las carencias que impone el subdesarrollo, y es su preocupación básica entender los graves problemas que ese fenómeno plantea y buscar soluciones para ellos. Prueba de ese interés es que esta institución

tiene un programa especial que dirige el doctor Jorge Vargas, específicamente consagrado al estudio del derecho del mar. Como primer resultado de tal esfuerzo se ha publicado ya la Terminología sobre el Derecho del Mar y, en breve, aparecerá una enciclopedia que sobre este mismo tema está concluyendo el propio doctor Vargas. Asimismo, este año, el Centro acogió en sus bellas instalaciones al Instituto de Derecho Internacional de La Haya, que dictó aquí su curso anual sobre (en esta ocasión) derecho y nuevo orden internacional; en él, uno de los temas sobresalientes fue el derecho relativo al mar.

En 1977, recién fundado este Centro, se celebró la Octava Reunión Pacem in Maribus, bajo el auspicio del Instituto Oceánico de Malta y el CEESTEM. El tercer número de nuestra revista, correspondiente a 1978, recogió algunos de los trabajos que se presentaron y discutieron en tan importante coloquio.

El que una institución pequeña y nueva como ésta haya dedicado tantos esfuerzos al estudio del derecho del mar, prueba la gran importancia que le concede.

Todos nosotros sabemos ya que en el mar puede estar la solución a muchos de los más graves problemas que afronta la humanidad. Y es preocupación de quienes creemos necesario el advenimiento de un nuevo orden internacional, que las grandes riquezas que encierran los mares se exploten en forma justa, lo que significa que los países del tercer mundo tengan también la oportunidad de beneficiarse con ellas.

Hasta ahora, el reparto del poder y la riqueza se ha caracterizado por la desigualdad; nosotros aspiramos a un futuro en el que la equidad sea efectivamente norma de conducta y, por lo tanto, la distribución de las enormes posibilidades que los mares ofrecen sea patrimonio de todos los pueblos y no sólo de los que hoy tienen la posibilidad de explotarlos, por ser los poseedores de la tecnología y los recursos necesarios para llevar a cabo esa obra.

Se ha dicho mucho que el futuro de la humanidad está en los mares, sólo quiero subrayar que para nosotros la humanidad la componen todos los pueblos de la tierra y no sólo los pueblos poderosos. Por eso, si queremos un mundo más justo, hay que pensar en que los hasta ahora desheredados deben acceder en plano de igualdad al disfrute de los bienes; entre ellos, los que ofrece el espacio oceánico.

Para que este ideal se logre y los recursos marinos lleguen a ser ese futuro promisorio para la humanidad, es preciso construir principios e instituciones jurídicas que establezcan un orden y una reglamentación adecuada. Es una noble tarea a la que espero que ustedes puedan contribuir con sus trabajo.

A nombre del señor licenciado Luis Echeverría, Presidente del Consejo de Administración de este Centro de Estudios; de su Director General, el doctor Viviano Osorio Taffal, y de mis compañeros, doy a ustedes la más cordial bienvenida y les deseo el mayor de los éxitos en sus labores. Muchas gracias."

Ahora, hace uso de la palabra el doctor John P. Craven, Director del Instituto de Derecho del Mar de la Universidad de Hawaii:

"Distinguidos amigos y colegas, es para mi un honor darles la bienvenida en nombre del Instituto de Derecho del Mar.

El tema y el programa de esta reunión anual se caracteriza por su contenido. El doctor Thomas Clingan, coordinador de la reunión por parte de nuestro Instituto, y el doctor Jorge Vargas, por parte del CEESTEM, han reunido a un grupo muy distinguido de ponentes y comentaristas quienes, junto con los distinguidos asistentes, constituyen un foro único para un estudio definitivo y técnicamente preciso sobre la práctica de los Estados y zonas de jurisdicción especial.

OPENING REMARKS

John P. Craven
Law of the Sea Institute

Dr. Caballero, Secretary Tello, distinguished friends and colleagues. The substance of this conference should not overwhelm the symbolic significance of a jointly sponsored meeting by the Law of the Sea Institute and the Center for Economic and Social Studies of the Third World.

For the Law of the Sea Institute, this meeting is a major milestone in its efforts to become truly international and to serve as an unbiased forum for timely debate on the evolving international law of the sea. In this regard, the evolution of the Institute parallels the evolution of the law of the sea itself. As the law makes the transition from a collection of unilateral declarations by coastal states and coastal regions to an agreed upon international law of global invariance, we see parallels in the development of the Institute.

Initially, the membership of the board of the Institute and the locale of the annual meeting was North American with a predominant focus on the concerns and interests of the United States. The internationalization of the focus of the Institute's meetings and workshops carried it to Honolulu, to the Hague and to Mexico City and in the future, to Korea and Kiel, and this is accompanied by a diversification of board members, to include representatives from Europe and Asia. But despite this effort to internationalize, many people feel after examining our board membership and our meeting places that the Institute's goals and concerns are at best Northern Hemispheric. But such a conclusion is contrary to the charter and the aims of the Institute.

The excellent and timely invitation of CEESTEM to jointly sponsor a conference on the Law of the Sea was a symbol to us of the recognition that the Institute is making progress toward its international goal. Nonetheless, we recognize that men of good will and good motive, acting within the mandates of a charter with which few will disagree, are nevertheless conditioned by their experiences, by their citizenship, their national loyalty and their national origin to the extent that conclusions which they reach are recognized as sharing a common perception with the prevailing view of the political organizations with which they are associated. Thus, we may conclude that in the terms of the perception of men, the Institute approaches this meeting with an orientation that is predominantly that of the United States, heavily modified by the historical and cultural perspectives of the North Temperate Zone and with only limited insights into the attitudes, concerns, and problems of the Third World.

Our distinguished co-sponsor, CEESTEM, like the Institute, has in the words of its own charter adopted a non-partisan and non-sectarian role in the field of international relations. CEESTEM is concerned with underdevelopment wherever it may occur, but by virtue of history its focus thus concentrates mainly on the problems of Asia, Africa, and Latin America. It is too early to observe evolutionary trends in the growth and development of CEESTEM except to applaud its early recognition of the need to examine the problems of both the developed and the underdeveloped world if its goals are to be achieved, and once again, this meeting is symbolic of that common understanding.

Nonetheless, we also recognize that the administrators and staff of CEESTEM, people of good will and good motive, acting within the mandates of a charter with which few will disagree, are conditioned by their experience, their citizenship, their national loyalty and national origins to the extent that conclusions which they reach are recognized as sharing a common perception with the prevailing view of the political organizations from which they come.

Thus, we may conclude that in terms of the perceptions of men CEESTEM approaches this meeting with an orientation that is predominantly that of Mexico heavily modified by the historical and cultural perspectives of the Third World. These mutual but differing perspectives can be healthy but we must realize with all candor that the history of mutual perception between Mexico and the United States has not been a happy one. It is only 158 years since Mexico became independent of Spain. Less than three decades later, the peoples of the United States acting in their best interests as they perceived them engaged in an armed conflict whose result was the transference of California, Texas, Nevada, Utah, most of Arizona and parts of Colorado, New Mexico and Wyoming from Mexico to the United States. Thus, Mexico lost half of its territory and the great bulk of the then known resources of that nation.

On the other hand, these newly acquired territories played and continue to play a major role in the economic health and vitality of the Northern nation and this fact, although it is more than 100 years old, colors our history and our perception as we meet today. We all realize that much has been done to ameliorate the relationships between Mexico and the United States and much has been accomplished since the emergence of modern Mexico in 1921.

Nevertheless, we are today all too painfully aware that the problems of a common border, the problems of riparian interaction, the problems of a common ocean and the problems of a common sea are not yet resolved. We are not here in this meeting to resolve or even to discuss these problems, but their importance stems from the fact that we are all aware that, had

international law been developed with full and fair participation by all of the parties, the resolution of these problems would have been greatly eased and they would not be with us today with the intensity that we now experience them.

To paraphrase a lawyer's adage, "Ours should be a world of law, not of perceptions," and it is in this spirit that this meeting takes on exciting dimensions. Mexico has made major contributions to the developing law of the sea and all of the attendees at this meeting have in one way or another made significant contributions to a world law, a law which is independent of national or regional dimensions. Thus, we here are fully representative of the peoples of the world to discuss the international law of the sea, to obtain insights into precepts and principles which would be acceptable to all regardless of perception.

I have high hopes that we will make substantial progress in this regard and I have high hopes that this community and these organizations will meet again and again, and I have high hopes that the rule of law will be our most effective techniques for the resolution and reconciliation of whatever misperceptions may yet exist.

Corresponde al señor embajador Manuel Tello Macías, Subsecretario de Relaciones Exteriores, en representación del señor Secretario Jorge Castañeda, declarar formalmente inaugurados los trabajos de la presente reunión. Suplicamos al público presente ponerse de pie.

"Doctora Gloria Caballero, Secretaria del Centro de Estudios Económicos y Sociales del Tercer Mundo; doctor Craven, Director del Instituto de Derecho del Mar de la Universidad de Hawaii; señores conferencistas, señoras y señores: ante la imposibilidad de acompañarlos como hubiera sido su deseo, el embajador Jorge Castañeda, Secretario de Relaciones Exteriores, me ha conferido el honroso encargo de representarlo en esta ceremonia con la que da comienzo la XIII Reunión Anual del Instituto de Derecho del Mar de la Universidad de Hawaii.

Es para nosotros muy satisfactorio el ver reunidos en este auditorio a tan eminentes especialistas en la materia, y ustedes conocen (lo acaba de decir el doctor Craven) el interés e importancia que concede México a lo que con el transcurso del tiempo se ha convertido en una de las más difíciles tareas asumidas por la comunidad internacional, esto es, la elaboración y negociación de un nuevo régimen jurídico para los océanos.

Seguiremos empeñando nuestros mejores esfuerzos a fin de que el nuevo derecho del mar, que se ha venido gestando en la III Conferencia de las Naciones Unidas sobre la materia, sea justo y equilibrado, a fin de que pueda ser aceptado por la inmensa mayoría de los Estados.

México piensa que las negociaciones hasta la fecha celebradas nos permiten ser optimistas en cuanto a la conclusión de los trabajos que tiene encomendados la Conferencia del Mar.

Tomando en consideración lo anterior, desearía aprovechar esta ocasión para reiterar nuestro llamamiento a todos los Estados, a fin de que se abstengan de adoptar medidas unilatera-

les que pudieran poner en peligro el objetivo final que nos fijamos al inicio de nuestras labores en Venezuela, es decir, la conclusión de una Convención que fije la conducta de los Estados en los océanos.

El interés en acompañarlos en este día resulta obvio; se reúne en este Centro una institución de prestigio, conocida por su contribución a la mejor comprensión de las nuevas normas jurídicas que se han venido elaborando en la III Conferencia sobre el Derecho del Mar. Las personalidades que año con año se reúnen en diversas partes del mundo para discutir este tema, son la mejor garantía de la seriedad y profundidad con que el Instituto de Derecho del Mar desempeña sus labores.

En nombre del señor Secretario de Relaciones Exteriores, me es muy grato declarar inauguradas las labores de la XIII Conferencia Anual del Instituto de Derecho del Mar de la Universidad de Hawaii. Muchas gracias."

PART I

AN OVERVIEW OF UNCLOS III

EXTENDED JURISDICTION: THE IMPACT OF UNCLOS III ON COASTAL STATE PRACTICE

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I. The Impact of UNCLOS III

No previous experience in conference diplomacy has presented more complicated problems of analysis and evaluation than the Third United Nations Conference on the Law of the Sea (UNCLOS III). Taking both the preparatory and formal stages of this conference as a single continuous process of diplomacy, most commentators would view this protracted exercise as directed at a number of objectives. In the first place, it is perceived as an approach to treaty-making, designed to result in a formal instrument which would be binding on all parties under the law of treaties. Equally clearly, however, UNCLOS III has addressed itself also to the important, but less precise, purpose of law reform, on the generally accepted assumption that the old law of the sea contained inequities or anomalies that had to be corrected in order to have the support of the expanded world community. Third, the technological revolution effected in the uses of the ocean over the last two or three decades had imposed on the minds of most delegations the need for a regulatory framework for efficient management of the ocean environment and its valuable resources. Furthermore, UNCLOS III has coincided with a more general movement to use problem-oriented global conferences to alter or modify those state practices around the world which are the chief evidence of customary international law, especially in economic and related areas of concern [1].

In the light of the multiplicity of objectives that can be ascribed to UNCLOS III it is extremely difficult to make a complete analysis of the impact of such a multifaceted process, particularly as long as the Conference is still in motion and the final contents are not yet entirely agreed upon. Even the most casual reader of the current version of the UNCLOS III text [2] would observe that this enormous document, consisting of over 300 articles and seven annexes, varies in content from extremely general propositions of an hortatory nature, at one extreme, to minutely detailed prescriptions of an operational nature, at the other extreme. The danger of over-generalizing about such a heterogeneous document must be avoided. At this Conference, we may be excused for limiting our analysis of UNCLOS III to Part V on the Exclusive Economic Zone (EEZ) and other provisions related to the exercise of national jurisdiction within extended limits under the new law of the sea [3]. Such a limitation to the issues of extended jurisdiction reduces some of the complexity of an impact analysis, since it is clear at least that the concepts of a 200 nautical mile (nm) economic zone, and of a continental shelf that might extend beyond these limits, are fixed and central features of the new law of the sea endorsed at UNCLOS III. A focus on the economic zone in particular is especially appropriate for impact analysis, in view of the fact that this concept is essentially the product of the Conference [4].

To the extent that the economic zone influence is reflected in national legislation, and other evidences of coastal state practices, it represents a measure of impact of the Conference itself.

But even the impact of this limited aspect of UNCLOS III -- that of extended jurisdiction -- is difficult to evaluate because of the various objectives of the Conference, as outlined above. Looking at UNCLOS III simply as a treaty-making exercise, we would be required to evaluate the emergence of the economic zone concept as a central motif around which the delegations could rally in the interest of compromise, so as to improve the prospect of coming to nearly unanimous agreement on the convention as a whole. It is, of course, premature to anticipate how far the compromise provisions on the economic zone will contribute to the final arithmetic of consent at the conclusion of UNCLOS III. While many of the traditional trans-oceanic states have come to terms with the concept of a 200nm zone of national jurisdiction, some of the states at the opposite extreme, associated with extended territorial sea claims, may still have difficulty in deciding to adopt a convention which limits the regime of the territorial sea to twelve miles. This particular kind of impact cannot be predicted with any degree of confidence, since the decision by any state whether or not to adopt the final text depends upon a host of interrelated factors.

From the law reform perspective, however, it is already evident that, whatever the final arithmetic of formal consent might be, the trend towards an economic zone regime and other forms of extended jurisdiction is perceived by a substantial majority of nations as a step forward toward the establishment of a more equitable legal system for the oceans. Whatever judgment one might pass on this matter, none will deny that the emergence of this trend will create a significant redistribution of effective control over the ocean's resources. In this sense, the phenomenon produced at UNCLOS III is likely to be accepted by most commentators as a contribution of some kind towards the cause of law reform.

Moreover, the zones of extended national jurisdiction which characterize the new law of the sea are often presented as a rational approach to the problems of securing effective ocean management. It is sometimes argued that the nearest coastal state has the most to gain in the long term from a management system designed to conserve offshore resources and to control access to coastal waters, and that therefore it is conducive to good management to vest management authority in the coastal state. Those chiefly concerned with promoting efficiency in ocean management tend, however, to be critical of the trend toward extended jurisdiction on the ground that it is essentially detrimental to the cause of optimal management [5]. Yet even these critics will concede that this judgment may have

to be altered in the longer term, as developing coastal states learn from experience how to attract and apply productive and managerial techniques to these resources in the offshore.

The question of the impact of extended jurisdiction on state practice, and ultimately on the customary international law of the sea, is perhaps the most pertinent of all preliminary questions about a conference such as this devoted to the new extended zones in the law of the sea. It is a question which requires the analyst to identify a number of hypotheses concerning the relationship between global diplomatic negotiations on the one hand, and national responses, legislative and otherwise, on the other. Because of the difficulty of establishing this relationship, it is necessary first to quantify as accurately as possible the pattern of national responses to the Conference, from its first preparatory stage in 1968 up to the middle of 1979 and also to recollect the patterns of state practices that existed in the period prior to UNCLOS III.

II. The Pattern of Coastal State Practices (1946-1965)

Claims to extended coastal state jurisdiction have taken various forms both before and during UNCLOS III, but it may be sufficient for present purposes, in dealing with the period between the conclusion of World War Two and the establishment of the U.N. Seabed Committee, to focus only on the three most prominent types of such claims: territorial sea claims beyond the traditional three-mile limit; fishing or fishery conservation claims beyond three miles; and (apparently extraterritorial) continental shelf claims. For the sake of convenience, these three types of claims are tabulated in five-year segments. The final year of tabulation (1965) is seven years after the conclusion of the four UNCLOS I Conventions adopted in Geneva, two years before the famous speech of Ambassador Pardo, which was to lead to the convening of UNCLOS III, and three years before the first meeting of the U.N. Seabed Committee.

A. Territorial Sea Claims

The first five columns of Table I illustrate the well-known expansion of territorial sea claims that has taken place since the 1940's. In early time the five Scandinavian countries (Denmark, Finland, Iceland, Norway, and Sweden) consistently claimed a four-mile territorial sea in the face of more familiar three-mile practices elsewhere. As to more modern times, the first column also shows that in 1945 as many as ten states had asserted claims to a six-mile territorial sea (Bulgaria, Greece, Haiti, Iran, Italy, Portugal [including its colonies of Cape Verde, Mozambique, and Sao Tome and Principe], Romania, Spain [including its colony of Equatorial Guinea], Turkey and Yugoslavia). Moreover, the Soviet Union and the Ukraine claimed

a 12-mile territorial sea. Interestingly, the most unusual claim was the colonial claim of the United Kingdom on behalf of Tonga [6].

Column two shows that surprisingly few new claimants to an extended territorial sea emerged in the period between 1945 and 1950. Yet all of the three new claims are worthy of note. The North Korean claim to 12 miles was to anticipate a trend that would become more evident in later decades; the Chilean claim to 50 kilometers represents the first departure from the general practice of using a mileage measurement; and the Peruvian claim to a 200-mile territorial sea marks, apparently, the first official national effort to effect a modern revolution in the scope of territorial jurisdiction at sea [7].

Ten new claims had been made by the end of the 1950-1955 period. Four of these settled on 12-mile limits (Bulgaria, Ecuador, Ethiopia, and Romania). Significantly, three of these four claimants substituted this 12-mile limit for lesser limits, and may therefore deserve credit for anticipating correctly a trend to be vindicated by UNCLOS III. Egypt was more conservative with a six-mile claim, and Cambodia and Albania somewhat odd with five- and ten-mile claims respectively. By 1955, moreover, two more Latin American states had joined Peru in creating a 200-mile territorial sea: Honduras, which previously claimed three-mile limits, and El Salvador. Lastly, South Korea introduced a non-uniform claim to areas varying from 20 miles to 200 miles from the shore [8].

During the period 1955 to 1960 -- significantly, the period of UNCLOS I and UNCLOS III -- a very clear picture emerges. Of the twelve new claimants to an extended territorial sea, no less than nine settled for 12-mile limits. The only exceptions to the general twelve-mile trend in this period are India and Thailand, both of which moved more cautiously from three miles to six [9], and colonial Somalia, which promulgated a six-mile claim.

In the final period of 1960 to 1965, ten of the 19 new claimants asserted claims to a 12-mile territorial sea. Most of the exceptions to this general trend were former colonies, making more limited claims to three or six miles, presumably under the continuing influence of the metropolitan countries [10].

In summary, the first five columns of Table I show that 56 states by 1965 had claimed a territorial sea exceeding the traditional three- or four-mile limits. Of these 56, almost one-half (27) had settled on 12 miles. Given the extreme variability of claims on both sides of the 12-mile limit, it had become evident that at a future law of the sea conference the majority of delegations would be likely to seek a compromise on 12-mile seaward limits of the territorial sea. Similarly,

the later decision at UNCLOS III to adopt a 200-mile zone of multi-functional authority was also overshadowed by the state practices of El Salvador, Honduras, and Peru, which embraced a territorial sea of these dimensions [11].

8. Continental Shelf Claims

Most specialists in the law of the sea regard the Truman Proclamations of 1945 [12] as marking the advent of the trend to extended coastal state jurisdiction. Even though this might be debated on strictly historic grounds [13], it is convenient to regard extended jurisdiction as a trend which began immediately after the termination of World War Two. As shown in Table I, a large number of coastal states in 1945, prior to the promulgation of the Truman Proclamations, still maintained the traditional practice of restricting their jurisdictional claims to a narrow territorial sea, and, in some cases, an additional contiguous zone which rarely exceeded a distance of 12 miles as measured from the base line of the territorial sea.

The seventh column shows the degree of influence exerted on state practices five years after the Truman Proclamations of 1945. This influence was confined to three regions: Latin America, the Caribbean, and the Arabian-Persian Gulf. It should be noted that by 1950 only the Gulf claimants could have been motivated by an imminent prospect of commencing offshore production of petroleum. Some of the other claimants, especially in Latin America, seem to have been chiefly motivated by the desire to protect their fishery resources [14].

The eighth column in Table I shows seven new claimant states appearing in the period between 1950 and 1955: Cuba, Ecuador, El Salvador, Guyana, Israel, Korea and Pakistan. Two features of this period are worthy of notice. First, the effect of these seven new claims to extended jurisdiction over the continental shelf was to spread the trend beyond the Latin American, Gulf, and Caribbean regions to the Middle East, the Far East, and the Northern Indian Ocean. Second, this period shows the first imitation of the Nicaraguan precedent of resorting to a depth rather than a distance criterion.

By 1960, 88 nations had made a strenous but unsuccessful attempt to reach a general agreement on uniform maximum limits of the territorial sea [15]. These negotiations had shown that the nations which still insisted on limiting territorial sea claims to three miles belonged to a rapidly diminishing minority in the world community, and that, on the other hand, a majority seemed prepared to accept a six-mile territorial sea [16]. The two law of the sea conferences were the most dramatic evidence to date that the trend toward extended jurisdiction was well established around the world. The ninth column of Table I provides striking evidence of this: by 1960, 41 coastal

states had advanced some kind of claim to expanded jurisdiction over the continental shelf. It should be noted that this number represents approximately one-half of the nations participating at UNCLOS II in 1960. Moreover, the 17 new claimants emerging between 1955 and 1960 reflect the continuation of the outward expansion of these jurisdictional trends to areas of Africa, the Red Sea, the Mediterranean, the Indian Ocean, the Bay of Bengal and the Gulf of Thailand. In the same period, Portugal became the first European nation to join the list of claimants. It will be noted that most of the new claimant states fall between the equator and forty-five degrees north latitude. What is most conspicuous, at the end of UNCLOS II, is the massive resistance which still existed to extended jurisdiction in the northern states of Europe and North America, areas from which most shipping and long-range fishing was conducted.

The tenth column in Table I shows the growing influence of the 1958 Convention on the Continental Shelf upon state practices around the world. A distinction can be drawn between those coastal states which simply ratified or implemented the Convention -- thereby incorporating the triple criteria of adjacency, depth and exploitability contained in Article II of that Convention -- and those coastal states, on the other hand, which refrained from incorporating the Convention but which made continental shelf claims influenced in one of several ways by the outcome of UNCLOS I. The tenth column shows that by 1965, 22 coastal states had resorted to the first of these two methods of making continental shelf claims: Albania, Australia, Bulgaria, Cambodia, Colombia, Denmark, the Dominican Republic, Guatemala, Haiti, Israel, Madagascar, Malaysia, Poland, Portugal, Romania, Senegal, South Africa, the Soviet Union, the Ukraine, the United Kingdom, the U.S.A. and Venezuela. These states represent all major geographic areas of the world, illustrating the acceptability which this Convention was achieving. Interestingly enough, even three landlocked states (Byelorussia, Czechoslovakia, and Uganda) had already ratified the Convention by this point, reflecting perhaps a disinterested desire on their part to participate in the reshaping of the international law of the sea, but possibly also a growing awareness among landlocked countries that sea-related issues were of potential importance even to them. Of the second category of states, only Burma seems to have adopted all the criteria of the 1958 Convention in its continental shelf claim without ratifying and implementing the actual instrument. Three of the other claimants (the Federal Republic of Germany, Syria and Uruguay) adopted a combination of the depth and exploitability criteria without adopting the Convention itself. Two others made continental shelf claims on the basis of a single criterion: Mauritania by reference to the 200 meter isobath alone, and Norway by reference to the exploitability criterion alone. It should also be noted that Panama, Somalia and Gabon made continental shelf claims in

general, deliberately unspecific, terms. Indonesia's claim was also expressed in general terms, addressed to the problem of delimitation.

Finally, it is important to notice that by 1965 no less than 65 coastal states had made continental shelf claims of one kind or another beyond the limits of the traditional three-mile territorial sea. Most commentators would agree that this figure, corresponding to a great majority of the states participating at UNCLOS I, represents very substantial support in state practice for the concept of an extended continental shelf in customary international law. This view was to be upheld only four years later by the International Court of Justice in North Sea Continental Shelf Cases [17].

C. Fishery Claims

Columns eleven to fifteen in Table I show the claims to extended fishery jurisdiction (i.e., beyond three-mile territorial limits) in five year segments up to 1965. The figures for column eleven, it should be remembered, are based on claims promulgated at the beginning of 1945, before the end of World War Two and, more important, before the Truman Proclamation which claimed an extensive zone for fishery conservation purposes [18]. Six of the states listed in column eleven are claimants to a fishing zone which is co-extensive with a claim to their territorial sea exceeding three-mile limits. More significant are the claims of those seven other states (Argentina, Brazil, Colombia, Ecuador, Lebanon, Portugal and Uruguay) claiming fishery jurisdiction beyond their own territorial limits. Of these seven, five still retained a narrow three-mile territorial sea. Three of these five claimed 12 miles for fishery jurisdiction; Argentina possessed a ten-mile fishing zone, and Uruguay claimed only a six-mile fishery zone. The sixth and seventh claimants in this category were Lebanon, claiming a six-mile fishery zone but not claiming a territorial sea, and Portugal, claiming a six-mile territorial sea but a 12-mile fishery zone. This policy of extended jurisdiction was also applied to Portugal's colonies of Cape Verde, Mozambique, and Sao Tome and Principe [19]. None of these seven claimants was an active combatant in World War Two, and all were presumably able to devote more time to fishery policy, but it should be noted that all five of the Latin American claims were made before the outbreak of World War Two. In fact, two of the five (Argentina and Uruguay) made their claims to extended fishery jurisdiction before World War One. Argentina's ten-mile fishery claim of 1907 seems to be the first of such claims in the history of maritime state practices [20].

By the beginning of 1950, almost five years had passed since the promulgation of the Truman Proclamation on Fishery Conservation. Column twelve shows that the impact of this instrument on state practices was much less immediate than that

of its more famous companion, the Truman Proclamation on the Continental Shelf. For example, two states (Costa Rica and Panama) had made claims to 200nm fishery zones, far beyond their territorial sea. One other Latin American claimant, Peru, also claimed a 200nm fishery zone, but this was co-extensive with its own territorial sea claim which was promulgated at the same time. Chile, yet another Latin American claimant, also claimed a 200nm fishery zone, but, unlike Peru, its claim was co-extensive with its continental shelf claim.

The period from 1950 to 1955 was one of oddities. Some of the oddity is apparent in unusual claims in Danish and French dependencies; others are reflected in the practice of Albania which introduced a ten-mile territorial sea and a 12-mile fishery zone at the same time, and of South Korea which claimed extended fishery jurisdiction together with its territorial sea in areas ranging from 20 to 200nm from its shore [21]. Egypt maintained a fairly safe and orthodox approach, claiming a six-mile territorial sea and a 12-mile fishing zone, whereas Ecuador struck a more modern note by claiming a 200nm fishery zone while, at the same time, expanding its territorial sea to 12 miles, which would become the pattern of the future. An earlier oddity in Icelandic state practice, whereby fishery jurisdiction was restricted to only three miles, at the time when a four-mile territorial sea was claimed, was rectified during this period by bringing the two into alignment with a four-mile zone. Of the four other countries claiming fishery zones exactly commensurate with their territorial seas, three (Bulgaria, Ethiopia and Romania) limited themselves to 12 miles, whereas the fourth, Honduras, established 200 miles for both purposes [22].

Column 14 shows the period influenced by UNCLOS I, where efforts made to produce uniformity in state practices on a three-mile territorial sea and a 12-mile fishing zone proved unsuccessful. Of the eight new claimants to extended fishery jurisdiction, six had settled on 12-mile limits by 1960. One of the other two, El Salvador, had joined the slowly growing list of states claiming 200nm limits for both territorial and fishery purposes. The eighth state, India, had expanded its territorial sea to six miles, and beyond these limits claimed a fishery conservation zone in areas up to 100nm from the limits of its territorial sea -- a variable approach which might be compared to that of South Korea.

Of the twenty new claimants to extended fishery jurisdiction listed in column fifteen, all but two (Congo and the United Kingdom) had advanced claims to 12-mile limits. Of the 18 "orthodox" claimants, four had also claimed a 12-mile territorial sea, but the remaining 14 might be said to have represented the "mainstream" in state practice at that time [23].

In summary, it can be seen that by 1965, 58 states (or dependent territories) had made claims to extended fishery jurisdiction: that is, beyond three-mile territorial limits. This figure is very close to the number of states and territories which had made extended jurisdictional claims to a territorial sea (56) and to the continental shelf (60). The three figures, taken together, show that the phenomenon of extended jurisdiction was proceeding in a functionally balanced manner -- a matter of some juridical importance when one considers the distinction between territorial, unifunctional and multifunctional regimes which would emerge more clearly at UNCLOS III. Moreover, it is of considerable historic interest to note that by 1965, only three years before the first meeting of the Seabed Committee, no less that 39 (i.e., two-thirds) of the claimants to extended fishery jurisdiction had accepted 12-mile limits. This represents dramatic evidence of the rapidity of change in state practices around the world since 1965, considering that 80 or more coastal states now claim extended fishery jurisdiction out to 200nm limits.

III. The Pattern of Coastal State Practices (1968-1979)

A. Rationalization and Response: The Seabed Committee and UNCLOS III

In his famous speech before the U.N. General Assembly on November 1, 1967, Ambassador Pardo spoke eloquently, from a universal perspective, on the need for the radical restructuring of the law of the sea. What he envisaged, even then, was a legal revolution which would match the technological revolution being effected on the seabed and deep ocean floor [24]. Later, in March, 1971, in a major address to the Seabed Committee, Pardo pointed to the dangers inherent in the trend toward extended national jurisdiction and renewed his earlier call for an international agency to act as trustee for all countries, not only over the ocean floor but throughout the entirety of "ocean space", beyond 200nm limits of national jurisdiction [25].

Many national governments were also disturbed by the trend to extended jurisdiction, albeit for different reasons than those put forward by Pardo. Those with traditional trans-oceanic interests, in particular, viewed the expansionist trend as threatening, and many of them were reluctant to respond to Pardo's call for a third U.N. conference on the law of the sea, if it might result in a rallying together of expansionist states. The majority viewpoint, however, was that such a conference was needed for a variety of reasons, which varied somewhat from state to state.

With serious misgivings in some quarters, the General Assembly agreed to establish an Ad Hoc Seabed Committee in 1967. The first meeting of this body took place in the summer

of 1968. As the name of the Committee implies, the original intention was to focus chiefly on the need to establish a regulatory system for deep ocean mining beyond the limits of national jurisdiction. At the beginning, then, this effort was not regarded as a systematic response of the world community to the larger phenomenon of extended jurisdictional claims around the world. But as the Seabed Committee debate unfolded, the variety of motivations for convening the Committee began to be reflected in a series of expanded agendas, until the framework of debate eventually encompassed virtually all jurisdictional issues in the law of the sea. By 1970 it had become clear that the phenomenon of extended jurisdiction was one of the two dominant motifs of the debate and that a future comprehensive law of the sea convention would have to provide multiple responses to the new pattern of expansionist state practices around the world. It was evident that, in the protracted negotiations which lay ahead, the existing national legislation supporting extended jurisdictional claims would have to be rationalized by the appropriate diplomatic representatives. The latter would, of course, be motivated to seek a treaty text which would represent an ex post facto vindication of these national claims.

On the other hand, the opponents of the expansionist trend took comfort in the knowledge that, despite the general seaward trend, a significant proportion of the claimants seemed prepared to limit most of their claims in surface and subjacent waters to 12 miles. Basing their forecasts on the pattern of state practices in the late 1960's, they had reason to believe that the forthcoming conference would put a brake on expanding claims, by virtue of a compromise agreement on modest uniform limits. To this extent, then, the conference process was seen as one of potential realignment likely to result, after difficult negotiations, in a higher degree of uniformity of state practices.

Whatever the viewpoint adopted, each delegation attending the early years of Seabed Committee discussions shared in the growing realization that what was evolving was an unprecedented exercise in protracted conference diplomacy, designed to attain an ambitious treaty-making objective, but strongly influenced by a dramatic and shifting pattern of extended jurisdictional claims. What was perceived to be emerging was a two-way stimulus/response process between the world of diplomatic debate, on the one hand, and the world of legislative action, on the other. Indeed, the U.N. Secretariat acceded more than once to requests by the delegations to provide updated listings of national jurisdictional claims [26].

It is interesting to recall, therefore, that at the beginning of the Seabed Committee discussions two competing jurisdictional trends had become evident in state legislative practice throughout the world. Numerically, the major trend

was toward 12-mile limits for both territorial sea and fishery zone purposes. As shown in the first column of Table 2, 37 states had claimed a 12-mile territorial sea. It should also be noted that as many as 48 claimants still confined their territorial sea to a minimum of three-mile limits, though many of these 48 were colonies which would shortly advance these claims further seaward after obtaining national independence. A number of other states had already embarked on a cautious advancement outward from three to six miles: as many as 19 claimed a six-mile territorial sea at the beginning of 1968. Even more significantly, column three of Table 2 shows that as many as 59 states or dependent territories had asserted some kind of claim to a 12-mile exclusive fishing or fishery conservation zone. Accordingly, it appeared that although the outcome of the expansion process was unclear, the 12-mile limit seemed likely to have juridical significance for one purpose or another.

Moreover, there was also a conspicuous, if less dominant, trend in state practices toward an assertion of 200nm limits. At the beginning of 1968 only six states made such an extensive territorial claim, but eight states, all in Latin America, had asserted claims to a 200nm fishery zone of one kind or another: Argentina, Chile, Costa Rica, Ecuador, El Salvador, Nicaragua, Panama and Peru.

B. Expansion in Jurisdictional Claims (1968-1974)

1. Introduction

In the twelve years since the debate in the Seabed Committee began in 1968, there has been a steady progression of ideas concerning the maximum limits of national jurisdiction and the features of the various national regimes: the regime of the territorial sea and contiguous zone, the regime of the continental shelf, the regime of the exclusive economic zone, and the regime of archipelagic waters [27]. Although this progression has been almost continuous, a landmark was reached at the Caracas session of UNCLOS III in 1974. Until that time it had been unclear that the proponents of narrow jurisdiction would accept the demand for a 200nm exclusive economic zone (EEZ). By the conclusion of the Seabed Committee discussions, however, they were prepared to acquiesce in this particular trend, subject to their satisfaction on a number of other issues such as freedom of navigation, rights of transit in international straits, and a moderate limit to the territorial sea. The Caracas session marked the emergence of the 200nm EEZ as a fait accompli, subject to the compromise agreements on these cognate issues. It is only after this conditional fait accompli had surfaced publicly at UNCLOS III that the fundamental uncertainty regarding the dominant issues of extended jurisdiction began to dissolve. In retrospect, it seems unlikely that any coastal state would have asserted a

200nm claim in that particular form until such a fait accompli had been accomplished in global diplomacy. It seems appropriate, therefore, to focus first on the pattern of extended jurisdictional trends from 1968 up until the end of 1974.

2. Territorial Sea Claims

Despite diplomatic uncertainty, the 1968-1974 period witnessed considerable activity by states in promulgating new claims to extended jurisdiction. In the case of new territorial sea claims, between 1968 and 1974 only three of the 46 new claimants retained the minimum traditional three-mile limits: namely, Korea, the United Arab Emirates, and Nauru [28]. Only one other, the Gambia, claimed less than 12 miles. The "new orthodoxy", on the other hand, had been joined by 28 additional claimants. This new batch of 12-milers brought the total count around the world to over 50. This figure represents more than one-half of the number of delegations participating in the Seabed Committee. Moreover, these 28 new territorial sea claims represent a substantial majority of the total number (46) of new territorial claims in the 1968-1974 period. Meanwhile, four newcomers joined the 200nm territorialists. The first two, Uruguay and Brazil, were followed, after 1971, by the first such claimants from outside the Latin American region: Sierra Leone and Somalia. This meant that the number of 200nm territorial sea claimants had increased to three by 1965, to six by 1968, and to ten by the end of 1974. Although these numbers are fairly modest, it should be noted that after 1971, this trend had spread to a second region of the world. Finally, Table 2 shows a suprising number of "odd" territorial claims between 12 and 200nm limits. Strikingly, all of these claims were made by African coastal states, signifying, perhaps, determination on the part of Africa as a whole to dissent from the two dominant trends of 12 and 200nm claims, as well as from the traditional three-mile claims of the colonial powers. It is particularly interesting that these eleven "odd" and diverse claims were being advanced by African states at the same time that their diplomats were making a collective effort to focus the Seabed Committee debate on the compromise formula of a 200nm exclusive economic zone [29].

3. Continental Shelf Claims

By the beginning of the 1968-1974 period, a decade had passed since the adoption of the Convention on the Continental Shelf at UNCLOS I. For most states in the world, this period was sufficient for them to decide, as a matter of national policy, how that instrument should be reflected, if at all, in their national legislation. Specifically, it was becoming apparent in national legislation how far each coastal state chose to be influenced by Article 2 of the Convention, which contained the three-criteria formula for the definition of the

continental shelf: adjacency, depth (200 meters), and exploitability. By 1974, as official negotiations on shelf and related issues were getting underway at UNCLOS III [30], it had become evident that seven types of continental shelf claims had been asserted by coastal states:

(i) adoption of the Convention (including the Article 2 formula);

(ii) adoption of the Article 2 formula, but not of the Convention itself;

(iii) application of a two-criteria formula (i.e., depth and exploitability);

(iv) application of a depth criterion formula;

(v) application of an exploitability criterion formula;

(vi) application of a distance criterion formula; and

(vii) adoption of the continental shelf or margin concept.

The first five of these seven types of continental shelf claims show a perceptible but diminishing degree of influence from UNCLOS I on state practices.

Table 2 shows that the most common of these seven categories of claims is the method of adopting the 1958 Convention on the Continental Shelf. As many as 17 states adopted this method: this is almost one-third of the 57 continental shelf claimants of this seven-year period. These 17 new claimants bring to 53 the total number of coastal states which had adopted the 1958 Convention by the Caracas phase of UNCLOS III, the phase in which official negotiations on continental shelf issues were begun. Moreover, it is noted in Table 2 that by 1975 five other states had adopted the formula of Article 2, placing themselves in a similar position to the other 17 from a national policy standpoint, if not in a legally identical position. A degree or two further removed from the influence of UNCLOS I were those 12 states which had applied a two-criteria formula, invoking both depth and exploitability. Two of these states introduced a deviation from the letter of the Geneva formula: Ghana used the 100-fathom isobath, which is close but not identical to the Geneva depth criterion; and the other, South Yemen, introduced a variation by applying a 300-meter criterion. Moreover, one state, Cyprus, applied a depth criterion formula alone (200 meters), and three (the island state of Iceland and the archipelagic states of Indonesia and the Philippines) merely

employed the test of exploitability. Completely uninfluenced by UNCLOS I, on the other hand, were two states, South Korea and Madagascar, which formulated their continental shelf claims in the 1968-1974 period by reference solely to a mileage criterion: three miles and 150 miles, respectively. Finally, 13 states merely adopted the concept of the continental shelf, eight expressly and five implicitly, in an indeterminate manner.

These continental shelf claims during the period of the Seabed Committee provide conflicting evidence of the acceptability of the UNCLOS I approach to the 1958 delimitation of the continental shelf. Whereas 17 states, during this period of uncertainty, were willing to take initiatives toward the adoption of that increasingly controversial treaty, only five additional states were willing to incorporate the notorious language of Article 2. No less than 15 states, on the other hand, were prepared to adopt initiatives which were clearly unsupported by UNCLOS I. As we look forward to the final stages of UNCLOS III, at a time when the breadth of the continental margin beyond 200 miles is still not agreed upon, we are struck by the omission during the Seabed Committee period of any new continental shelf claim to a 200nm limit. By the beginning of 1975 only four states had asserted 200nm claims to their continental shelf: Chile, El Salvador, Panama, and Peru. It is also interesting to observe that single-criterion, depth-only claims had diminished almost to the point of extinction in the seven year period.

4. Fishery Zone Claims

It will be recalled that the Seabed Committee had become increasingly interested in the question of uniform limits for an exclusive fishing zone, a matter which had engendered much controversy since the unsuccessful conclusion of UNCLOS II. That Conference had almost succeeded in obtaining a two-thirds majority for a 12-mile exclusive fishing zone throughout the world. By the end of the Seabed Committee period, however, it had become clear that an extraordinary revolution of expectations had taken place and that the concept of a 200nm exclusive fishing zone, subsumed under a newly proposed regime for a 200nm exclusive economic zone, had become acceptable to most delegations.

Table 2 illustrates dramatically how far diplomatic consensus at the global level had moved beyond the actual practice of legislative action around the world. During the 1968-1974 period, not a single state advanced a claim to extended fishery jurisdiction of less than 12 miles. Seventeen states made new fishery zone claims which are limited to the 12-mile limit, but as many as 18 made claims beyond the 12-mile limit but less than 200nm. Most striking of all, however, is the fact that only five claimant states focused on 200nm fishery zones, despite the accumulating evidence during Seabed Committee

debates that a non-territorial or quasi-territorial compromise was in the making, whereby 200nm fishery zones would be legally permissible. It deserves to be noted that the five states which claimed 200nm fishery zones in the 1968-1974 period were Uruguay, Brazil, Somalia, Australia, and Bangladesh [31].

C. Expansion in Jurisdictional Claims: 1975 to Present

This four-and-one-half year period is, of course, the period of UNCLOS III proper, up to the beginning of the resumed Eighth Session in New York during the summer of 1979. In diplomatic terms, this period is marked by a virtual consensus at the global level on the acceptability of a 200nm EEZ and on the impropriety of a territorial sea exceeding 12 miles in breadth. The period is also characterized by continuing uncertainty regarding the legal formulation for determining the seaward limits of the continental margin in areas where the margin extends beyond 200nm limits.

This period marks the advent of the 200nm EEZ in state practice. As shown in Table 3, no less than 47 coastal states advanced claims to a 200nm EEZ during the first four-and-one-half years of UNCLOS III proper. Of these, Africa has produced 15, Asia 10, mainland Latin America 7, the Caribbean island states 5, Western Europe 4, and Oceania/Australasia 6. These figures are impressive in three respects: first, they show a rapid adoption of the 200nm EEZ concept in state practice at a time that is still two or more years removed from the probable termination date of UNCLOS III; second, they show a truly global spread to every geographic region except that of Eastern Europe; and third, they reflect not a single deviant state in terms of mileage of the areas claimed, even in the face of obvious geographical limitations in semi-enclosed seas [32].

The history of fishing zone claims, since the beginning of 1975, is, of course, dominated by the mushrooming of 200nm claims. Of the 83 such claims recorded by mid-1979, no less than 74 were advanced after the end of 1974. This is perhaps the most striking evidence of all that the UNCLOS III theme of extended jurisdiction has taken hold in a permanent manner in the pattern of state practices around the world. During the same four-and-one-half year period, only nine new claims were made to a 12-mile fishery zone and nine to a fishery zone of intermediate breadth between 12 and 200nm limits. Three other states stand out for introducing extremely narrow claims to exclusive fishing zones of less than twelve miles in breadth.

As to territorial sea claims, with 20 new extensions in this period, the total number of claimants to a 12-mile territorial sea rises to 76. This total figure is very close to the total figure for a 200nm fishery zone (83). Together,

these two figures underline the impact of UNCLOS III on claims to extended jurisdiction in state practice. States which now made claims of both kinds would be entitled to regard themselves as in alignment with the "new orthodoxy" and as contributing most directly toward the new customary law of the sea.

Given the dominance of the trend towards a 12-mile territorial sea in conformity with UNCLOS III texts, recent new claimants which deviate from this norm are worthy of attention. Those five states which have recently made claims to a 200nm territorial sea (Benin, Congo, Ghana, Guinea, and Liberia) seem to have embarked on a particularly provocative line of state practice, whether in ignorance or wilful disregard of UNCLOS III and the current pattern of state practice. Equally curious, albeit less provocative, is the introduction of territorial sea claims by nine other states to distances exceeding 12 miles but less than 200nm. At the opposite extreme, five states have contented themselves to claims of a territorial sea of less than 12 miles in breadth. The cumulative figures for territorial sea claims show that 12-mile limits have been accepted by substantially more than one-half of all the coastal states which have recorded claims to the territorial sea.

IV. UNCLOS III and State Practices: Problems of Impact Analysis

A. Introduction

By the time a new law of the sea convention is opened for signature, at the conclusion of UNCLOS III, the entire process will have taken half a generation of global diplomatic effort. Such a phenomenon deserves, and will undoubtedly receive, the continuing attention of the social science research community. A good deal of this attention in the 1980's is likely to focus on the mutual influences of conference diplomacy and state practices that revealed themselves in the period beginning with the first session of the Seabed Committee in 1968. No previous diplomatic conference has been sufficiently protracted to make such a study feasible. Moreover, UNCLOS III is certain to engender further studies in more orthodox areas of investigation: diplomatic history, negotiating style and technique, international politics, the theory of international relations, international law, and comparative legislation.

This paper represents only a first tentative step toward a limited goal: the measurement of the impact of UNCLOS III on national legislation. Like other simple forms of quantitative analysis, it makes only a limited and preliminary contribution to the finer art of evaluation. Any sophisticated effort to appraise the significance and influence of UNCLOS III around the world will involve recourse to supplementary modes of textual and contextual analysis. Yet the limited

kind of information provided above does have a certain suggestive value in generating hypotheses that will have to be investigated in various ways. The Dalhousie Ocean Studies Programme (DOSP) has now embarked on such studies, and its investigators look forward to joining with colleagues and programs elsewhere in these aims.

B. Questions and Hypotheses

The work done for this paper has brought into focus a number of interesting hypotheses on questions that seem to deserve the attention of social scientists. Six, in particular, might be nailed on the door:

1. National Interest: The authors published a monograph in 1973 [33] which attempted to classify all nations by reference to the intensity of their support or opposition to the proposal for a 200nm EEZ. That study envisaged a continuum of national government attitudes ranging from "maximum intensity protagonist" to "maximum intensity antagonist" [34]. It was presumed that EEZ positions or attitudes were chiefly based on a consideration of national interests within the appropriate geographical setting. The history of UNCLOS III since 1973 shows some dramatic shifts from adamant opposition, to reluctant acquiescence, to enthusiastic support. Support is reflected in national legislation as well as diplomatic posture. Since the geography of the case remains the same, it may be presumed that the newly supportive states have realigned themselves only after a thorough recalculation of national interest [35].

Investigation might show that some of the switching states made too superficial a study of national self-interest in the first place, allowing their position to be governed chiefly by traditional sentiment, past practices, ideology, or loyalty to allies. In other cases, it might be shown that the initial study of national interest was dominated by considerations of foreign or military policy at the expense of domestic or economic policy. On the other hand, it seems that some of the early "protagonists" in favor of the EEZ proposal have lost some of the original enthusiasm [36]. It may be hypothesized, then, that a particularly long and difficult exercise in global conference diplomacy is a more or less painful learning process which tends to force governments into a broader, multi-factoral review of their original positions, within a larger perception of national interest.

2. Diplomatic Progress and Legislative Imitation: One of the most difficult problems confronting the UNCLOS III-watcher has been that of assessing "progress". The continuing collective effort to achieve consensus over a broad range of difficult and interlocking issues has involved subtleties and nuances, many of which are grasped only by a small proportion of delegates and a handful of close observers.

This has made the assessment of diplomatic progress a largely subjective undertaking. In retrospect, however, social scientists will wish to investigate the succession of events in and around the Conference in the hope of identifying the casual factors that seem to have contributed to the various phases of UNCLOS III: the periods of acceleration, the periods of retardation, and the periods of "suspended animation" [37].

Among the various hypotheses that might be advanced, it will be necessary to look at the impact of external events, such as national legislative initiatives and regional or bilateral treaty arrangements, in areas of interest to the Conference. In some sectors, the threat of such action may have been more influential than the action itself [38]. Theories of diplomatic "momentum" and "inertia" might be more easily tested by taking stock of "leaders" and "followers" among the participating delegations, and by tracing the influence of the former on the latter outside as well as inside the Conference. Data of the kind presented in this paper will help to reveal patterns of "dependency" and "imitation" that might be emerging in EEZ-type legislation around the world. Specifically, it will be possible to ascertain what degree of correlation can be established between "imitative" legislating states and "follower" delegations at UNCLOS III, on the one hand, or between "model" legislating states and "leader" delegations, on the other hand. What should result from studies of this kind would be a clearer understanding of the role of national "initiatives" and "responses" in the shaping of the new law of the sea as reflected both in the negotiation of law-making treaties and in the formation of customary international law.

3. Uniform Intentions and Diverse Effects: Law-making conference diplomacy is normally intended to produce a convention which will have the effect of increasing the degree of uniformity in the relevant area of state practices [39]. Sometimes, indeed, the fact or prospect of too much diversity is part of the motivation for convening a law-making conference in the first place. In modern times, global law-making diplomacy has rarely, if ever, resulted in the actual realization of total uniformity in state practices, but generally the net effect of such diplomacy is an appreciable increase in the degree of uniformity, at least on paper if not always in practice. From this perspective, UNCLOS III seems to have been special, possibly unique, in its tendency to produce diversity in some areas as well as uniformity in others. Evidence both ways seems to be available in the data presented above.

The tendency to produce diversity at UNCLOS III may be due chiefly to the importance of geography, particularly in the areas of jurisdictional issues entrusted to the Second

Committee. But divergences resulting from the Conference may be found, after a period of initial experimentation, to be more apparent than real, or more temporary than permanent, as various factors such as the convenience of legislative imitation and the logic of ocean management begin to take effect in national or regional undertakings, and produce a countertendency to international convergence.

4. Deviant Behaviour: One of the most noticeable features of the picture presented in this study is the number and variety of what have been termed "odd" claims. Claims are regarded as "odd" if they deviate markedly from established or clearly emerging trends, as reflected either in general state practice or in global diplomatic debate, or in both. For example, attention has been drawn to the "oddness" of many African national claims to zones of more than 12 miles and less than 200 in the mid-1970's [40]. These claims are peculiar in three ways: they deviate from the emerging norm of 12 and 200nm limits reflected in state practice in other regions; they deviate from the same norm emerging in the consensus of UNCLOS III; and they deviate from the diplomatic positions adopted at UNCLOS III by their own diplomatic representatives.

Only a few of these deviant claims seem to be explainable by geography. The fact that so many are African might suggest a conscious regional policy or a partly unconscious cultural influence at work. Textual analysis would show whether the deviancy was reflected in the formulation as well as the timing and extent of the claim, but only careful contextual analysis would be likely to yield a convincing explanation. The sector of national bureaucracy responsible for choosing the type and timing of the claim might, in one case, be oblivious to the norms established or emerging; in another case, it might be simply indifferent; in yet another, it might be deliberately defiant. In many situations the explanation might be locked away in inter-agency or inter-personal rivalries in the national bureaucracy; or the anomaly may be attributable simply to lack of communication between the diplomatic elite that attends the conference circuit abroad and the governing elite that stays at home.

5. The Function of Sovereignty: In the battle for extended national jurisdiction, especially in the Seabed Committee period, there were two opposing strategies: the territorialist and the functionalist. By forming an uneasy coalition, these two groups were able to move the Conference away from the laissez faire traditionalists of Europe and their allies [41]. For tactical reasons, the territorialists and functionalists were able to paper over the differences between them, until the principle of extended jurisdiction within 200nm limits had become a fait accompli at Caracas in the summer of 1974. Since then, these strains have reappeared from time to time in various contexts, and the

history of national claims to extended jurisdiction in the last five years shows no significant abatement in the problem of divergence.

This problem seems likely to cause considerable difficulty in the years ahead, as coastal states begin to exercise asserted rights of ocean management within the limits of their national jurisdiction. The concept of sovereignty, or its cognate "sovereign rights", is certain to be the focal mode of justification in these future disputes and conflicts. Coastal interpretations of sovereignty and sovereign rights will be tested against the language of the final text produced at UNCLOS III and against the language of the preceding debate that is seen as the language of consensus. Linguistic nuances will emerge as critical components of the argument, especially at the instance of those who choose to present the matter as essentially one of semantics. But certain coastal states will point to constitutional difficulties that preclude any easy resort to amendment of earlier (sovereignty-type) enactments. Some of these "territorialist" states, unable or unwilling to bring their legislation into compliance with the "functionalist" letter of UNCLOS III, will be faced with legal and diplomatic difficulties in reconciling their state practices with the apparent consensus of the world community. The attempt to clarify the meaning of sovereignty and sovereign rights in the new law of the sea may be frustrated by difficult and basic issues in the law of treaties and in the theory of customary international law [42]. Unfortunately, the difficulties may be compounded by the fact that the lack of a fully explanatory official record since Caracas prevents a detailed juxtaposition of the UNCLOS III debate and contemporary state practices [43].

6. Community Perceptions: The phenomenon of extended jurisdiction has already had a discernible effect upon the expectations of fishermen around the world. The scaling up or scaling down of industrial planning is quite dramatic in many cases. It is no exaggeration to say that the advent of 200-mile zones will lead to a substantial redistribution of fishing effort in the 1980's. For fishing communities in particular, but also coastal communities in general, the vast extension seaward of the national or subnational system of public administration means a <u>quantitatively</u> different perception of community interest. Normally, in referring to the "local community", one wishes to draw attention to the limited physical scale of a particular unit of the population. By implication one also wishes to underline the "parochial" nature of the community's needs and aspirations. Unlike the land-locked local community, the coastal community of the future is likely to acquire a more extensive spatial view of its "local" concerns.

Already in a few countries, such as the United States of America, the local coastal community is directly represented

in new subnational or national mechanisms charged with certain functions of ocean management. This kind of continuing participation in larger, non-local processes of decision-making is bound to have an appreciable impact upon the political, social, and economic life of the coastal community. The understanding that its "local" interests may be directly and significantly affected by events 200nm away may give a totally different perception of community welfare: in some ways enriched, in other ways rendered more vulnerable. A boundary dispute, which is presented by national government as an international issue, may also be perceived as a local community concern, a dispute over the village limits. Perceptual shifts of this order may be expected to be reflected, sooner or later, in a variety of state practices designed or re-designed, to accommodate expanded local community demands and expectations.

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APPENDICES

EXPLANATORY NOTES

The dates used for the columns in Table 1 represent the first day of each stated year, e.g., the 1945 Column (Column 1) represents all legislation which was in force on January 1, 1945. If a state promulgated territorial sea legislation in June of 1945 that legislation would first be recorded in the 1950 Column (Column 2).

The dates used in the Columns in Table 2, unlike those in Table 1, represent the last day of each stated year, e.g., the 1967 Column represents all legislation which was in force by December 31, 1967.

The figures used for the "Present Claims" column of Table 3 represent those claims forwarded by the end of July 1979.

The data used in the three tables have been taken from a number of sources, with the primary source of information being: The U.S. Department of State, LIMITS IN THE SEAS No. 36 National Claims to Maritime Jurisdictions 3rd Rev. December 23, 1975, and updates.

SYMBOLS

--	=	No information available
LL	=	Landlocked
C	=	Colonial claim
-F	=	Claim made by State to which the designated state once belonged
f	=	Fathoms (depth)
m	=	Meters (depth)
L	=	League
X	=	Ratified the 1958 Continental Shelf Convention
X+	=	Ratified the 1958 Continental Shelf Convention and has implemented it within its national legislation

EX = Claim to the continental shelf as far as it can be exploited

Delim = The continental shelf has been delineated either through legislation or by treaty

CS = Legislation shows that the concept of the continental shelf appears in the State's legislation, but that the legislation is not specific as to the limits of the continental shelf.

NOTE: All claims are in nautical miles.

TABLE I

TERRITORIAL SEA

	1945	1950	1955	1960	1965
Afghanistan	LL	LL	LL	LL	LL
Albania	0	0	10	10	10
Algeria	3C	3C	3C	3C	12
Andorra	LL	LL	LL	LL	LL
Angola	LL	LL	LL	LL	LL
Argentina	3	3	3	3	3
Australia	3	3	3	3	3
Austria	LL	LL	LL	LL	LL
Bahamas	3C	3C	3C	3C	3C
Bahrain	3C	3C	3C	3C	3C
Bangladesh	3C	3-F	3-F	3-F	3-F
Barbados	3C	3C	3C	3C	3C
Belgium	3	3	3	3	3
Belize	3C	3C	3C	3C	3C
Benin	3C	3C	3C	3C	3
Bhutan	LL	LL	LL	LL	LL
Bolivia	LL	LL	LL	LL	LL
Botswana	LL	LL	LL	LL	LL
Brazil	3	3	3	3	3
Bulgaria	6	6	12	12	12
Burma	3C	3	3	3	3
Burundi	LL	LL	LL	LL	LL
Cameroon	3C	3C	3C	3C	6
Canada	3	3	3	3	3
Cape Verde	6C	6C	6C	6C	6C
C.A.R.	LL	LL	LL	LL	LL
Chad	LL	LL	LL	LL	LL
Chile	3	50km	50km	50km	50km
China	3	3	3	12	12
China (Tai)	3	3	3	3	3
Colombia	3	3	3	3	3
Comoros	3C	3C	3C	3C	3C
Congo	3C	3C	3C	3C	3
Costa Rica	3	3	3	3	3
Cuba	3	3	3	3	3
Cyprus	3C	3C	3C	3C	3
Czechoslovakia	LL	LL	LL	LL	LL
Denmark	4	4	4	4	4
Djibouti	3C	3C	3C	3C	3C
Dominica	3C	3C	3C	3C	3C
COLUMN	1	2	3	4	5

	1945	1950	1955	1960	1965
Dom. Rep.	3	3	3	3	3
Ecuador	3	3	12	12	12
Egypt	0	0	6	12	12
El Salvador	0	0	200	200	200
Eq. Guinea	6C	6C	6C	6C	6C
Ethiopia	0	0	12	12	12
Faroes*	--	--	--	--	--
FIJI	3C	3C	3C	3C	3C
Finland	4	4	4	4	4
France	3	3	3	3	3
Gabon	3C	3C	3C	3C	12
Gambia	3C	3C	3C	3C	3C
G.D.R.	3-0	3-0	3	3	3
F.R.G.	3	3	3	3	3
Ghana	3C	3C	3C	3	12
Greece	6	6	6	6	6
Greenland*	--	--	--	--	--
Grenada	3C	3C	3C	3C	3C
Guatemala	12	12	12	12	12
Guinea	3C	3C	3C	3	130
Guinea-Bissau	--	--	--	--	--
Guyana	3C	3C	3C	3C	3C
Haiti	6	6	6	6	6
Honduras	12km	12km	200	200	200
Hungary	LL	LL	LL	LL	LL
Iceland	4	4	4	4	4
India	3C	3	3	6	6
Indonesia	3C	3	3	12	12
Iran	6	6	6	12	12
Iraq	3	3	3	12	12
Ireland	3	3	3	3	3
Israel	3-F	3	3	6	6
Italy	6	6	6	6	6
Ivory Coast	3C	3C	3C	3	3
Jamaica	3C	3C	3C	3C	3
Japan	3	3	3	3	3
Jordan	3	3	3	3	3
Kampuchea	3C	3C	5	5	5
Kenya	3C	3C	3C	3C	3
Kiribati	3C	3C	3C	3C	3C
Korea (N)	--	12	12	12	12
Korea (S)	--	0	20	20	20
Kuwait	3C	3C	200 3C	200 3C	200 3
Laos	LL	LL	LL	LL	LL
COLUMN	1	2	3	4	5

	1945	1950	1955	1960	1965
Lebanon	0	0	0	0	0
Lesotho	LL	LL	LL	LL	LL
Liberia	--	0	3	3	3
Libya	--	--	0	12	12
Liechtenstein	LL	LL	LL	LL	LL
Luxembourg	LL	LL	LL	LL	LL
Madagascar	3C	3C	3C	3C	12
Malawi	LL	LL	LL	LL	LL
Malaysia	3C	3C	3C	3	3
Maldives	3C	3C	3C	3C	3C
Mali	LL	LL	LL	LL	LL
Malta	3C	3C	3C	3C	3
Mauritania	3C	3C	3C	3C	6
Mauritius	3C	3C	3C	3C	3C
Mexico	9	9	9	9	9
Monaco	3	3	3	3	3
Mongolia	LL	LL	LL	LL	LL
Morocco	--	--	--	0	0
Mozambique	6C	6C	6C	6C	6C
Namibia*	--	--	--	--	--
Nauru	3C	3C	3C	3C	3C
Nepal	LL	LL	LL	LL	LL
Netherlands	3	3	3	3	3
New Zealand	3C	3	3	3	3
Nicaragua	3	3	3	3	3
Niger	LL	LL	LL	LL	LL
Nigeria	3C	3C	3C	3C	3
Niue	3C	3C	3C	3C	3C
Norway	4	4	4	4	4
Oman	3C	3C	3C	3C	3C
Pakistan	3C	3	3	3	3
Panama	0	0	0	12	12
Papua-N. Guinea	3C	3C	3C	3C	3C
Paraguay	LL	LL	LL	LL	LL
Peru	3	200	200	200	200
Philippines	--	3	3	3	3
Poland	3	3	3	3	3
Portugal	6	6	6	6	6
Qatar	3C	3C	3C	3C	3C
Romania	6	6	12	12	12
Rwanda	LL	LL	LL	LL	LL
St. Lucia	--	--	--	--	--
San Marino	LL	LL	LL	LL	LL
Sao Tome P.	6C	6C	6C	6C	6C
Saudi Arabia	0	6	6	12	12
Senegal	3C	3C	3C	3C	6
Seychelles	3C	3C	3C	3C	3C
Column	1	2	3	4	5

	1945	1950	1955	1960	1965
Sierra Leone	3C	3C	3C	3C	3
Singapore	3C	3C	3C	3C	3C
Solomon Is.	3C	3C	3C	3C	3C
Somalia	--	--	--	6C	6
S. Africa	3	3	3	3	6
Spain	6	6	6	6	6
Sri Lanka	3C	3	3	3	3
Sudan	--	--	--	0	12
Surinam	3C	3C	3C	3C	3C
Swaziland	LL	LL	LL	LL	LL
Sweden	4	4	4	4	4
Switzerland	LL	LL	LL	LL	LL
Syria	3C	3	3	3	12
Tanzania	3C	3C	3C	3C	12
Thailand	3	3	3	6	6
Togo	3C	3C	3C	3C	12
Tonga	Rec-tangle C	Rec-tangle C	Rec-tangle C	Rec-tangle C	Rec-tangle C
Trinidad & Tobago	3C	3C	3C	3C	3
Tunisia	3C	3C	3C	3	6
Turkey	6	3	3	3	6
					12
Tuvalu	3C	3C	3C	3C	--
Uganda	LL	LL	LL	LL	LL
U.S.S.R.	12	12	12	12	12
Byelorussia	LL	LL	LL	LL	LL
Ukraine	12	12	12	12	12
U.A.E.	3C	3C	3C	3C	3C
U.K.	3	3	3	3	3
U.S.A.	3	3	3	3	3
Upper Volta	LL	LL	LL	LL	LL
Uruguay	3	3	3	3	6
Venezuela	3	3	3	12	12
Vietnam	3C	3C	3	3	12
W. Samoa	3C	3C	3C	3C	3
Yemen	--	--	--	--	3
S. Yemen	3C	3C	3C	3C	3C
Yugoslavia	6	6	6	6	6
Zaire	3C	3C	3C	3C	3
Zambia	LL	LL	LL	LL	LL
Zimbabwe	LL	LL	LL	LL	LL
COLUMN	1	2	3	4	5

TABLE I

CONTINENTAL SHELF

	1945	1950	1955	1960	1965
Afghanistan	LL	LL	LL	LL	LL
Albania	0	0	0	0	X
Algeria	--	--	--	--	0
Andorra	LL	LL	LL	LL	LL
Angola	LL	LL	LL	LL	LL
Argentina	0	CS	CS	CS	CS
Australia	0	0	0	0	X
Austria	LL	LL	LL	LL	LL
Bahamas	--	CS	CS	CS	CS
Bahrain	--	CS	CS	CS	CS
Bangladesh	--	0-F	100f-F	100f-F	100f-F
Barbados	--	--	--	--	--
Belgium	00	0	0	0	0
Belize	--	--	--	--	--
Benin	--	--	--	--	0
Bhutan	LL	LL	LL	LL	LL
Bolivia	LL	LL	LL	LL	LL
Botswana	LL	LL	LL	LL	LL
Brazil	'41 CS	CS	1L	1L	1L
Bulgaria	0	0	0	0	X+
Burma	--	0	0	CS	58 Def
Burundi	LL	LL	LL	LL	LL
Cameroon	--	--	--	--	0
Canada	0	0	0	0	0
Cape Verde	--	--	--	--	--
C.A.R.	LL	LL	LL	LL	LL
Chad	LL	LL	LL	LL	LL
Chile	0	200	200	200	200
China	0	0	0	0	0
China (Tai)	0	0	0	0	0
Colombia	0	0	0	0	X
Comoros	--	--	--	--	--
Congo	--	--	--	--	0
Costa Rica	0	200	200	200	200
Cuba	0	0	200m	200m	200m
Cyprus	--	--	--	--	0
Czechoslovakia	LL	LL	LL	LL	X
Denmark	0	0	0	0	X+
Djibouti	--	--	--	--	--
Dominica	--	--	--	--	--
COLUMN	6	7	8	9	10

	1945	1950	1955	1960	1965
Dom. Rep.	0	0	0	0	X
Ecuador	0	0	200m	200m	200m
Egypt	0	0	0	200m	200m
El Salvador	0	0	200	200	200
Eq. Guinea	--	--	--	--	--
Ethiopia	0	0	0	12	12
Faroes*	--	--	--	--	--
Fiji	--	--	--	--	--
Finland	0	0	0	0	0
France	0	0	0	0	0
Gabon	--	--	--	--	CS
Gambia	--	--	--	--	--
G.D.R.	--	--	0	0	58 Def
F.R.G.	0	0	0	0	200m EX
Ghana	--	--	--	--	100f
Greece	0	0	0	CS	CS
Greenland*	--	--	--	--	--
Grenada	--	--	--	--	--
Guatemala	0	CS	CS	CS	X
Guinea	--	--	--	0	0
Guinea-Bissau	--	--	--	--	--
Guyana	--	--	CS	CS	CS
Haiti	0	0	0	58 Def	X+
Honduras	'36 200m	200	200	200 EX	200m EX
Hungary	LL	LL	LL	LL	LL
Iceland	0	0	0	0	0
India	--	0	0	CS	CS
Indonesia	--	0	0	0	Delim
Iran	0	0	0	CS	CS
Iraq	0	0	0	CS	CS
Ireland	0	0	0	0	0
Israel	--	0	EX	EX	X
Italy	0	0	0	0	0
Ivory Coast	--	--	--	0	0
Jamaica	--	CS	CS	CS	CS
Japan	0	0	0	0	0
Jordan	0	0	0	0	0
Kampuchea	--	0	0	50m	X
Kenya	--	--	--	--	0
Kiribati	--	--	--	--	--
Korea (N)	--	0	0	0	0
Korea (S)	--	0	20	20	20
			200	200	200
COLUMN	6	7	8	9	10

	1945	1950	1955	1960	1965
Kuwait	--	CS C	CS C	CS C	CS C
Laos	LL	LL	LL	LL	LL
Lebanon	0	0	0	0	0
Lesotho	LL	LL	LL	LL	LL
Liberia	--	0	0	0	0
Libya	--	--	0	CS	CS
Liechtenstein	LL	LL	LL	LL	LL
Luxembourg	LL	LL	LL	LL	LL
Madagascar	--	--	--	--	X
Malawi	LL	LL	LL	LL	LL
Malaysia	--	--	--	0	X
Maldives	--	--	--	--	--
Mali	LL	LL	LL	LL	LL
Malta	--	--	--	--	0
Mauritania	--	--	--	--	200m
Mauritius	--	--	--	--	--
Mexico	0	CS	CS	CS	CS
Monaco	0	0	0	0	0
Mongolia	LL	LL	LL	LL	LL
Morocco	0	0	0	X+	X+
Mozambique	--	--	--	--	--
Namibia*	--	--	--	--	--
Nauru	--	--	--	--	--
Nepal	LL	LL	LL	LL	LL
Netherlands	0	0	0	0	0
New Zealand	0	0	0	0	0
Nicaragua	0	200m	200m	200m	200m
Niger	LL	LL	LL	LL	LL
Nigeria	--	--	--	CS C	CS
Niue	--	--	--	--	--
Norway	0	0	0	0	EX
Oman	--	--	--	--	--
Pakistan	--	0	100f	100f	100f
Panama	0	0	0	0	CS
Papua-N. Guinea	--	--	--	--	--
Paraguay	LL	LL	LL	LL	LL
Peru	0	200	200	200	200
Philippines	--	0	0	0	0
Poland	0	0	0	0	X
Portugal	0	0	0	200m	X
Qatar	--	CS C	CS C	CS C	CS C
Romania	0	0	0	0	X+
Rwanda	LL	LL	LL	LL	LL
St. Lucia	--	--	--	--	--
San Marino	LL	LL	LL	LL	LL
Sao Tome + P.	--	--	--	--	--
COLUMN	6	7	8	9	10

	1945	1950	1955	1960	1965
Saudi Arabia	0	CS	CS	CS	CS
Senegal	--	--	--	--	200m
Seychelles	--	--	--	--	--
Sierra Leone	--	--	--	--	0
Singapore	--	--	--	--	--
Solomon Is.	--	--	--	--	--
Somalia	--	--	--	--	CS
South Africa	0	0	0	0	X+
Spain	0	0	0	0	0
Sri Lanka	--	0	0	CS	CS
Sudan	--	--	--	0	0
Surinam	--	--	--	--	--
Swaziland	LL	LL	LL	LL	LL
Sweden	0	0	0	0	0
Switzerland	LL	LL	LL	LL	LL
Syria	--	0	0	0	200m EX
Tanzania	--	--	--	--	0
Thailand	0	0	0	0	0
Togo	--	--	--	--	0
Tonga	--	--	--	--	--
Trinidad & Tobago	--	--	--	--	0
Tunisia	--	--	0	0	0
Turkey	0	0	0	0	0
Tuvalu	--	--	--	--	--
Uganda	LL	LL	LL	LL	X
U.S.S.R.	0	0	0	0	X
Byelorussia	LL	LL	LL	LL	X
Ukraine	0	0	0	0	X
U.A.E.	--	CS C	CS C	CS C	CS C
U.K.	0	0	0	0	X+
U.S.A.	0	CS	CS	CS	X
Upper Volta	LL	LL	LL	LL	LL
Uruguay	0	0	0	0	200m EX
Venezuela	0	0	0	200m EX	X EX
Vietnam	--	--	0	0	0
W. Samoa	--	--	--	--	0
Yemen	--	--	--	--	0
S. Yemen	--	--	--	--	--
Yugoslavia	0	0	0	0	0
Zaire	--	--	--	--	0
Zambia	LL	LL	LL	LL	LL
Zimbabwe	LL	LL	LL	LL	LL
COLUMN	6	7	8	9	10

TABLE 1

FISHERY ZONE

	1945	1950	1955	1960	1965
Afghanistan	LL	LL	LL	LL	LL
Albania	0	0	0	12	12
Algeria	--	--	--	--	0
Andorra	LL	LL	LL	LL	LL
Angola	LL	LL	LL	LL	LL
Argentina	10	10	10	10	10
Australia	0	0	0	0	0
Austria	LL	LL	LL	LL	LL
Bahamas	--	--	--	--	--
Bahrain	--	--	--	--	--
Bangladesh	1-L-F	1-L-F	1-L-F	1-L-F	1-L-F
Barbados	--	--	--	--	--
Belgium	3	3	3	3	3
Belize*	--	--	--	--	--
Benin	--	--	--	--	0
Bhutan	LL	LL	LL	LL	LL
Bolivia	LL	LL	LL	LL	LL
Botswana	LL	LL	LL	LL	LL
Brazil	12	12	0	0	0
Bulgaria	0	0	12	12	12
Burma	--	0	0	0	0
Burundi	LL	LL	LL	LL	LL
Cameroon	--	--	--	--	0
Canada	0	0	0	0	12
Cape Verde	12C	12C	12C	12C	12C
C.A.R.	LL	LL	LL	LL	LL
Chad	LL	LL	LL	LL	LL
Chile	0	200	200	200	200
China	3	3	3	3	3
China (Tai)	3	12	12	12	12
Colombia	12	12	12	12	12
Comoros	3C	3C	3C	3C	3C
Congo	--	--	--	--	15
Costa Rica	0	200	200	200	200
Cuba	3	3	3	3	3
Cyprus	--	--	--	--	12
Czechoslovakia	LL	LL	LL	LL	LL
Denmark	3	3	3	3	3
Djibouti	--	--	--	--	--
Dominica	--	--	--	--	--
Dom. Rep.	0	0	15	15	15

COLUMN	11	12	13	14	15

	1945	1950	1955	1960	1965
Ecuador	12	12	200	200	200
Egypt	0	0	12	12	12
El Salvador	0	0	0	200	200
Eq. Guinea	--	--	--	--	--
Ethiopia	0	0	12	12	12
Faroes*	--	--	12C	12C	12C
Fiji	--	--	--	--	--
Finland	4	4	4	4	4
France	3	3	3	3	3
Gabon	--	--	--	--	0
Gambia	--	--	--	--	--
G.D.R.	--	--	0	0	3
F.R.G.	--	--	0	0	3
Ghana	--	--	--	12	12
Greece	0	0	0	0	0
Greenland*	--	--	12C	12C	12C
Grenada	--	--	--	--	--
Guatemala	0	0	0	0	0
Guinea	--	--	--	0	0
Guinea-Bissau	--	--	--	--	--
Guyana	--	--	--	--	--
Haiti	0	0	0	0	0
Honduras	0	0	200	200	200
Hungary	LL	LL	LL	LL	LL
Iceland	3	3	4	12	12
India	--	0	0	6	6
				100	100
Indonesia	--	0	0	0	12
Iran	0	0	0	12	12
Iraq	0	0	0	0	0
Ireland	0	0	0	0	12
Israel	6-F	6	6	6	6
Italy	6	6	6	6	12
Ivory Coast	--	--	--	0	0
Jamaica	--	--	--	--	0
Japan	0	0	0	0	0
Jordan	3	3	3	3	3
Kampuchea	20km C	20km C	20km C	12	12
Kenya	--	--	--	--	0
Kiribati	--	--	--	--	--
Korea (N)	--	0	0	0	0
Korea (S)	--	0	20	20	20
			200	200	200
Kuwait	--	--	--	--	0
COLUMN	11	12	13	14	15

	1945	1950	1955	1960	1965
Laos	LL	LL	LL	LL	LL
Lebanon	6	6	6	6	6
Lesotho	LL	LL	LL	LL	LL
Liberia	—	0	0	0	0
Libya	--	--	0	0	0
Liechtenstein	LL	LL	LL	LL	LL
Luxembourg	LL	LL	LL	LL	LL
Madagascar	--	—	--	--	12
Malawi	LL	LL	LL	LL	LL
Malaysia	--	--	--	0	0
Maldives	--	--	—	--	--
Mali	LL	LL	LL	LL	LL
Malta	--	--	—	--	0
Mauritania	—	--	--	--	12*
Mauritius	--	--	--	--	--
Mexico	0	0	0	0	0
Monaco	0	0	0	0	0
Mongolia	LL	LL	LL	LL	LL
Morocco	6C	6C	6C	6	12
					6
Mozambique	12C	12C	12C	12C	12C
Namibia*	--	--	—	—	--
Nauru	--	--	--	--	--
Nepal	LL	LL	LL	LL	LL
Netherlands	0	0	3	3	3
New Zealand	3C	3	3	3	3
Nicaragua	0	0	0	12*	12*
Niger	LL	LL	LL	LL	LL
Nigeria	--	--	--	--	0
Niue	--	--	--	--	--
Norway	4	4	4	4	12
Oman	--	--	--	--	--
Pakistan	1-L-C	1-L	1-L	1-L	1-L
Panama	0	200	200	200	200
Papua-N. Guinea	--	--	--	--	--
Paraguay	LL	LL	LL	LL	LL
Peru	0	200	200	200	200
Philippines	—	0	0	0	0
Poland	3	3	3	3	3
Portugal	12	12	12	12	12
Quatar	—	—	--	--	--
Romania	6	6	12	12	12
Rwanda	LL	LL	LL	LL	LL
St. Lucia	--	--	—	--	--
San Marino	LL	LL	LL	LL	LL
Sao Tome + P.	12C	12C	12C	12C	12C
COLUMN	11	12	13	14	15

	1945	1950	1955	1960	1965
Saudi Arabia	0	0	0	0	0
Senegal	--	--	--	--	12
Seychelles	--	--	--	--	--
Sierra Leone	--	--	--	--	0
Singapore	3C	3C	3C	3C	3C
Solomon Is.	--	--	--	--	--
Somalia	--	--	--	--	0
S. Africa	0	0	0	0	12
Spain	6	6	6	6	6
Sri Lanka	--	0	0	0	0
Sudan	--	--	--	0	0
Surinam	3C	3C	3C	3C	3C
Swaziland	LL	LL	LL	LL	LL
Sweden	0	0	0	0	0
Switzerland	LL	LL	LL	LL	LL
Syria	--	0	0	0	12
Tanzania	--	--	--	--	0
Thailand	0	0	0	0	0
Togo	--	--	--	--	12
Tonga	--	--	--	--	--
Trinidad & Tobago	--	--	--	--	12
Tunisia	--	--	50m C	50m	12
Turkey	0	0	0	0	12
Tuvalu	--	--	--	--	--
Uganda	LL	LL	LL	LL	LL
U.S.S.R.	12	12	12	12	12
Byelorussia	LL	LL	LL	LL	LL
Ukraine	12	12	12	12	12
U.A.E.	--	--	--	--	--
U.K.	3	3	3	3	6
U.S.A.	0	0	0	0	0
Upper Volta	LL	LL	LL	LL	LL
Uruguay	6	6	6	6	12
Venezuela	0	0	0	12	12
Vietnam	20km C	20km C	20km	20km	20km
W. Samoa	--	--	--	--	0
Yemen	--	--	--	--	12
S. Yemen	--	--	--	--	--
Yugoslavia	0	10	10	10	10
Zaire	3C	3C	3C	3C	3
Zambia	LL	LL	LL	LL	LL
Zimbabwe	LL	LL	LL	LL	LL
COLUMN	11	12	13	14	15

TABLE II

	1967			1968			1969			1970		
	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ
Albania	10	X+	12*								12	
Algeria	12	0	0									
Angola	6C	--	12C									
Argentina	200	200m EX	12 200L									
Australia	3	X+	12									
Bahamas	3C	CSC	--						12C		58 Def	C
Bahrain	3C	Delim C	--									
Bangladesh	3-F	0-F	1-L-F									
Barbados	3	0	0		Follow 58 Def							
Belgium	3	0	12					CS				
Benin	3	0	12	12	100*							
Brazil	6	IL	12*		200m		12	CS		200		200
Bulgaria	12	X+	12		EX							
Burma	3	58 Def	0	12		12						
Cameroon	18	CS	Decree									
Canada	3	0	12*							12	X	Zones Decree
Cape Verde	6C	--	12C									
Chile	3	200	200									
China	12	0	3								CS	
China (Tai)	3	0	12									
Colombia	3	X	12							12		
Comoros	3C	0	12C									
Congo	3	0	15				12					
Costa Rica	3	58 Def	200									
Cuba	3	200m	3									
Cyprus	12	0	12									
Denmark	3	X+	12									
Djibouti	—	--	--									
Dominica	--	--	--									
Dom. Rep.	6	X+	12*									
Ecuador	200	200m	200									
Egypt	12	200m EX	12									
El Salvador	200	200	200									
Eq. Guinea	6C	--	--							12		
Ethiopia	12	12	12									
Faroes*	—	--	12									

	1967			1968			1969			1970		
	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ
Fiji	3C	--	--					58				
								Def C				
Finland	4	X	4					X+				
France	3	X+	12									
Gabon	12	Decree	0							25		25
Gambia	3	CS	0	6		12*	12					24*
G.D.R.	3	58	3									
		Def										
F.R.G.	3	200m	3									
		EX										
Ghana	12	100f	112*		100f							
					EX							
Greece	6	CS	0					58				
								Def				
Greenland*	--	--	12									
Grenada	3c		--									
Guatemala	12	X+	0									
Guinea	130	0	0									
Guinea-Bissau	--	--	--									
Guyana	3	3	0									
Haiti	6	58	0									
		X										
		Def										
Honduras	12	200m	12									
		EX										
Iceland	4	0	12					EX				
India	12	200m	6									
		EX										
Indonesia	12	Delim	12					EX				
Iran	12	CS	12									
Iraq	12	CS	0									
Ireland	3	0	12		Delim							
Israel	6	X	6									
Italy	6	200m	12									
		EX										
Ivory Coast	6	200m	12*									
Jamaica	12	X	12									
Japan	3	0	3									
Jordan	3	0	3									
Kampuchea	5	50mX	12		X		12					
Kenya	0	0	0	12				X				
Kiribati	--	--	--									
Korea (N)	12	0	0									
Korea (S)	20	20	12	3	3							
	200	200										
Kuwait	12	CS	0									
Lebanon	0	0	6									
Liberia	12	0	0									
								200m				
								EX				

	1967			1968			1969			1970		
	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ
Libya	12	CS	0									
Madagascar	12	X+	12									
Malaysia	3	X+	0									
Maldives	--	--	--	3					12 Polygonal 100			Polygonal 150
Malta	3	X+	3									
Mauritania	12	200m	18*									
Mauritius	3C	--	--							12	X+	
Mexico	9	X	12				12					
Monaco	3	0	12									
Morocco	3	58 Def	12				12					
Mozambique	6C	--	12C									
Nauru	--	--	--	3		12						
Netherlands	3	X+	12									
New Zealand	3	X+	12*									
Nicaragua	3	200m	200									
Nigeria	12	CS	0		200m EX							
Niue	--	--	--									
Norway	4	EX	12									
Oman	3	CS	0									
Pakistan	12	100f	12									
Panama	200	200	200									
Papua-N. Guinea	3C	--	12C									
Peru	200	200	200									
Philippines	Base-lines	0	Base-lines		EX							
Poland	3	x	3									12
Portugal	6	200m X	12					200m EX				
Qatar	3C	Delim	--									
Romania	12	X+	12									
St. Lucia	--	--	--									
Sao Tome + P.	6C	--	12C									
Saudi Arabia	12	CS	0									
Senegal	6	200mX	12			18*						
Seychelles	--	--	--									
Sierra Leone	12	X	0									
Singapore	3	0	3									
Solomon Is.	--	--	--									
Somalia	12	CS	12									
S. Africa	6	X+	12									
Spain	6	0	12									
Sri Lanka	6	CS	106*									
Sudan	12	0	0								200m EX	

	1967			1968			1969			1970		
	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ
Surinam	3C	—	12C									
Sweden	4	X+	0			12						
Syria	12	200m EX	12									
Tanzania	12	0	0									12
Thailand	12	0	12		X+							
Togo	12	0	12									
Tonga	Poly-gonal	0	0									CS
Trinidad + T.	3	0	0		200m X EX	12	12					
Tunisia	6	0	12									
Turkey	6	0	12		58 Def							
	12											
Tuvalu	—	—	—									
U.S.S.R.	12	X	12		200m EX							
Ukraine	12	X	12		200m EX							
U.A.E.	3	Delim	0				3					
							12					
U.K.	3	X+	6									
U.S.A.	3	X	12									
Uruguay	6	200m	12				12		CS			
							200		200			
Venezuela	12	X	12									
Vietnam	12	0	20km									
Vietnam (S)	3	CS	20km								200m EX	
W. Samoa	3	0	0							12		
Yemen	12	200m	12									
S. Yemen	3	0	0							12	300m EX	12
Yugoslavia	10	X	10			12*						
Zaire	3	0	3									
TOTAL				7	13	7	9	10	4	9	8	8

	1971			1972			1973			1974			
	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	EZ
Albania													
Algeria													
Angola													
Argentina									200				
Australia													
Bahamas													
Bahrain										12	CS	200	200
Bangladesh													
Barbados													
Belgium													
Benin													
Brazil													
Bulgaria													
Burma													
Cameroon													
Canada													
Cape Verde													
Chile													
China													
China (Tai)													
Colombia													
Comoros													
Congo													
Costa Rica				12	X+								
Cuba				200m							X		
Cyprus													
Denmark													
Djibouti													
Dominica													
Dom. Rep.													
Ecuador													
Egypt													
El Salvador													
Eq. Guinea													
Ethiopia													
Faroes*													
Fiji		X+											
		Delim											
Finland												12	
France													
Gabon				30		80*	100		150*				
				100		150							
Gambia	50		62*										
G.D.R.								X					
F.R.G.													
Ghana							30		130*				
Greece					X+								
Greenland*													

	1971			1972			1973			1974			
	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	EZ
Grenada													
Guatemala													
Guinea										150			
Guinea-Bissau													
Guyana											CS		
Haiti				12	CS	15*							
Honduras													
Iceland						50							
India													
Indonesia													
Iran										50			
Iraq													
Ireland								New Delim					
Israel													
Italy													
Ivory Coast													
Jamaica													
Japan											CS		
Jordan													
Kampuchea					Delim								
Kenya													
Kiribati													
Korea (N)													
Korea (S)													
Kuwait													
Lebanon													
Liberia													
Libya													
Madagascar							50				150*		
Malaysia											200m EX	X	
Maldives													
Malta			12										
Mauritania	200m EX			50		36*							
Mauritius													
Mexico													
Monaco							12						
Morocco										70			
Mozambique													
Nauru				12									
Netherlands													
New Zealand													
Nicaragua													
Nigeria	50	X	12			30					X		
			30										

	1971			1972			1973			1974			
	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	EZ
Niue		X											
Norway													
Oman				12	58 Def	50*							
Pakistan													
Panama													
Papua-N. Guinea													
Peru													
Philippines													
Poland													
Portugal											200m EX	X	
Qatar													
Romania													
St. Lucia													
Sao Tome + P.													
Saudi Arabia										12			
Senegal						122*						X+	
Seychelles													
Sierra Leone	200												
Singapore													
Solomon Is.													
Somalia				200		200							
S. Africa													
Spain		X											
Sri Lanka	12		112*										
Sudan													
Surinam													
Sweden													
Syria													
Tanzania							50						
Thailand													
Togo													
Tonga		X								12			
Trinidad + T.													
Tunisia		Delim					12						
Turkey													
Tuvalu													
U.S.S.R.													
Ukraine													
U.A.E.													
U.K.											Delim X		
U.S.A.													
Uruguay													
Venezuela													
Vietnam													
Vietnam (S)		Delim				53*							

	1971			1972			1973			1974			
	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	TS	CS	FZ	EZ
W. Samoa						12							
Yemen													
S. Yemen													
Yugoslavia													
Zaire	12		12										
TOTAL	8	8	5	7	6	10	6	2	7	2	10	2	

TABLE III

	CLAIM CHANGES SINCE 31 DEC. 1974			PRESENT CLAIMS		
	TS	FZ	EZ	TS	FZ	EZ
Albania	15	15		15	15	0
Algeria		12		12	12	0
Angola	20	200		20	200	0
Argentina				200	200	0
Australia		200		3	200	0
Bahamas	12	200		12	200	0
Bahrain				3	3	0
Bangladesh				12	200	200
Barbados	12	200	200	12	200	200
Belgium		200		3	200	0
Benin	200	200		200	200	0
Brazil				200	200	0
Bulgaria				12	12	0
Burma		200		12	200	200
Cameroon	50	50		50	50	0
Canada		200		12	200	0
Cape Verde	12	200	200	12	200	200
Chile				3	200	0
China		12		12	12	0
China (Tai)						0
Colombia		200	200	12	200	200
Comoros		200	200	12	200	200
Congo	200	200		200	200	0
Costa Rica			200	12	200	200
Cuba	12	200	200	12	200	200
Cyprus				12	12	0
Denmark		200		3	200	0
Djibouti	12	200	200	12	200	200
Dominica	3	12		3	12	0
Dom. Rep.		200	200	6	200	200
Ecuador				200	200	0
Egypt				12	12	0
El Salvador				200	200	0
Eq. Guinea		12		12	12	0
Ethiopia				12	12	0
Faroes*		200		--	200	--
Fiji	12	12/200	200	12	200	200
Finland				4	12	0
France		200		12	200	200
Gabon				100	150	0
Gambia		200		50	200	0
G.D.R.		200		3	200	0
F.R.G.		200		3	200	0
Ghana	200	200		200	200	0
Greece		6		6	6	0

	CLAIM CHANGES SINCE 31 DEC. 1974			PRESENT CLAIMS		
	TS	FZ	EZ	TS	FZ	EZ
Greenland*		200		--	200	--
Grenada	12	200	200	12	200	200
Guatemala		200	200	12	200	200
Guinea	200	200		200	200	0
Guinea-Bissau	12	200	200	12	200	200
Guyana	12	200	200	12	200	200
Haiti		200	200	12	200	200
Honduras				12	12	0
Iceland		200		4	200	0
India		200	200	12	200	200
Indonesia				12	12	0
Iran				12	50	0
Iraq		12		12	12	0
Ireland		200		3	200	0
Israel				6	6	0
Italy	12			12	12	0
Ivory Coast	12	200	200	12	200	200
Jamaica				12	12	0
Japan	12	200		12	200	0
Jordan				3	3	0
Kampuchea		200		12	200	200
Kenya		200	200	12	200	200
Kiribati	3	200C		3	200	0
Korea (N)		200	200	12	200	200
Korea (S)	12	200		12	200	0
Kuwait				12	12	0
Lebanon				0	6	0
Liberia	200	200		200	200	0
Libya		12		12	12	0
Madagascar		150	200	50	150	200
Malaysia				12	12	0
Maldives	Poly-gonal	Poly-gonal	200	Poly-gonal	Poly-gonal	200
Malta	12	20,25		12	25	
Mauritania	70	200	200	70	200	200
Mauritius		200		12	200	200
Mexico		200	200	12	200	200
Monaco				12	12	0
Morocco				12	70	0
Mozambique	12	200	200	12	200	200
Nauru				12	12	0
Netherlands		200		3	200	0
New Zealand	12	200	200	12	200	200
Nicaragua				3	200	0
Nigeria		200	200	30	200	200
Niue		200	200	0	200	200
Norway		200	200	4	200	200
Oman		200		12	200	0

	CLAIM CHANGES SINCE 31 DEC. 1974			PRESENT CLAIMS		
	TS	FZ	EZ	TS	FZ	EZ
Pakistan		200	200	12	200	200
Panama				200	200	0
Papua-N. Guinea		200	200	12	200	200
Peru				200	200	0
Philippines	Poly-gonal	Poly-gonal		Poly-gonal	Poly-gonal	0
Poland	12	200		12	200	0
Portugal	200	200		12	200	200
Quatar		3		3	3	0
Romania				12	12	0
St. Lucia	3	12		3	12	0
Sao Tome + P.		200		12	200	200
Saudi Arabia				12	12	0
Senegal	150	200	200	150	200	200
Seychelles	12	200	200	12	200	200
Sierra Leone		200		200	200	0
Singapore				3	3	0
Solomon Is.		200C		3	200	0
Somalia				200	200	0
S. Africa		200		12	200	0
Spain		200	200	12	200	200
Sri Lanka		200	200	12	200	200
Sudan		12		12	12	0
Surinam	12	200	200	12	200	200
Sweden	12	200		12	200	0
Syria				12	12	0
Tanzania		50		50	50	0
Thailand				12	12	0
Togo	20	200	200	30	200	200
Tonga	Poly-gonal	Poly-gonal		Poly-gonal	Poly-gonal	0
Trinidad				12	12	0
Tunisia				12	12	0
Turkey				6	12	0
				12		
Tuvalu	3	200	200	3	200	200
U.S.S.R.		200		12	200	0
Ukraine		200		12	200	0
U.A.E.	3	3		3	3	0
U.K.		200		3	200	0
U.S.A.		200		3	200	0
Uruguay				200	200	0
Venezuela		200	200	12	200	200
Vietnam		200	200	12	200	200
Vietnam (S)						
W. Samoa		200	200	12	200	200
Yemen				12	12	0

	CLAIM CHANGES SINCE 31 DEC. 1974			PRESENT CLAIMS		
	TS	FZ	EZ	TS	FZ	EZ
S. Yemen		200		12	200	200
Yugoslavia	12			12	12	0
Zaire				12	12	0

NOTES

1. There is, of course, a motivational linkage between the second and fourth of these objectives, to the extent that both can be regarded as elements in the North-South encounter. But the law reform objective is essentially juridical in character, oriented toward the need for "legal development" both in substantive and procedural contexts; whereas the objective of altering or modifying state practices is more frankly political in complexion, extending beyond law-making forums to virtually every sector of the "international system": food production, population growth, human settlement, transportation, monetary exchange, tariff and other barriers to trade, commodity regulation, and so on.

2. Informal Composite Negotiating Text/Revision 1 (Doc. A/Conf. 62/WP.10/Rev. 1, April 28, 1979).

3. See also Part II ("Territorial Sea and Contiguous Zone") and Part VI ("Continental Shelf"), ibid.

4. Although the EEZ, stricto sensu, is the product chiefly of African diplomacy at UNCLOS III, the concept does, of course, have historic antecedents in the Latin American doctrine of the "patrimonial sea", and Latin American and other delegations at the Seabed Committee discussions played a crucial role in persuading the majority to accept the African formulation with minor modifications. Andres Aguilar, "The Patrimonial Sea or Economic Zone Concept" (1974), 11 San Diego L. Rev. 579. On diplomatic difficulties engendered by the EEZ proposal, see Thomas A. Clingan, Jr., "Emerging Law of the Sea: The Economic Zone Dilemma" (1977), 14 San Diego L. Rev. 530. In state practice, Chile was the first country to assert a claim to a 200-mile zone of any kind. This claim to a "protection and control zone" was promulgated on June 23rd, 1947. Peru proclaimed a 200-mile zone several weeks later on August 1st. Ann L. Hollick, "The Origins of 200-Mile Offshore Zones" (1977), 71 Amer. J. Int. Law 494. This Peruvian claim was more comprehensive than the Chilean and is generally regarded as territorial in character.

5. See, for example, Jon L. Jacobson, "Future Fisheries Technology and the Third Law of the Sea Conference," in H. Gary Knight, The Future of International Fisheries Management (1975), pp. 51-92, at 76-80.

6. This claim, promulgated as early as 1887, was formulated in geometric terms designating a rectangular area to constitute Tonga's territorial waters.

7. See note 4, supra.

8. The South Korean proclamation of January 18, 1952, Tobago, Jamaica, Sierra Leone, Zaire, and Nigeria maintained their colonial three-mile limits, but others such as Cameroon, Mauritania, Senegal, and Tunisia -- all former French colonies -- advanced from three- to six-mile claims.

9. It should be recalled that the Indian delegation at UNCLOS II in 1960 was one of those voting against the final "6 + 6" formula, whereby there would have been a 12-mile exclusive fishing zone measured from the baseline of a six-mile territorial sea. The Indian decision to vote against was made at the last moment, causing surprise and consternation since India was only a six-mile territorial claimant and regarded as one of the "moderates" on this issue.

10. Benin (Dahomey), Cyprus, Western Samoa, Trinidad and Tobago, Jamaica, Sierra Leone, Zaire, and Nigeria maintained their colonial three-mile limits, but others such as Cameroon, Mauritania, Senegal, and Tunisia -- all former French colonies -- advanced from three- to six-mile claims.

11. Although these three countries were the only 200-mile territorialists to emerge in the 20-year period from 1945-1965, they would be joined by three more (Argentina, Ecuador, and Panama) within the next two years, before the famous Pardo speech was delivered on November 1, 1967. It should be noted, however, that one of the original 200-milers, Honduras, retrenched and adopted the emerging norm of a 12-mile territorial sea.

12. Presidential Proclamation No. 2667, Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, 59 Stat. 884 (1945); and Presidential Proclamation No. 2668, Concerning the Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, ibid., 885. For a detailed account of the circumstances surrounding these proclamations, see Ann L. Hollick, "U.S. Ocean Policy: The Truman Proclamations" (1977), 17 Virg. J. Int. Law 23.

13. See page 14, infra.

14. The first two 200-milers, Chile and Peru, both referred to the Truman Proclamation on the Continental Shelf as a precedent for their own claims, although they justified their assertions by reference to whaling and anchoveta interests, respectively. Hollick, supra note 4.

15. In 1958, 87 nations sent delegations to UNCLOS I. Two years later, UNCLOS II attracted 88 delegations.

16. See note 9, supra.

17. I.C.J. Rep. 1969, p. 3. From the doctrine of appurtenance, the Court derived the view that a coastal state's rights to the resources of the shelf "exist ipso facto and ab initio without there being any question of having to make good a claim to the areas concerned ..." Ibid., at para. 19.

18. Presidential Proclamation No. 2668 (1945), supra note 12.

19. Barry Buzan, Seabed Politics (1976), p. 5.

20. In 1923, Colombia and the Soviet Union claimed 12-mile territorial seas. Hollick, supra note 12, pp. 25-26.

21. The fishery claim, like its territorial counterpart, was presumably influenced by military considerations. See note 8, supra.

22. See note 11, supra.

23. By 1965, it might be said in retrospect that three distinct types of claims to extended fishery jurisdiction had emerged as evidence of general confusion about the limits of permissible state practice. The "mainstream" type of claim was one which sought to conform with the majority or "orthodox" view expressed at UNCLOS I and II, permitting a 12-mile fishing zone beyond a narrower territorial sea. The "progressive" type of claim was one which correctly anticipated future trends toward of zones fishery jurisdiction greatly in excess of 12-mile territorial limits. Last, there were a significant number of "idiosyncratic" or "odd" claims which made no effort to conform to any pattern or formula.

24. "He drew the attention of the Assembly to the vast riches hidden on the deep ocean floor of the world ocean which the technological revolution was rapidly making accessible to exploration and exploitation, and which did not belong to any nation. He pointed to the dangers of a military competition to dominate the deep seas. He saw a race developing to carve up the no-man's land of the ocean floor in the way the black continent had been carved up by the colonial powers in past centuries, which would give rise to acute conflict and pollution. He explained how the old law of the sea, based on the premises of the sovereignty of coastal states over a narrow belt of ocean along the coasts and of the freedom of the seas beyond this, was being eroded. He suggested that a new concept, the common heritage of mankind, must take the place of

the old freedom of the sea. He stressed the ecological unity of ocean space and the interactions between all areas and all uses of ocean space." Elizabeth Mann Borgese, "Introduction," in E. M. Borgese, ed., The Common Heritage: Selected Papers on Oceans and World Order, 1967-1974, By Arvid Pardo (International Ocean Institute, Occasional Papers No. 3, 1975), at p. ii. From the text of Pardo's 1967 speech, see ibid., pp. 1-41.

25. The need for organizational restructuring is a constant theme in Pardo's speeches on law of the sea issues between 1967 and 1974. See, for example, ibid., pp. 43-49, 51-65, 93-101, 103-116, 124-136, 137-150 and 239-248. In this last-cited speech, addressed to the Second Committee of the U.N. General Assembly on November 24, 1971, Pardo proposed the establishment of an "International Sea Service", primarily to supply the deficiencies of existing specialized agencies in the provision of technical training and services to developing coastal states, with a view to assisting them in the discharge of their ocean management responsibilities within expanded limits of national jurisdiction.

26. See, for example, Docs. A/AC.135/11, A/AC.138/9, and A/AC. 138/21.

27. Strictly speaking, the present version of the UNCLOS III text (ICNT Rev.1) does not envisage a "regime of archipelagic waters". Part IV deals with "Archipelagic States", and it provides in Article 49 that the "sovereignty of an archipelagic State" extends not only to "the waters enclosed by the baselines, described as archipelagic waters, regardless of their depth or distance from the coast", but also to "the air space over the archipelagic waters, the bed and subsoil thereof, and the resources contained therein." The only regime referred to in Part IV is "the regime of archipelagic sea lanes passage." This regime seems analogous, but not identical, to that of the territorial sea to the extent that the coastal state's sovereignty is subject to the right of archipelagic sea lanes passage, which is analogous, but not identical, to the right of innocent passage.

28. At this point, South Korea had abandoned its earlier claim to a territorial sea varying from 20 to 200nm. Rather than joining the "new orthodoxy", however, it chose to replace that claim with the traditional three-mile limit. Nauru and the U.A.E. both became independent states in the 1968-1974 period, but posited claims identical to those held by their respective "mother" states, Australia and the U.K.

29. See pp. 35-36, infra.

30. While it is true that negotiations had been proceeding in the Seabed Committee, 1974 nevertheless marked the beginning of formal diplomatic negotiations at UNCLOS III. This occurred at the second session (the first session had been an organizing session held in New York in December, 1973) held at Caracas in June through August of 1974. See S. Oda, The Law of the Sea in Our Time, New Development, 1966-1975, vol. 1. (1977, pp. 152-158.

31. Bangladesh promulgated the first legislation creating an EEZ. See, The Territorial Waters and Maritime Zone Act (Act No. XXVI of 1974), Article 5, reprinted in United Nations Legislative Series, National Legislation and Treaties Relating to the Law of the Sea, 13 June 1978 at 32-34 (ST/LEG/SER.B/19 - Preliminary Issue).

32. Several of these 200nm claims made in semi-enclosed seas extend well beyond the median or equidistance line which is referred to in Article 74 of the ICNT/Rev. 1 ("Delimitation of the exclusive economic zone between adjacent or opposite States"). This form of state practice adds to the volume of maritime boundary disputes which can be expected to arise in the aftermath of UNCLOS III.

33. Douglas M. Johnston and Edgar Gold. The Economic Zone in the Law of the Sea: Survey, Analysis and Appraisal of Current Trends (Law of the Sea Institute, University of Rhode Island, Occasional Papers Series No. 17, June 1973).

34. Each state examined in the study was capable of being placed into one of eight categories, which included three levels of intensity for protagonists, three levels of intensity for antagonists, in addition to the categories of equivocal and uncommitted. Ibid., pp. 16-18.

35. In order to conduct empirical investigations in this area, social science researchers may have to depend upon government officials who are willing and able to participate in research programmes which are designed to be run on a collaborative basis.

36. Several African speakers at the Pacem in Maribus Conference held at Yaoude, Cameroon, in January 1979, questioned the wisdom of their governments in advocating a 200nm exclusive economic zone at the Seabed Committee and UNCLOS III proper.

37. In addition to the obvious sorts of political and diplomatic factors, account will have to be taken of tech-

nological and personal (psychological and personality) factors. This underlines the need for psychiatric and psychocultural studies of protracted conference diplomacy and for case studies of the behaviour of diplomatic elites.

38. The "threat" of unilateral national legislation on deep ocean mining before the conclusion of UNCLOS III was exploited in various ways, especially between 1976 and 1979, and eventually acquired a symbolic value in negotiations on related (and sometimes unrelated) issues.

39. This expectation is presumably derived from the tradition of codification in legal theory and diplomatic (U.N.) practice. The addition of the concept of "progressive development" of international law in the U.N. Charter seems to have done little to diminish the expectation that postwar law-making conference diplomacy would result in increased uniformity in state practice.

40. See p. 23, supra.

41. Edward Miles, "The Dynamics of Global Ocean Politics," in D. M. Johnston, ed., Marine Policy and the Coastal Community, (1976), 159-167.

42. It cannot be assumed that most of the states whose delegations have contributed to the emerging "consensus" at UNCLOS III will choose to execute all the acts of "consent" which are available to them: voting, signature, ratification, and the decisions to refrain from attaching debilitating reservations. One envisages instead a bewildering variety of "consent" patterns, ranging from complete, explicit and unconditional -- all evidenced or inferred over a period of a decade or longer.

43. Tribunals which are requested to pronounce on these difficulties may be forced to develop an expanded concept of travaux preparatoires in order to include some of the semi-official documentation of UNCLOS III.

AN ANALYSIS OF THE EXCLUSIVE ECONOMIC ZONE AS FORMULATED IN THE INFORMAL COMPOSITE NEGOTIATING TEXT

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As the first substantive speaker from the USA, I hope you will permit me just a moment to make a few remarks. Only two weeks ago my colleagues and I at the University of Miami had the privilege of welcoming President Lopez Portillo to our campus. We heard him remind us of our heritage and our duty. Now, I have the additional pleasure of coming to Mexico City to join some old and treasured friends. For this I would like to express my appreciation both to the Law of the Sea Institute and to the Center for Economic Social Studies of the Third World.

It is also a very great honor to speak about the economic zone here in Mexico. To be sure, the insurgency and inspiration originated in South America; but the revolution -- the unprecedented peaceful revolution in international law that is the economic zone elaborated at the Law of the Sea Conference -- that revolution could never have occurred without the skill, wisdom and courage of the Mexican delegation and its distinguished leader, Jorge Castaneda, now Secretary of Foreign Affairs.

El Universal put it well today when it said on a front page headline, "Inadmisible la Fuerza Para el Arreglo de Litigios Entre Estados."

I. The Impact on International Law

The theme of this conference is state practice in zones of special jurisdiction. One might reflect for a moment on how this theme might be illuminated by an analysis of the exclusive economic zone as formulated in the Informal Composite Negotiating Text/Revision 1 currently before the Third United Nations Conference on the Law of the Sea. In a sense, such an analysis relates, not to state practice, but to the other major requirement for emergence of a rule of international law, namely opinio juris. At the same time the texts regarding the exclusive economic zone that emerged at the Conference had a major influence on the legislation, practice and expectations of governments.

*The views expressed herein are those of the author and do not necessarily represent those of the Department of State or the U.S. Government.

The elaboration of an exclusive economic zone at the Conference began as "progressive development" of international law. A decade later, it will emerge essentially unchanged as a "codification" of international law in important respects. If this is so, it means that during the intervening period the basic rules contained in the Conference texts regarding the economic zone become law; that is, they become the basis for the actual practice and expectations of states. The formal -- but by no means exclusive or definitive -- evidence of such state practice and expectations can be found in the texts of national laws and regulations that are based on the texts before the Conference.

We have just heard the excellent presentations by Dr. Gold and Dr. Johnston illustrating this process in considerable detail. Also, all members of the Bar owe a considerable debt of gratitude to professionals in other disciplines for providing us with the material for these kinds of analyses, particularly to the geographers and hydrographers such as Commander Beazley, Professor Alexander and Dr. Hodgson.

The evolution involved here serves to emphasize the dual nature of what we call "lawmaking" conferences. As a formal matter, the Conference is charged with preparing a treaty that becomes legally binding on states that become party to it. As a practical matter, given appropriate conference procedures and serious participation by capitals, the conference may produce new law irrespective of ratification of an eventual treaty.

No better illustration can be cited than the emergence as positive law of basic aspects of the economic zone as elaborated by the Conference. This occurred not only prior to the entry into force of the Convention, but prior to its completion. This presents a lawmaking process that is neither wholly legislative nor wholly customary, but in fact a combination of the two.

This will of the majority -- whether or not those in the majority are seriously affected by a particular rule -- is the salient feature of formal lawmaking power in a parliamentary body. The will of those affected, whether or not they are in the majority, is the salient feature of the customary lawmaking process. Each group, in its respective sphere, can prevent the emergence of a rule of law if it is prepared to pay the price.

Of course, any so-called lawmaking conference may have some impact on the development of international law in the field. The revolutionary impact of the Law of the Sea Conference is due to the fact that its procedures and composition reflect the salient aspects of <u>both</u> parliamentary and customary lawmaking.

Two factors here are crucial. First, the consensus procedures of the conference. Second, the direct participation by capitals at a political and expert level, including those interests directly affected.

No set of articles better illustrates the combination of these factors than those regarding the exclusive economic zone.

We might look to the United States delegation, for example, as an illustration of the second factor.

Work on the exclusive economic zone for the United States commanded high level attention on the United States delegation and, in Washington, at the cabinet level and occasionally at the presidential level.

Expert level participation from the capital was overwhelming. The United States exclusive economic zone team at the Conference included representatives, frequently including personal representatives of cabinet members, from eight different government departments and agencies concerned. Eight Congressional committees were represented in this process. Six subcommittees of our Public Advisory Committee on the Law of the Sea were involved, including various industrial and regional representatives.

The composition of other delegations at the Conference -- while perhaps a bit less given over to participatory democracy -- nevertheless reflected a similar depth of concern. One region of the world where this seems to be less true was in Africa. This may be one of the factors that might be brought to bear on some of the comments we've just heard from Professor Gold. Nevertheless, various African delegations included fisheries, petroleum, and navigation experts who were influential in the African Group as a whole.

Thus, the Law of the Sea Conference -- perhaps at the opposite end of the spectrum from the United Nations General Assembly at its worst -- was literally creating shared expectations among those people who would in fact have to deal with these problems in practice at home. That is indeed the stuff of which law is made.

The value of the texts that are now before the Conference as evidence of likely state practice (and therefore as evidence of customary law) must be qualified in at least two respects.

First, one has to ask whether the texts in question will survive the formal proceedings of the Conference. If so, they will have enhanced value as evidence of international law. If they are changed by voting at the Conference, the Convention that emerges will have much less value as evidence of

international law on the specific point changed and, to some degree, in its entirety.

Second, one must analyze the primary forces at play in reaching an accommodation on the particular articles in question.

There are two general reasons for accommodation on any given text.

One is based on the merits of the particular issue or substantively related groups of issues.

The second is a part of a larger process of accommodation which is designed to promote an overall Law of the Sea package -- an overall Law of the Sea Convention -- that is generally acceptable and widely ratifiable. Substantive links between the issues are not necessary to that kind of accommodation.

This is a matter of degree. Both kinds of accommodation are implicit in any given settlement of an issue. But to the extent that the first basis of accommodation -- accommodation on the merits -- was the primary force at play, there is a higher likelihood that customary law will evolve in the way set forth in the text. To the extent that the second basis of accommodation -- the interest in achieving an overall package -- was the primary factor in reaching an accommodation on a particular issue, it is less clear that customary international law will evolve in the way in which the text prescribes, particularly if the package concept breaks down or is never really established.

The question of whether the recognition of the concept of the exclusive economic zone in the Informal Composite Negotiating Text is declaratory of international law is the wrong question, for at least two reasons.

First, the concept of the exclusive economic zone in the text is the sum of its parts. The concept has no existence independent of its elements. It would be a fundamental error to assume that the Law of the Sea Conference accepted the concept of the exclusive economic zone as a norm of international law, but regarded the details set forth in the provisions on the zone as merely contractual in character (lex ferenda).

Second, one must do an element-by-element analysis of the exclusive economic zone as set forth in the text in order to determine whether that element is declaratory of international law. This analysis entails two questions:

1. Are the texts regarding the particular element in question consistent with existing state practice?

2. Will those texts continue to guide state practice after the Conference ends if a widely ratified treaty does not emerge?

In sum, the question of the legal significance of the exclusive economic zone texts set forth into the ICNT has two major aspects.

First, that influence depends on how widely ratified the Convention will be. This is both a numerical and a qualitative inquiry. Questions such as the permissibility of reservations and the prospect of amendments will also affect that legal influence.

Second, to determine the legal influence of those texts pending the entry into force of the Convention or in the absence of a widely ratified Convention, one has to examine the texts element by element, determine whether each element is absorbed into state practice in fact, and try to determine whether that acceptance is likely to last in the absence of a widely ratified Convention.

II. History

Turning more closely to the exclusive economic zone as set forth in the ICNT, some historical observations are in order. Needless to say, a historical commentary on the concept of the exclusive economic zone would amount to a rehearsal of the history of the entire law of the sea. Most of us are familiar with the major aspects of that history. Therefore, these observations merely emphasize certain conceptual points.

The "traditional" international law of the sea was based largely on a dichotomy between the territorial sea and the high seas. It was an exceedingly blunt instrument. The problem, simplified perhaps, is that the regime of the high seas was not sufficiently responsive to coastal state interests, while the regime of the territorial sea was not sufficiently responsive to navigational and other non-coastal interests.

It is tempting to cite the continental shelf principle as a watershed development in the evolution of the law of the sea away from this approach. But one wonders.

The continental shelf doctrine basically worked because it was confined to seabed resources; those resources were not an object of the traditional law of the sea. Navigation, fishing and other high seas interests protected by the traditional law were for the most part not directly affected

by the continental shelf doctrine. At the time the continental shelf doctrine was first promulgated, there were no non-coastal interests asserted with respect to control of the resources of the continental shelf.

The problems with respect to the water column, both in terms of history and in terms of uses, were infinitely more complex. There were a variety of attempts to make the basic territorial sea/high seas dichotomy work by adjusting the content of the regimes. Let us take two examples.

On the one hand, from a coastal perspective, one could look at the national laws of Argentina and Uruguay. Although they speak of a 200-mile territorial sea, they preserve freedom of navigation and overflight in that area. The result, of course, is not a classic territorial sea.

On the other hand, adhering to the principle of flag state consent implicit in the high seas regime, the United States some years ago negotiated a series of bilateral and regional fisheries agreements designed to give priority to the economic interests of the coastal state on the high seas beyond the territorial sea and 12-mile fishing zone. The result differed substantially from classic freedom of fishing.

Neither one of those attempts at accommodation succeeded. The dilemma was one of basic characterization: trying to deal with problems within the conceptual structure of the territorial sea/high seas dichotomy.

The very text of an early and seminal document on our subject -- the 1952 Declaration of Santiago by Chile, Ecuador and Peru -- avoids the dichotomy and uses the vague term "zona maritima". Had it not made a wholly unnecessary reference to innocent passage, its revolutionary conceptual impact might not have been blunted by diversions to classical territorialism.

The Santiago Declaration and the South American claims that followed established the geographic scope of the problem: they established 200 miles as the area in question. But there was no agreement on the content of the regime in that area. Indeed, there was not even agreement on the content and conceptual nature of the zone by the three states that originally made the Declaration. There were, however, two basic common elements that were generally accepted.

First, coastal states would have jurisdiction over fishing. The reasoning of the Santiago Declaration itself refers entirely to natural resources.

Second, the navigation rights of all would be protected.

Nevertheless, even with respect to these two elements, there was no agreement on specific content.

The Canadian claims to control pollution from ships in the Arctic introduced a new element into the equation that added complexity to the problem of trying to establish an accommodation. It is precisely navigation -- precisely the international use that would be protected under the basic concepts of the regime -- that would be subject to a measure of coastal state control if the coastal state is given jurisdiction to control pollution from ships.

III. Preparatory Steps

The problem faced by the 200-mile claimants was to define their position and establish a base of support at the Law of the Sea Conference from which to negotiate with those who were less enthusiastic about a 200-mile concept. The 1972 Santo Domingo Declaration on the patrimonial sea and the 1973 Declaration of the Organization of African Unity on the exclusive economic zone are attempts to do just that. Needless to say, both declarations may also be regarded as political efforts to promote regional solidarity.

There are six fundamental elements of the patrimonial sea as set forth in the Santo Domingo Declaration:

1. It would be an area beyond the territorial sea.

2. It would extend to a maximum limit of 200 nautical miles from the coast (baseline).

3. There would be coastal state sovereign rights over extraction of natural resources, both living and non-living, in the waters and in the seabed and subsoil.

4. The coastal state would have duty to promote, and the right to regulate, marine scientific research.

5. The coastal state would have the right to adopt necessary measures to prevent marine pollution.

6. All states would enjoy freedom of navigation and overflight and freedom to lay submarine cables and pipelines.

The Declaration of the Organization of African Unity, in setting forth the concept of the exclusive economic zone, repeats these elements, but with three important refinements.

First, the OAU Declaration contains a general reference to the rights of all states to engage in "other legitimate uses of the sea" in the zone, although only navigation, overflight, and laying submarine cables and pipelines are specifically mentioned.

Second, the OAU Declaration does not subject the freedoms of all states to restrictions resulting from the exercise by the coastal state of it rights within the zone.

Third, the OAU Declaration introduces the idea that land-locked and other disadvantaged countries are entitled to share in the exploitation of living resources of neighboring economic zones. The declaration proposes that the coastal state accord national treatment to the fishermen of land-locked countries in the region.

The OAU Declaration, issued the year after the Santo Domingo Declaration, represents a conceptual evolution designed to lay the foundation for dealing with the maritime states and the land-locked and "geographically disadvantaged" states. It is the last refined blueprint. After that come the texts.

IV. Conference Negotiations

Considerable informal work was done on the economic zone after Caracas, between sessions, and then at the third session in Geneva, in the so-called Evensen Group, named after its chairman, Minister Jens Evensen of Norway. That group gradually got larger until, in the end, it was in effect an open-ended assemblage of the conference as a whole.

The final product of the Evensen Group was the Chairman's sixth revision text. That text addressed all of the matters dealt with in the current exclusive economic zone articles except for delimitation between states with opposite or adjacent coasts. (The details of the marine scientific research and pollution regimes were negotiated subsequently).

The sixth revision text was incorporated in 1975 into the original Single Negotiating Text issued by the Chairman of the Second Committee. A few changes were made to reflect criticisms which had been made by the African Group and the Group of 77.

In 1976, a Revised Single Negotiating Text was issued. In 1977, an Informal Composite Negotiating Text was issued.

An important procedural change affected the revision of the Informal Composite Negotiating Text. Its preparation was the responsibility of the bureau as a whole -- that is, the President of the Conference and the Chairmen of the three Main Committees, with whom the Chairman of the Drafting Committee and the Rapporteur General would be associated. No textual

change could be made unless the change received widespread and substantial support in Plenary offering a substantially improved prospect of consensus.

The interesting thing about this procedural decision of the Conference is that although no article had ever been voted upon, the text could only be changed if there were widespread and substantial support for the change offering a substantially improved prospect for consensus. That Conference decision should dispel any illusions about the true status of the informal texts. The view that they are completely open to formal change at a formal stage of the conference would be as destructive of the Conference as it would be a naive analysis of what has happened.

V. Structural and Organizational Problems

The exclusive economic zone begins at the outer limit of the territorial sea, for which the text specifies a maximum limit of 12 miles. The zone ends at 200 miles from the baseline. This posed structural problems.

The classic view of the continental shelf regime was that it began at the outer limit of the territorial sea and continued seaward. The classic view of the high seas was that the high seas began at the outer limit of the territorial sea. The structural problem posed was how to deal with this intersection of the economic zone with other regimes.

There were also organizational problems. The conference divided itself into several committees. The basic regimes -- aside from deep seabed mining -- were the responsibility of the Second Committee. The Third Committee was accorded responsibility for marine pollution and marine scientific research. The Informal Plenary was accorded responsibility for settlement of disputes. All dealt in important respects with exclusive economic zone issues.

The solutions to the structural problems proposed in the original Single Negotiating Text in 1975 were a response to forces that had very little to do with the inherent substance of the regime of the exclusive economic zone. The proposed solutions were primarily a response to problems of timing and the intricate tactical situation at the time.

The issue of whether there would be coastal state rights over the continental shelf beyond 200 miles was still contentious in 1975. The broad margin states that were arguing that there should be such rights were basing their argument on a concept of natural prolongation from the coast. Those states felt that their argument would be undercut if the continental shelf were regarded as a concept relevant only beyond the 200-mile limit of the economic zone. The stability

of expectations of those who had already made investments under continental shelf laws of various states may also have been a factor. Accordingly, the definition of the continental shelf beginning at the limit of the territorial sea was retained.

With respect to the definition of the high seas, the problem was essentially ideological and tactical. While the questions of fisheries jurisdiction in principle and offshore installations were nearing resolution, at that time the problems of scientific research, marine pollution, and fishing rights for land-locked and geographically disadvantaged states were being fiercely contested. The issue of dispute settlement was not yet resolved. The coastal states felt that the resolution of all those issues would have been seriously prejudiced if one established a high seas status for the exclusive economic zone. The original SNT thus defined the high seas as beginning at 200 miles. That definition was removed two years later in the ICNT as the other issues were approaching resolution.

The result of the organizational problems is that with respect, for example, to questions of pollution and marine scientific research, one must read the separate chapters on these subjects in their entirety in order to ascertain the regime of the exclusive economic zone in those respects. The section on the exclusive economic zone merely cross-references those chapters.

For example, the duty to protect and preserve the marine environment applies to the exclusive economic zone but does not specifically refer to it. Similarly, the duty to promote and facilitate the conduct of scientific research applies to the exclusive economic zone but does not specifically mention it. The same is true of the general provisions on settlement of disputes.

Indeed, even within texts of the Second Committee of the Conference there are similar problems. Thus, for example, one must read the chapters on the high seas and on enclosed and semi-enclosed seas to get a full picture of the regime of the economic zone.

The end result is that if one wants to know what are the rules applicable in the 200-mile zone as elaborated in the ICNT, one must read Part V on the exclusive economic zone, Part VI on the continental shelf, Part VII on the high seas, Part VIII on the regime of islands, Part IX on enclosed and semi-enclosed seas, Part XII on protection and preservation of marine environment, Part XIII on marine scientific research, Part XV on settlement of disputes, and an annex identifying highly migratory species. The general and final clauses that emerge may also have some impact.

For measuring the limits of the exclusive economic zone, including limits between opposite and adjacent states, one must read in addition to Part V on the economic zone, Part II on the territorial sea and Part IV on archipelagic states for relevant baseline provisions, as well as Part VIII on the regime of islands, Part XV on settlement of disputes, and Part XVI on final clauses. Part VI on the continental shelf may be relevant, as delimitation of one State's economic zone may affect the claimed continental shelf of another state even in areas beyond 200 miles from the latter's coast.

VI. The Points of Entry

With this vast array of provisions it becomes exceedingly important to determine the proper points of entry. There are two articles that serve this purpose. They are article 56, the basic article on coastal state rights, and article 58, the basic article on the rights and freedoms of all states in the exclusive economic zone.

Both provisions are in major respects merely cross references: tables of contents. They cannot be understood or interpreted properly, or correctly copied into national laws, without reference to many other provisions of the text.

A. Article 56

Article 56 treats the rights of the coastal state in the economic zone in two clauses. The first is an establishment clause, a substantive description of the rights of the coastal state.

The clause in paragraph 1(a) establishes two categories of sovereign rights: the sovereign rights of the coastal state for the purposes of exploration, exploitation, conservation and management of the natural resources of the seabed, sub-soil and superjacent waters, and the sovereign rights of the coastal state 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.

This clause gives the exclusive economic zone its economic character and its exclusive character. But even here, it is misleading to assume that this is all there is to be said on the subject. There is much more to be said about the exercise of sovereign rights over resources elsewhere in the Convention. In and of itself, the clause is incomplete.

Thus, paragraph 1(c) refers to duties specified elsewhere in the Convention and paragraph 3 cross-references Part VI on the continental shelf.

The second clause on coastal state rights, paragraph 1(b) of article 56, is a cross-reference clause only. Paragraph 1(b) refers to "jurisdiction as provided for in ... this Convention." It refers to artificial islands, installations and structures (the cross-reference is basically to article 60), marine scientific research (the cross-reference is basically to Part XIII, especially articles 246 to 254), and preservation of the marine environment (the cross-reference is basically to Part XII, especially articles 208, 210, 211, 214, 216 and 220).

Paragraph 1(c) cross-references all "other rights and duties provided for in this Convention." The reference to duties qualifies all of article 56, including the sovereign rights. It includes the conservation duties of the coastal state under Part V itself and the environment duties of the coastal state under Part XII.

The most important structural feature of article 56 is that there are no implied or residual coastal state rights. All are set out specifically in article 56, either directly or by cross-reference.

B. Article 58

There are two groups of freedoms and rights of all states that are set out in article 58.

First there is the unqualified clause: all states enjoy the freedoms referred to in article 87 of navigation, overflight, and laying submarine cables and pipelines.

Article 87 is the basic article listing the freedoms of the high seas. Therefore, the cross-reference to article 87 establishes the qualitative identity of freedom of navigation, overflight and laying submarine cable and pipelines in the exclusive economic zone and on the high seas beyond. High seas law determines the meaning of article 58, subject of course to the express limitations on the application of that law within that article.

This cross reference to article 87 makes clear that treaties regulating these freedoms on the high seas apply in the same way to the exercise of these freedoms in the exclusive economic zone. In particular, the cross reference was intended to make clear that article 12 of the Chicago Convention on Civil Aviation applies in exactly the same way to freedom of overflight within the exclusive economic zone as it applies to freedom of overflight beyond the exclusive economic zone. The reference to the high seas in article 12 of the Chicago Convention should be read as a reference to freedom of overflight in the modern law of the sea.

Article 58 contains a clause that can be, and has been, criticized in this respect. In elaborating the freedoms of all states, article 58 uses the term "subject to the relevant provisions of this Convention." No similar term appears in article 56.

Obviously, every term in a Convention is subject to the relevant provisions of every other term. The substantive reason for the specific reference in article 58 is related to marine pollution. Unlike other provisions regarding the exclusive economic zone, a duty to control marine pollution specifically relates to the exercise of freedom of navigation. Since negotiations on this matter were not completed -- indeed were hotly contested -- in 1975, avoidance of tactical prejudice inherent in an unqualified reference to freedom of navigation was necessary to achieve agreement in the Evensen Group.

In any event, one must note that article 56 contains an express cross-reference to other duties of the coastal state, whereas article 58 does not contain such an express reference. Therefore, the term "subject to the relevant provisions of this Convention" in article 58 is at most a companion clause to the reference to coastal state duties in article 56, paragraph 1(c).

The second major group of rights of all states in the exclusive economic zone elaborated in article 58 is qualified. These rights are subject to a compatibility test. This is different from saying merely that their exercise must be compatible: the identification of the rights themselves is subject to a compatibility test.

Two sets of rights are in this category. First, article 58, paragraph 1, refers to "other internationally lawful uses of the sea related to" the freedoms of navigation, overflight and the laying of submarine cables and pipelines, "such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention." Second, article 58, paragraph 2, incorporates articles 88 to 115 by reference. These are the basic articles elaborating the high seas regime. They apply to the exclusive economic zone "insofar as they are not incompatible with" Part VI on the exclusive economic zone.

The cross-reference in article 58, paragraph 2 incorporates the entire regime of the high seas as set out in the Convention with only two exceptions:

1. Fishing provisions, since these are not relevant at all, and

2. The list of high seas freedoms in article 87, since article 58, paragraph 1, contains

its own list and its own cross-reference to article 87.

The high seas law of nationality and immunity of ships, piracy, visit and search, suppression of slavery, pirate broadcasting, and so on: all of it applies in the economic zone.

VII. Accommodation of Uses

Articles 56 and 58 both contain the same basic rule of law for accommodating the simultaneous existence of coastal state and flag state jurisdiction: the "due regard" obligation. The coastal state, in the exercise of its rights and performance of its duties in the zone, must have due regard for the rights and duties of other states. Similarly, other states, in the exercise of their rights and performance of their duties in the zone, must have due regard to the rights and duties of the coastal state.

This obligation finds its inspiration in article 2 of the Convention of the High Seas, which provides that states, in exercising the freedoms of the high seas, must have reasonable regard to the interests of other states in their exercise of the freedoms of the high seas.

One may wonder how "reasonable regard" became "due regard". Article 87(2) of the ICNT, which specifically repeats the substance of article 2 of the High Seas Convention, uses the term "due consideration". If one examines page 166 of the new and excellent terminological study prepared by Dr. Vargas, one will note that the Spanish equivalent of "reasonable regard" in article 2 of the 1958 High Seas Convention is "debida consideracion". Article 87 was one of the few articles in the SNT drafted by the Chairman of the Second Committee, Ambassador Galindo Pohl of El Salvador, on his own, since there was no negotiated text. His text was rendered in English as "due consideration" which, of course, is a literal English translation of the Spanish equivalent of "reasonable regard". While the term "due regard" was negotiated in the Evensen Group, the influence of the Spanish text of the High Seas Convention -- and the general allergy of civil lawyers to the reliance on rules of reason by their common law brethren -- may have been the main factors.

In addition to the parallel due regard obligations between the coastal state and the flag state, article 58 also contains an element which is not present in article 56. Paragraph 3 of article 58 provides that in exercising their freedoms, states must comply with the laws and regulations established by the coastal state in accordance with the Convention. What does this mean?

Obviously it does not mean that there is coastal state regulatory power over navigation and overflight in principle. One must note that this particular clause arises in the same sentence that deals with the due regard obligation. Therefore, in context, it is a reference to those situations where there is an intersection between the exercise of a freedom enjoyed by all states and the exercise of a coastal state right.

The clearest example of such an intersection would exist in the case of pollution. In exercising freedom of navigation, one must of course comply with the laws and regulations of the coastal state regarding vessel source pollution that are established pursuant to article 56, that is in accordance with Part XIII of the Convention. It is also possible, although a little more speculative, that this could be read as a reference to the intersection between freedom of navigation of fishing vessels and coastal state regulatory powers over fishing as well.

Basically, this "laws and regulations" clause, like the "subject to" clause in paragraph 1 of article 58, is a result of drafting over-kill. If either clause is over-emphasized, the entire system for the economic zone set out in the text makes no sense.

VIII. Coastal State Rights

Against this background, we can see that article 56 is a mere adumbration. The substance of most of the rights and duties of the coastal state in the exclusive economic zone cannot be found in article 56. One must look to the specific provisions dealing with each individual use in the exclusive economic zone, bearing in mind that each of these specific uses is subject to the overall "due regard" and environmental obligations. A few examples will be noted briefly.

A. Seabed Resources

The sovereign rights of the coastal state with respect to seabed resources in the economic zone are not elaborated upon. The rights of the coastal state regarding artificial islands, installations,and structures are of course closely related, but they are dealt with as a separate matter in the ICNT.

There are some rights related to seabed resources which fall into the category of "other rights and duties" under paragraph 1(c) of article 56. One might mention the rights of the coastal state with respect to pipelines in article 79 and drilling in article 81, both of which appear in Part VI on the continental shelf. One might also note the rights of the coastal state with respect to pollution from seabed resource activities; these are really ancillary to the basic sovereign

rights of the coastal state. They are set forth in articles 208 and 214 of Part XII on Protection and Preservation of the Marine Environment.

Insofar as duties are concerned, there are the accommodation of use duties. These are set out not only in the "due regard" obligation of article 58 but in article 78 dealing with the continental shelf.

There are the general environmental duties, applicable to the entire ocean, including seabed resource activities in the economic zone. Article 192 provides that states have the obligation to protect and preserve the marine environment. Article 193 provides that states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment. Article 194, paragraph 2, provides that states shall take all necessary measures to ensure that activities under their jurisdiction or control are so conducted that they do not cause damage by pollution to other states or their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with the Convention.

Articles 208 and 214 establish specific obligations to adopt and enforce anti-pollution measures with respect to seabed activities under coastal state jurisdiction "no less effective" than international measures in this field.

Under article 296 there is no compulsory dispute settlement with respect to the exercise of coastal state sovereign rights over seabed resources. However, interference with freedom of navigation and violation of applicable international environmental standards are subject to compulsory arbitration or adjudication.

B. Living Resources

There are elaborate provisions in Part V dealing with the rights and duties of the coastal state with respect to conservation and optimum utilization of living resources in the economic zone. They were an integral part of the overall bargain on the exclusive economic zone. It was only as agreement on these detailed fisheries provisions was emerging in the Evensen Group that agreement on the concept of the exclusive economic zone became possible.

The duty of the coastal state to conserve living resources and the duty to ensure optimum utilization of those resources are extraordinary innovations in the international law of the sea and, indeed, in international law generally. The duty to ensure optimum utilization should not be confused with the exclusive power of the coastal state over allocation. As long

as the coastal state ensures optimum utilization, it has a right, if I may paraphrase one of my esteemed colleagues, to "marry the bride with the largest dowry."

There is a list of factors that the coastal state must take into account in allocating the surplus. These include the rights of land-locked states and states with so-called special geographical characteristics in the region or subregion under articles 69 and 70. To that extent, there are some obligations as to how the coastal state behaves in the allocation of the surplus.

There are also special rules with respect to particular species. One should note here that the rule regarding marine mammals is mis-drafted. It does not correctly state its intent, which is to permit stricter, but in no case more lax, conservation than is required by article 61. This presumably will be corrected soon.

With respect to fisheries enforcement, there is a requirement of prompt release of vessels, on posting of reasonable bond or other security, and there is a prohibition on imprisonment or other forms of corporal punishment.

The regime of fisheries in the economic zone includes non-binding conciliation on some fisheries disputes.

C. Other Economic Uses

Article 56 establishes sovereign rights over "other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds." There is nothing else in the Convention dealing with these matters, although of course the general provisions on accommodation of uses and protection of the environment apply, and the installations article is closely related. The clause is in effect a special subset of the basic provision for sovereign rights over natural resources, a subset in which the ambient water and air of the zone are themselves employed as a natural resource. It must be read in the context of the overall relationship between articles 56 and 58. A sailing ship navigating in the exclusive economic zone for commercial purposes comes under freedom of navigation in the exclusive economic zone. It does not come under the sovereign rights over economic production of energy from the wind.

D. Artificial Islands, Installations and Structures

One cannot stress too much the extent to which artificial islands, installations, and structures posed an exceedingly delicate problem.

Article 60 places all artificial islands under coastal state jurisdiction. It places installations and structures

under coastal state jurisdiction if they fall into any one of three groups:

1. They are for the purposes provided for in article 56;

2. They are for other economic purposes, for example, an offshore airport or port facility;

3. They may interfere with the exercise of coastal state rights in the exclusive economic zone.

All economic installations and structures, whether or not they are related to resources, are under coastal state jurisdiction in the zone.

With respect to marine scientific research installations and structures, the text has a complex system of cross-references. Article 258 states the rule, namely that the basic scientific research regime determines the rights of the coastal state with respect to scientific research installations and structures. They are subject to the consent regime and the rules regarding the exercise of the consent rights for marine scientific research activities in the zone.

The cross-reference to article 56 relates to sovereign rights over resources and other economic activities, drilling into the seabed, and jurisdiction over marine scientific research. The cross-reference in article 56 to article 60 of course adds nothing. The cross-reference to pollution jurisdiction in article 56 also has no practical meaning in terms of deciding the types of installations and structures subject to coastal state jurisdiction.

Accommodation of uses is normally dealt with in the ICNT by placing a duty on the state conducting the activity in question. In the case of installations and structures, however, it becomes a basis of coastal state jurisdiction. An installation which "may interfere" with the exercise of coastal state rights is subject to the jurisdiction of the coastal state. This codifies the rule of U.S. v. Ray, 423, F.2d 16 (5th Cir. 1970).

One interesting question posed by this article is, "What is an installation or structure?" The answer to this question depends on the relationship between articles 56 and 58, since article 60 is in effect an elaboration of article 56. Article 58 determines what is not an installation or structure, because the freedoms and uses referred to in article 58 are not subject to coastal state jurisdiction. Accordingly we should exclude the class of things used in exercising the freedoms and rights of all states referred to in article 58. Thus, one reaches

the conclusion that ships, aircraft, and submarine cables and pipelines are not installations or structures within the meaning of articles 56 and 60. Similarly, for example, one concludes that related equipment such as an anchor or equipment that is temporarily being used to repair a cable are also not installations or structures within the meaning of articles 56 and 60.

One must bear in mind that the provision governing the conduct of a particular activity also govern the use of artificial islands, installations, and structures for that purpose. To the extent that they are used to exploit seabed resources, the seabed resource provisions govern. To the extent that they are used to conduct marine scientific research, the research provisions govern. With respect to pollution and dispute settlement, the treatment of artificial islands, installations and structures under coastal state jurisdiction is generally the same as the treatment of seabed resources of the economic zone. There are special rules on the placement of installations and on safety zones. Those rules are in fact specific elaborations of the due regard obligation of the coastal state; violations would in principle entail interference with navigation.

E. Pollution

The most complex and easily misunderstood of coastal state rights in the economic zone is the jurisdiction with respect to the preservation of the marine environment.

It goes without saying that any activity that is itself subject to coastal state jurisdiction, for example exploitation of seabed resources, will be subject to coastal state environmental jurisdiction. Indeed, in some instances the desire of coastal states to exercise environmental control was one of the reasons for establishing or extending general coastal state jurisdiction over an activity. In addition to this, there is some environmental jurisdiction over foreign pipelines under article 79. The coastal state has environmental jurisdiction over ships of its flag in the zone, not because it is a coastal state but because it is the flag state. In all of these cases, the coastal state and flag state are subject to new environmental duties under the Convention.

Foreign ships are the nub of the problem of coastal state environmental jurisdiction in the exclusive economic zone. Unlike any other coastal state right in the zone, this jurisdiction directly qualifies the exercise of a freedom -- freedom of navigation. Because of this, the provisions of the text on the environmental jurisdiction of the coastal state over foreign ships are among the most complex and intricate in the Convention.

A very careful balance was sought between the rights of the coastal state and the freedom of navigation of the flag state. The essence of the agreement in this case is the detail, in particular the limitation of the coastal state to specified rights to enforce only international discharge standards, subject to elaborate safeguards and compulsory arbitration or adjudication. It cannot be assumed that there was general agreement on comprehensive coastal state jurisdiction over pollution from foreign ships in the exclusive economic zone. That is simply not true; if it exists at all, it exists only with respect to merchant ships in ice-covered areas.

IX. Freedoms of All States

The elaboration of the freedoms enjoyed by all states contains four basic cross-references in article 58.

First, the cross-reference to article 87 (in Part VII on the High Seas) in connection with the freedoms of navigation, overflight and laying submarine cables and pipelines.

Second, a reference to other "internationally lawful" uses of the sea related to these freedoms.

Third, the cross-reference to articles 88 to 115 (in Part VII on the High Seas) which apply insofar as they are not incompatible with Part V on the economic zone.

Fourth, the implied cross-reference to the pollution obligations of the flag state in the clause "subject to the relevant provisions of this Convention."

These cross-references mean that the content of the freedoms and uses referred to in article 58 is found in high seas law. High seas law as classically understood, and as elaborated and developed in the ICNT, determines what is meant by "freedom of navigation", "freedom of overflight", and so on.

To apply the incompatibility standard in the third cross-reference, one has to look to article 56, and to the articles elaborating on article 56, to find out whether there is something incompatible in those provisions. If not, then the relevant high seas article survives the incompatibility test.

For example, article 89 says that no state may validly purport to subject any part of the high seas to its sovereignty. It is incorporated by references into the economic zone by article 58(2), subject to the incompatibility test. There is nothing incompatible with this statement in article 56, which deals with the sovereign rights of the coastal state for specific purposes. It does not permit an assertion of sovereignty. On the other hand, the incompatibility test

protects the coastal state against any attempt to invoke article 89 to undermine the sovereign rights of the coastal state specified in article 56.

A different result obtains in the case of article 110. Article 110 specifies the cases in which a right of visit may be exercised by a warship with respect to a foreign ship on the high seas. Clearly, there is a partial incompatibility here. All of the same boarding rights apply in the economic zone in the same way. But the enumeration of cases in which boarding is permitted in article 110 cannot be read to exclude the coastal state power of enforcement in the exclusive economic zone pursuant to article 56, for example with respect to fisheries and pollution.

With respect to the fourth cross-reference on pollution, one must stress the immense increase in the environmental duties of the flag state as compared with the 1958 Law of the Sea Conventions. These flag state duties apply wherever the ship may be.

X. The Status of the Zone

Having gone through all of this detail, we ask: "What is the exclusive economic zone as elaborated in the ICNT?" This can be divided into two other questions. First, "What isn't it?" Second, "Why are we asking the question?"

What isn't it?

First, it is not the territorial sea or part of the territorial sea. The text makes that clear. Therefore, it is not part of the territory of the coastal state.

Second, it is not an area of general coastal state jurisdiction. The economic zone has no conceptual existence separate from its specific elaboration in the text. Article 55 makes this clear. It says, "The exclusive economic zone is an area beyond and adjacent to the territorial sea subject to the specific legal regime established in this Part, under which the rights and jurisdictions of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

Why are we asking the question? Two answers come to mind: guidance in interpreting the text, and the problem of residual rights.

We may be seeking conceptual guidance in interpreting the text. But article 55 specifically negates that kind of conceptual inquiry. It specifically excludes a distinction between the details and the concepts, and reflects the fact that agreement on details was at the heart of agreement on the economic zone in principle.

Article 58 and 86 no longer divide the sea geographically between economic zone and high seas. They divide the sea functionally. Each is a provision addressing the applicability of rules of high seas law. Article 86 says they apply to the area beyond the economic zone without qualification. Article 58 says they apply to the area within the economic zone with one qualification, the compatibility test. Even if that qualification were not stated, under normal rules of interpretation the same result would obtain, namely the high seas rules would apply to the extent they are not expressly overridden by article 56.

The enumerated freedoms with respect to the economic zone are different from the enumerated freedoms with respect to the seas beyond because the sovereign rights and jurisdiction of the coastal state in the zone replace some of the freedoms. The only meaningful difference then relates to the non-enumerated uses. The high seas provision on this subject consists of the words "inter alia" before the enumerated list of high seas freedoms in article 87. The clause in article 58 confers on all states the right to other internationally lawful uses of the sea related to the freedoms of navigation, overflight and the laying of submarine cables and pipelines. What is the difference?

The article 58 reference was specifically expanded from the earlier reference in the RSNT so as to cover all existing and contemplated uses that are not subject to coastal state jurisdiction under article 56. This in turn clarifies the scope of the special economic zone residual rights clause, article 59. That article is intended to deal with unforeseen uses, and then does not resolve the question. It says the question shall be resolved on the basis of a balancing of the interests involved.

There may be a larger significance in article 59 for this reason. It reflects the underlying thesis of the exclusive economic zone: a case-by-case functional allocation of rights and duties that in the end can only be achieved if the states concerned are prepared to negotiate in detail.

This leads to the conclusion that one cannot seriously compare the exclusive economic zone in the Informal Composite Negotiating Text with the kind of blunt regimes that the processes of customary international law are capable of supplying. The ICNT zone is refined, complex, and interwoven in its detail. It would be exceedingly difficult to produce that kind of agreement and consensus by custom alone.

I would liken it to comparing a Bach fugue with a round of Frere Jacques. There may be some who prefer to improvise on Frere Jacques. I do not.

COMENTARIOS DEL DOCTOR ALBERTO SZÉKELY:

"Quería preguntar simultáneamente a los tres ponentes de esta mañana, ya que en sus exposiciones de alguna manera tocaron el mismo tema, sobre todo al referirse a las reclamaciones que por medio de instrumentos legislativos han llevado a cabo una gran cantidad de países sobre zonas de 200 millas. Los profesores Johnston y Gold nos han dado una idea de cómo ha ido la práctica de los Estados en estas reclamaciones, y el profesor Oxman nos ha hecho ver, al principio de su ponencia, que es muy importante, para saber la fuerza jurídica de las transacciones que se han logrado en la Conferencia del Derecho del Mar, determinar si estas fórmulas ahí aceptadas se han logrado filtrar en la práctica de los Estados. En ambos casos, quisiera advertir de un enorme peligro que se incurre al realizar el ejercicio de ver quién ha reclamado qué, y hasta qué punto, es decir qué tipo de reclamaciones se han hecho.

Al realizar ese ejercicio, de ver si las instituciones aceptadas en la Conferencia se han infiltrado o no en la práctica de los Estados, se detecta una gravísima situación en la mayoría de los instrumentos legislativos con los que los Estados han hecho sus reclamaciones sobre zonas marinas.

La experiencia que he obtenido al leer una gran cantidad de esos instrumentos legislativos, es que están plagados de errores técnicos que tienen su origen en diversas circunstancias, ya sea porque algunos de ellos se adoptaron en el momento en que existía solamente el Texto Unico, o porque ya existía el Texto Revisado, que ya tenía ciertas modificaciones, o porque fueron adoptados cuando estaba el Texto Integrado ya elaborado en la Conferencia. Esta puede ser una razón por la cual hay una distinción de reclamaciones, un enfoque distinto a las jurisdicciones que, por ejemplo, antes se llama-

ban exclusivas y ahora ya no están calificadas como exclusivas. Eso dificulta enormemente la tarea de hacer una estadística de quién ha reclamado qué y de determinar hasta qué punto las instituciones de la Conferencia del Mar se han infiltrado en la práctica de los Estados.

Otro origen de los tremen os errores técnicos que se encuentran en las legislaciones es la falta de cuidado del legislador, ya sea por una herencia de terminología en la legislación anterior de un Estado, como podría ser, plo, la dificultad para un país sudamericano que de repente abandona su terminología tradicional, la cual ha venido usando en su legislación históricamente, y adaptarse estrictamente a la terminología que aparece, por ejemplo, en el Texto Integrado.

El descuido de los legisladores puede ser simplemente por ignorancia, o por desorientación, es decir, porque no saben cuál es el estado de la terminología jurídicamente aceptada en los foros en los que se ha venido negociando. Creo que no se puede muy ligeramente catalogar a ciertos Estados, como Estados que han reclamado, por ejemplo, zonas económicas exclusivas de 200 millas, porque a lo mejor lo han querido hacer, pero lo han hecho mal, o a lo mejor lo han querido hacer pero con intereses particulares, modificando el lenguaje del Texto Integrado. Eso dificulta enormemente esa tarea y también dificulta saber hasta qué punto la práctica de los Estados se ha consolidado en ciertas materias, porque los errores, en realidad, conllevan al establecimiento de prácticas bastante variadas.

A mi, por ejemplo, después de analizar la legislación de una gran cantidad de Estados, se me hace muy difícil llegar a la conclusión de que las normas del Texto Integrado sobre la zona económica exclusiva hayan sido adoptadas por una mayoría de Estados en forma textual, porque aún aquellos que pretenden copiar textualmente el Texto han hecho modificaciones, ya sea vo-

luntarias o no voluntarias, que hacen difícil saber si esa práctica se ha consolidado o no.

Y me pregunto si los tres ponentes han tomado en consideración estas dificultades al llegar a sus conclusiones. Gracias."

JON VAN DYKE: Two quick questions for Professor Oxman. Is there any doubt at the present time that the coastal state has sovereign rights over the migratory species within the exclusive economic zone? Second, if a fishing nation were able to prove long standing historic rights in an exclusive economic zone, would that have any meaning in terms of any further rights to fish in that zone?

BERNARD OXMAN: Customary international law evolves from a process which engages the states most directly affected. There is no doubt that the United States is one of the states most directly affected by the regime for highly migratory species. The position of the United States Government, including the United States Congress, on that question is well known. I don't think one can undertake a sensible customary law analysis which ignores that position.

Mind you, I'm not answering the question of what should it be. I'm answering the question of what it is.

As to your second question regarding historic rights, the ICNT treats habitual fishing as one factor to be taken into account in allocating surplus. It's arguable that there may also be some principles of international law transcending the law of the sea as such which apply to the behavior of a state in such a case. There is a general bias in international law against abrupt change; I don't know that I would want to go beyond that.

DOUGLAS JOHNSTON: These are pivotal questions of enormous difficulty. I think the realistic expectation is that there will not be a great deal of litigation or arbitration in the next ten or twenty years to clarify the processes of formation of customary international law. So we're left with the problem of the diversity that's been described.

What, therefore, could be done to bridge the gap between the existing diverse national claims on the one side and highly sophisticated closely inter-locked understanding of UNCLOS III on the other? Two things come to mind.

First, it might be useful if those countries with old legislation and divergent conflicting legislation on these matters might come together in regional and perhaps sub-regional settings in order to discuss with one another the problem they confront in having on their books national legislation that seems out of kilter to some extent with the sophisticated understandings of UNCLOS III.

One would like to think that out of these regional and sub-regional consultations there might be some common ground to be discovered and some common agreement might be reached by these old legislating states on the need for amendment or some kind of supplementary legislation by them. That's the first kind of development that I would like to see in the 1980's.

The second would be the kind of thing that I talked about a year ago in the Netherlands. It would be very helpful if at some point in the 1980's after UNCLOS III, the Secretariat of the United Nations in some kind of special task force could monitor this problem from a global perspective -- to look at the trend towards both convergence and divergence, and perhaps by looking at these old and new state claims and national enactments, try to establish guidelines on the interpretations that ought to be made of the text of UNCLOS III in light of the diverse national enactments around the world.

In this way, perhaps then by the late 1980's, one would like to think there could be at both local and regional levels a serious effort being made to establish what I would call understandings that could be successor to the work of the glossators of the Middle Ages when they had to make the old courts of Justinian and others conform with present day realities.

. . . . . END OF A.M. SESSION . . . . . .

PART II

LIVING RESOURCES

GLOBAL SITUATION WITH RESPECT TO NATIONAL LEGISLATION, BILATERAL AGREEMENTS, AND REGIONAL COMMISSIONS

Professor Carl August Fleischer*

I. Introduction: the end of the formative stage of multilateral negotiations through UNCLOS: further development through legal interpretation and application in state practice.

Mr. Chairman,

Let me first of all express my gratitude for the occasion to present my views on this important topic in this forum of advanced expertise in the field. As we know the formative stages of the Third United Nations Conference on the Law of the Sea may seem to be reaching their end, at least where the provisions on the economic zone and the right to fish are concerned, and the possibilities of new developments through the negotiating machinery of the Conference are rather limited. Whether or not there is to be a successful outcome of the Conference, and whether or not there is to be a new Law of the Sea Convention, we must regard the legal material rendered to us by the Conference as an established fact, which forms part of the basis from which legal conclusions must be drawn. Consequently, there is a marked shift in emphasis. The main processes which determine the actual content of the rules to apply in zones of special jurisdiction, and the further development of those rules, are now the practice of States as well as the legal conclusions which you and other eminent representatives of the legal and related professions are going to draw from the existing material.

This does not deny the fact that the value of the UNCLOS texts as sources of law, and their impact on future state practice, will depend largely on whether a Convention is adopted and on its becoming formally binding on individual states through the ordinary procedures of signature and ratification. There is an obvious difference between a situation where a text is formally binding on the states involved as part of an international convention, and the situation where the text is merely one of several factors to be taken into account, in

* The views presented are those of the author personally and do not necessarily coincide with those of the Norwegian Ministry of Foreign Affairs or the Norwegian Delegation to the Third U.N. Conference on the Law of the Sea.

particular as evidence of a possible or emerging "consensus" in the international community as to what the rules of international law are or should be.

Reference in this connection may be had to the reasoning by the International Court of Justice in 1974 in the Icelandic Fisheries Jurisdiction Cases [1]. As we remember, the Court found that Iceland must by reason of its special dependence on fisheries have a priority to the resources in the zone adjacent to the twelve mile limit, and that the concept of "preferential rights" was incompatible with the unilateral exclusion of British fishing activities between twelve and fifty nautical miles. What was at the basis of Iceland's special rights to a priority, and of the Court's limitation of those rights so that the vessels from the United Kingdom should have a certain right to fish, was a resolution which had been passed by the first UNCLOS in 1958 concerning States whose population was overwhelmingly dependent upon fisheries and further proposals submitted at the second UNCLOS in 1960 [2]. These two factors were the main legal rationale for the Court's finding that contemporary international law comprises a rule on priority for certain coastal states, a rule which was applied by the Court as decisive in the cases before it. The Court's finding of the existence in contemporary international law of a rule to be applied based on resolutions and proposals at international conferences, as evidence of a "consensus revealed" [3], must be regarded as a rather interesting development, which can be of relevance also in regard to the text established by UNCLOS III.

Obviously, the leeway for States to choose the one or the other solution in their actual practice may be more restricted if and when the UNCLOS texts become formally binding. But whether or not this is going to be the case, the conclusion of the formative stages and the negotiating process will imply that the accent is put on the process of interpretation and application in actual practice; in other words, on the work which we in the future must undertake.

What has been said does not, of course, imply a lack of recognition of the important contributions to the new Law of the Sea which UNCLOS has already given; in particular in inspiring the vast amount of State practice which now exists in regard to the 200 mile zones of special jurisdiction, be they so-called exclusive economic zones or merely zones for jurisdiction on fisheries.

As was done by the International Court of Justice in its 1974 judgments in the Icelandic cases, one must pay due regard to the views accepted in the community of States and to a "consensus" or "near-agreement" which develops at an international conference and in the ensuing State practice. These factors were the very basis of the Court's conclusions

when it found that the 12 mile special fishery zone, and also the principle of preferential rights for a country such as Iceland, had become parts of contemporary international law. Therefore, we may regard the development of the 200 mile economic zone concept as a major achievement by the LOS Conference [4]. The principles worked out by the Conference have been a major factor in the creation of an extremely important new body of law, as witnessed by the establishment of 200 mile zones in conformity with the Conference texts by countries such as the United States, Canada, Mexico, India, members of the European Community and others.

We may fairly well say that UNCLOS has given the starting point, but we must ourselves carry the work on from there.

II. Basis and Purpose of Further Discussion

My task here is to assess the present global situation in State practice -- with regard to national legislation, bilateral agreements and State cooperation through regional organs.

Those are the fundamental and by far the most important expressions of today's general international law on zones of special jurisdiction, and in particular on the 200 mile fishery zone or economic zone. It is the practice of States which *per se* constitutes the rules of international law in this matter; not the ICNT of UNCLOS III, nor any other informal or formal text drawn up by an international conference or organization. There is no general regulation in a multilateral treaty of the limits of coastal zones and of the competences of coastal States which apply in the different zones (with the exception of the rather incomplete regulation which is provided by the 1958 Geneva Convention). As States are the principal subjects of the law of nations, and as the principal modes of law-making are those of treaties and customs formed by the collectivity of States, it must be State practice and thereby the expression of the *opinio juris* in domestic legislation which is the paramount evidence of the rules of law and of their content, in this otherwise unregulated field.

The near-consensus and the texts of UNCLOS have been a great inspiration for the practice of individual States; but they do not in themselves represent the direct conduct in legal relationships by those entities, the States, which are vested with the general power of law-making according to international law.

It would be impossible, and probably rather uninteresting for the reader, if one should here go through each and every domestic law or bilateral treaty. The idea in a presentation of the existing "global situation" must be to try and find the

different elements which constitute today's general international law as laid down by State practice, and thereby the content of the principles which have attained the status of generally applicable international law.

III. The Main Rule: "Sovereign Rights" for the Coastal State in a Zone of Extended Jurisdiction

The wording "sovereign rights", an important element in the near-agreement [5] of UNCLOS III, is found in a large number of national laws [6] as well as in bilateral agreements [7]. Obviously, the rights prescribed are also being exercised. The general trend is also confirmed in the practice of regional commissions and the attitude of States thereto. As might be expected, there is a tendency to reduce the importance of regional fisheries commissions, because larger areas have become subject to exclusive national management [8].

What is more important than the wording "sovereign rights" is of course the nature of the rights or functions actually exercised by the coastal State. The evidence here seems to support the conclusion that in the present state of international law such rights are vested with the coastal State within the zone of extended jurisdiction, and that the factual exercise of jurisdiction is respected by the other States. Whether or not this situation may be regarded as merely provisional or conditional upon certain future developments, in particular the outcome of UNCLOS III, may be looked upon as a matter which is not yet entirely settled.

The conclusion of bilateral agreements concerning the sovereign rights of coastal States may have several different aspects. It seems that the true manifestation of a "sovereign" right, which is a right which belongs to any State (or, in this regard, any coastal State) by virtue of its very existence and sovereignty and as a direct result of the existing law of nations, must be the practice found in national legislation and the enforcement thereof; not the practice of bilateral agreements. Such agreements may be regarded as practical instruments in the exercise of sovereign rights, in particular insofar as the coastal State by its own will chooses to allocate fishing rights to other States. Or, if it is under an obligation to do so because of the contents of the general rules of customary law, bilateral agreements may be the most convenient way in which to execute such an obligation.

A bilateral agreement between the coastal State and another State interested in fishing in the extended zone may further be looked upon as the recognition by that other State of the coastal State rights. Thereby the customary law on "sovereign rights" is being strengthened. In this connection, however, one must note that as such and in principle a recognition can

never go further than what is contained or implied in the statements given by the recognizing party. It may, e.g., be advocated that the parties have gone no further than to regulate their bilateral relationship on a provisional basis, in the special situation which has arisen as a result of protracted deliberations at UNCLOS and difficulties caused by unilateral action; and that each party must retain its full freedom to take whatever position of principle in regard to the 200 mile zone at a later stage. Here, one may point to such elements of bilateral agreements as whether they use the term "sovereign rights" [9] or the more neutral one of "jurisdiction" (or even "exclusive" jurisdiction), whether they contain a non-prejudice clause with respect to the parties' views on maritime jurisdiction, etc. As long as the agreement goes no further than to accept a specific system of jurisdiction on fisheries in a specific zone in a limited period of time, and if it does not use the expression "sovereign rights" in the operative provisions [10], one may perhaps assert that it does not contain any acceptance of the general rule on "sovereign rights", nor of the particular exercise of such rights by the other party to the agreement beyond what has been actually said in the provisions adhered to. Such an approach would be consonant with the more cautious attitude taken in modern legal theory to the question of bilateral agreements in regard to the recognition of States and governments [11].

The role of a bilateral agreement is also to substitute itself, in the relationship between the parties, for the rules of general international law. True, a bilateral agreement is also the foundation of binding rules of international law, but only a particular character. It may therefore be advocated that the wide-spread practice of bilateral fishery agreements allowing for coastal State jurisdiction and rights of third States tends to reduce the importance of national legislation as evidence of a customary rule on "sovereign rights". As far as jurisdiction exercised has its basis in a binding bilateral arrangement, it may be said that there is no need to rely on general international law. Consequently, the practice exercised does not need to be construed as expressive of an opinio juris in regard to the coastal State's rights by virtue of the general law. Personally, I think this line of argument may and will, in all likelihood, be met with the view that most bilateral agreements must be read as consequent upon, and not as prerequisites for, the exercise of coastal State jurisdiction in the extended zones. The agreements are needed to solve questions which have arisen as a result of extensions carried out on the basis of coastal State sovereign rights. The agreements have enabled the coastal States concerned to limit the exercise of their sovereign rights by giving certain limited rights of access to third States, and to execute possible specific obligations under international law in this regard, but they have not been called for as a condition for the exercise of sovereign rights as such [12].

It may be observed that not all national law and regulations, or bilateral agreements, relevant to extended zones of special jurisdiction use the term "sovereign rights". The Japanese Act of May 2, 1977 (amended on November 29, 1977) speaks about "jurisdiction" in the "fishing zone" [13]. A term favored in the practice of the United States is "fishery managements authority" [14].

One should, perhaps, be careful not to over-emphasize the difference between the wording of "sovereign rights" and that of "jurisdiction", "authority" or similar terms. As was evidenced by the development of the UNCLOS articles from the Revised Single Negotiating Text (RSNT) to the Informal Composite Negotiating Text (ICNT) of 1977 the subtleties of legal terminology may be drawn too far. In particular, it was difficult to see any material difference between the "jurisdiction" on certain "other" economic uses of the EEZ in the 1976 text and the "sovereign rights", on living and non-living resources. In 1977 the "other" uses were added to the list of "sovereign rights", and there was also a simplification in the rest of the catalogue of what is now article 56, where the term "jurisdiction" is being used to cover also cases which had earlier been put under the formula of "exclusive" jurisdiction.

Nevertheless, the concept of "sovereign rights" obviously contains the idea of a stronger position of the coastal State and a more secure basis in general international law than "jurisdiction" alone. Practice based on "sovereign rights" will therefore, probably, have a greater impact in the evolution of a new rule of customary law; or in the confirmation of a rule which was already in existence (inter alia because of the now almost traditional maritime zones of Latin American countries such as Chile, Ecuador and Peru), but earlier contested by several countries. There is here reason to point out that the use of a term such as "jurisdiction" in some instances does not necessarily weaken the custom on "sovereign rights". The word "jurisdiction" is completely neutral and applicable to "sovereign" as well as to other rights accorded under international law. While the value of a national law on "jurisdiction" alone is slighter than those on "sovereign rights" in order to support a "sovereign" regime in the extended zone, there is nothing in "jurisdiction" which per se serves to deny the existence of "sovereign rights" or to counterbalance the practice which is otherwise in evidence. It may further be observed that the exercise of "jurisdiction" or "authority" may often amount to the same as the exercise of sovereign rights; with regard to the general managing of fisheries as well as the decision on who shall have the right to fish, including the exclusion of fishing by foreign vessels not expressly authorized by the coastal State. Article 6 of the Act of May 2, 1977 of Japan, referred to above, prohibits foreigners from fishing in the extended zone of coastal

jurisdiction unless a permission has been obtained from the Ministry of Agriculture [15].

An evaluation of the practice mentioned must take some account of the amount and significance of permissions granted, as well as the frequency of agreements on access to fishing grounds. It is, however, difficult to gather sufficient material in this connection, inter alia because agreements between the authorities and private companies are often kept secret and at any rate not subject to open publication [16]. It must be maintained that the issue of permits and the conclusion of agreements with private parties, and with those of foreign nationality as well as with the coastal State's own citizens, is a normal mode of the exercise of sovereignty or sovereign rights, in sea areas as well as on the land territories. But a wide-spread practice whereby foreigners are in fact allowed to fish may to some extent be invoked as evidence that the sovereign rights in the zone of special jurisdiction are not firmly established. The same may go for situations where the coastal States do not enforce their legislation; although due regard must be paid to the fact that "sovereign rights" should be recognized even on this matter, and that it is up to the State itself to decide how rigidly it will enforce its enactments vis-a-vis the citizens of other States. One must, in particular, take account of difficulties encountered by many developing countries as well as by the smaller industrialized nations, with limited means of surveillance and enforcement in the extensive areas subject to their jurisdiction. The point of departure must be that the proof of non-compliance by foreign vessels which might possibly be gathered in regard to such situations, particularly in the first and transitory period of a new regime, does not run counter to the existence of "sovereign rights". Some degree of poaching by foreign vessels is always to be expected, as in the traditional territorial sea or in the 12 mile contiguous fishery zones which were established in the 1960's, in the wake of UNCLOS I and II [17].

On the other hand, we have instances where the coastal State purports to exercise authority which is even stronger than that of "sovereign rights". In particular we have those States which claim a 200 mile territorial sea [18]. The difference between such proclamations and the promulgation of a zone of special jurisdiction in regard to resources may mainly be found where other matters than fishery jurisdiction are concerned. To the extent that traditional freedoms of navigation and overflight are upheld, it may also be argued that the extended "territorial seas" or areas of "sovereignty" [19] in reality have the same effect as a zone of special jurisdiction and sovereign rights in regard to resources. However difficult the evaluation of the territorial claims may be, and whatever their position in contemporary international law, they will support the right to a special

zone of jurisdiction. Their possible illegality under present law relates to that part of the proclaimed "territorial" jurisdiction which goes beyond the rights accorded in the UNCLOS texts (RSNT and ICNT) and the ensuing practice. There seems to be no basis for a contention of indivisibility of the 200 mile territorial claims; so that the problems concerning the "territorial" part would render them null and void as evidence of sovereign rights in regard to resources.

In conclusion it may be said that the exercise of what is actually sovereign rights in a zone of special jurisdiction is substantiated by a vast amount of State practice. The evidence which may be invoked covers not only the coastal States which have declared a zone of "sovereign rights", but also those having "territorial" or "sovereignty" claims, and to some degree even those restricting themselves to formulae of "authority" or "jurisdiciton". As for the addition of the "territorial" claims to the States restricting themselves to special jurisdiction in regard to living (or other) resources the situation is similar to that following UNCLOS I and II, where there was evidence both of 12 mile territorial seas and of 12 mile zones particularly for fisheries [20].

There may be some difficulties in establishing whether a proclaimed zone of ownership or sovereignty is really in its effects or intentions a territorial sea or only a zone of special jurisdiction over natural resources. Personally, I have a feeling that the instances sometimes quoted as examples of a 200 mile territorial sea should not be put in this category. This is the case, in my opinion, as regards the 1966 200 mile law of Argentina, mentioned inter alia in an Annex to FAO doc. COFI/78/Inf. 9 as 200 mile territorial sea. The law (of December 29, 1966) is also put under the listing of "The Territorial Sea" in the U.N. Collection of National Legislation etc. from 1970. While art. 1 of the act admittedly speaks of the "sovereignty of the Argentine nation" over a 200 mile belt, it must be observed that according to art. 3 the "freedom of navigation or of air traffic" is not affected by the provisions [21].

For the sake of completeness one may mention the traditional view that all areas beyond the territorial sea are open to all nations; and that consequently a zone of special jurisdiction over natural resources is not compatible with international law, even if an extension to the same distance of a territorial sea might be acceptable [22]. This theory, which might find some support in the definition of "high seas" in art. 1 of the 1958 High Seas Convention and in its art. 2 on freedoms which shall exist on the high seas, is in contrast with the vast State practice on both 12 and 200 mile zones and cannot be regarded as tenable under modern international law [23]. Therefore, there must be a sound basis for counting also the "territorial" practice on 200 miles as supporting the

right of the special jurisdiction up to that distance; with the result that the right to exercise such jurisdiction can now be based on the practice in almost all sea areas around the globe [24].

In some cases where there is evidence of a zone of special jurisdiction the national law or bilateral agreement in question has been qualified by being referred to as "provisional measures", measures subject to international law, or otherwise. To some extent this may be said of a 1976 resolution by the Council of the European Communities, wherein it is stated that "the present circumstances, and particularly the unilateral steps taken or about to be taken by certain third countries, warrant immediate action by the community to protect its legitimate interests" [25].

Further in this direction one may quote the USSR decree of December 10, 1976, noting that an "increasing number of States, including some adjoining the USSR" have been establishing economic or fishing zones up to 200 miles "without waiting for the conclusion" of UNCLOS III, and that "pending the conclusion" of a convention "immediate action is needed to protect the interests of the Soviet State". The measures laid down, including sovereign rights over fish and other living resources, are referred to as "provisional" [26].

Interesting observations from this USSR viewpoint may be found in a recent article by Kovalyov, reproduced in "International Affairs" in 1979 [27].

The weight to be put on such reservations in regard to the general law on special zones may be open to some doubt. One may wonder whether a jurisdiction which is purely "provisional" can be "sovereign" at the same time. The same difficulty does not adhere to the idea of a "protective" measure; as self-preservation is an essential element of State sovereignty. As for provisions to the effect that the rights over the special zone shall be exercised in accordance with "international law" [28], they may be said to contain no more than a reference to rules which would operate anyhow, and which do not depend on declarations by individual States.

Interesting provisions in the 1976 Fishery Conservation and Management Act of the United States, which to some degree may reduce its persuasive force in favor of a general right to an extended zone, are found in sect. 401 on the effect of a comprehensive LOS Treaty, which may lead to promulgation of amendments to the Act, and on "nonrecognition": The U.S. government shall not recognize any claim by a foreign State to a fishery zone if that State "fails to consider and take into account traditional fishing activity of fishing vessels of the United States", etc. [29]. Together with the terminology of a "conservation and management zone" with fishery management

authority, this may be argued as evidence in favor of a contention that the right to a zone is dependent on acceptance and recognition in the bilateral relationship with each and every other State which has fishing interests in the zone.

Despite all such reservations concerning the legal principles it seems a reasonable presumption that the development towards extended coastal State jurisdiction is not a reversible process. Once the 200 mile EEZ's and the exclusive fishing zones have been put into practice, they have formed a network of international and national arrangements, and they have become the basis of the expectations and aspirations of fishermen as well as of other voters and pressure groups in a great number of coastal States. Whatever the fate of UNCLOS III there can be no going back from this new international law on fisheries management to the limits of coastal jurisdiction which existed before.

Even if the extended zones of jurisdiction have become a common practice all around the world only in recent years, and even if the development of this practice on a global scale has been prompted by the debates and proposals at UNCLOS III, it must be remembered that 200 mile zones of jurisdiction over resources and virtually economic zones have been in existence for some 30 years in certain Latin American countries, in particular on the Pacific coast of South America. As Garcia Amador put it, the "zone maritima" existed as a zone sui generis [30]; and this was prior even to UNCLOS I and II. The 200 mile zones of Chile and Peru were proclaimed as early as 1947 [31].

IV. Extent and Scope of the Special Jurisdiction

State practice seems to give overwhelming evidence of a right to extend special jurisdiction up to 200 nautical miles from the baselines. Following the view set out above, according to which the "territorial" claims may be added to those on "sovereign rights" or "jurisdiction", coastal State right on resources extending up to the 200 mile limit have been established along virtually all the oceanic coasts of the world, including the North as well as South and Central America, Africa, Europe, the USSR (Asiatic as well as European coasts), Asia and Australia [32].

The right to a 200 mile zone -- be it a fishery zone or an EEZ -- seems to be applied on all parts of the coasts of a State. It is not restricted to countries where there is a particular need for measures to protect the resources or the interests of the fishery population; nor to such parts of a State's coastline where there is specific evidence of such needs. The practice covers the coasts of islands as well as the mainlands. The proposed view that the taking of measures

beyond a 12 mile limit is a right to be exercised only by a limited number of States "overwhelmingly dependent" on fisheries -- a view which had some support at UNCLOS I and II in 1958 and 1960, and which found some recognition as a rule of law by the International Court of Justice in 1974 [33] -- has not been adopted by the State practice which is now in existence. Practice has chosen the alley of sovereign rights applicable for coastal States and coastal areas in general, while the International Court in 1974 restricted its view to "preferential rights" for a limited number of States.

In regard to the specific item of anadromous species, e.g. salmon, there is some evidence of claims going even beyond the 200 mile limit. The USSR decree of 1976, while conservative in other respects, purports to give the Union "sovereign rights" over fish and other living resources, and the same type of rights over anadromous species of fish within their entire migration area, except when they may occur within other States' territorial waters and economic or fishery zones recognized by the USSR [34].

As for the contents of the special jurisdiction the wording "sovereign rights", which has a firm basis in State practice [35], seems to go a long way in providing the answer. The term is in conformity with the one commonly used in practice regarding the continental shelf, and, in particular, in art. 2 of the 1958 Shelf Convention.

"Sovereign rights" are related to one or more specific purposes. The term conveys, on the one hand, the idea of the functional approach: The coastal State does not have full sovereignty as on its land territory or in the territorial sea, but has a right of jurisdiction which is related to certain purposes. Beyond the scope of jurisdiction so defined there is no special basis for coastal State rights, and the traditional rules which have been developed on the high seas will continue to apply. On the other hand, insofar as the specific purposes are concerned, the coastal State is "sovereign": It has the exclusive right of decision in regard to the rules which are to apply within the extended zone, and the exclusive right to enforce the measures decided upon.

The practice on 200 mile zones seems to depart from the pattern of the continental shelf in that it has not accepted the ipso facto and ab initio idea [36]. In other words, while the shelf is regarded as belonging to the coastal State without any express proclamation, and while no one may undertake the relevant activities without permission [37], the existence of a special 200 mile zone depends on the formal decision of the competent authorities to establish such a zone. Consequently, it seems that practice allows a State to refrain from establishing a zone of special jurisdiction, and it may restrict

its claim to a narrower area than the 200 miles permitted by international law or to certain of the functions prescribed.

The most striking difference is here perhaps that between a fishery zone and a full economic zone, i.e. a zone where the sovereign rights of the coastal State apply also to non-living resources and in particular to the seabed and subsoil. Whether and to what extent such a "jurisdictional surplus" in addition to the jurisdiction on living resources has been established as a rule of customary law may at the present stage be open for some doubt [38], but is not to be discussed here. As for living resources it seems clearly evident that the rights of the coastal State comprise both the fish in the narrower sense of the term and other living resources which are not biologically in the same order as fish proper. The general right concerning living resources is confirmed both by the practice on zones concerning living resources or fisheries, and by the more far-reaching practice on a full economic zone comprising even the non-living resources of the seabed and subsoil.

There is some variation as to whether all living resources shall be included. E.g., the USSR decree of 1976 mentions "fish and other living resources" [39], while the "fisheries resources" act of the Bahamas of 1977 defines a "fishery resource" (subject to "sovereign rights") as "fish of any kind found in the sea," including sedentary species, but excluding species of tuna which spawn and migrate over great distances in waters of the ocean [40]. The 1977 act of Japan covers both "fisheries" and the "catching and taking of marine animals and plants" [41]. Plant life is included in the definition of "fish" in Guyana's act of 1977 [42], while Pakistan in 1975 included "molusks, crustaceans, kelp and other marine animals" under that term [43]. The "young and eggs" of any fish, including marine animals, are covered by "fish" in the New Zealand (Tokelau) act of 1976 [44]. Irrespective of these differences it seems that State practice must be construed as the basis for coastal State jurisdiction on living resources in general. The differences just mentioned must be read as expressions of administrative or political convenience, not as an opinio juris restricting the legal right of the State in question.

As both national legislation and bilateral treaties to a large extent have been based on the UNCLOS texts it is not surprising that the practice covers the "exploration" of resources as well as "exploitation." Sovereign rights in these regards imply that the coastal State is the master of who shall explore or exploit and of the conditions to apply. The coastal State is not restricted to non-discriminatory conservation and management measures in the narrower sense of these words, but may restrict or exclude foreign fishing activities in order to further the interests of its own fishing population. At least this is the basic principle, and the point of departure.

whether there are limitations on the discretion to be exercised by the authorities of the coastal State in this regard is another matter [45].

The practice which is based on the UNCLOS texts has a tendency to include sovereign rights on the "conserving" and managing" of natural resources, in addition to "exploring" and exploiting". It may be said that this probably does not have any legal effect insofar as the scope of coastal State rights are concerned. As is indeed shown by the model of the 1958 Geneva Convention on the Continental Shelf "exploration" and "exploitation" are sufficient to give the coastal State all relevant powers in regard to the resources mentioned, and the management and conservation are thereby included. This does not, however, necessarily justify the conclusion that the extra wording is redundant. In particular it may be invoked as part of the basis for certain limitations on the coastal State rights. The effect of the more ample terminology may be that the State is under an obligation to manage the resources and take effective measures of conservation; an obligation which probably goes beyond what can be inferred from the 1958 Shelf Convention, but which is of particular importance in the matter of living resources. Such an obligation may also be substantiated from other elements of State practice [46].

There is no support in practice for a limitation of the State's sovereign rights within the 200 mile zone when a stock is in fact shared with other States because it also migrates into their zones. Nor is there any exception for cases where the fish during its life cycle is found on the high seas beyond the special zones or in the internal waters or territorial seas of any State. But in both these instances it would seem advisable and even necessary for the States concerned to enter into negotiations and cooperate on suitable arrangements, including the use of regional commissions. There may even be some reason to interpret the existing State practice as the basis for an obligation to do so.

A specific item is that of the so-called "highly migratory species". Here we find instances where such species have been excluded from the zonal jurisdiction otherwise applicable. In the 1977 act of Japan the prohibition of foreign fisheries without permission does not apply where the fisheries or the catching and taking of marine animals and plants "pertain to highly migratory species prescribed by Cabinet Order" [47]. United States legislation and practice is similar [48]. "Species of tuna" have been excluded from the definition of "fishery resources" applied in the 1977 act concerning the sovereign rights of the Bahamas [49]. It may, however, be difficult to regard the practice in this matter as sufficient to lay the foundation of a rule of customary international law. The answer to any such question might seem to depend on whether evidence of a uniform practice should be required in order to

prove a specific rule on the sovereign rights of a coastal State in regard to highly migratory species found within its 200 mile zone; or whether it is the possible exception for such species which needs a specific basis in a State practice, once the general right of coastal States to resources has been established.

V. Possible Limitations on the Rights of Coastal States

It may seem that the sovereign rights of the coastal State are less "sovereign" than the rights which apply to the Continental shelf. But it must, at the same time, be borne in mind that there is per se no conflict between the idea of sovereign rights and that of rules which limit the exercise of those rights. Such rules can apply even in the territory of a State, subject to full sovereignty.

Here again one is faced with the rather crucial preliminary question as to whether the right to extend to a certain limit must be justified by considerable evidence from the State practice or whether the burden of proof is reverse. May one rely on the right of the coastal State to determine, in the first instance, the extent of its own jurisdiction (for this is per se a right which is being exercised by all nations) but with the proviso that "the delimitation of sea areas has always been an international aspect" [50] and must therefore be kept within the limits which might derive from international law? The latter perspective might warrant the submission that there is at present no uniform legislation on the limits of fisheries jurisdiction and that such limits may be fixed by each coastal State within the range evidenced by State practice which in fact goes up to 200 nautical miles. Today no evidence exists of any uniform practice which obliges a coastal State to restrict itself to a narrower limit. In this perspective it seems natural to regard the 200 mile limit of special jurisdiction in the same light as the traditional limit of the territorial sea and the 12 mile contiguous zones of the 1960's. And there should be no obligation to allow the sharing of resources inside the areas which fall within the limits of fisheries or continental shelf jurisdiction, for such limits may be fixed by the coastal State according to its own legislation within the limits imposed by international law.

The large number of agreements or other arrangements entered into by States to allow for foreign fishing within the zones of coastal jurisdiction may therefore seem to spring from reasons of politico-economical expediency rather than from legal requirements -- or from an opinio juris sive necessitatis, which was emphasized by the ICJ in 1969 as an essential element in the formation of customary law [51]. To a great extent earlier agreements related to volsinage and to the phasing-out of foreign fishing in connection with the extensions to 12

nautical miles -- situations which are clearly different from the claims which have played the major role at UNCLOS, and which may also for this reason be of slight value in the formation of a legal custom.

But there is also another possible construction which may fit in well with the existing State practice -- the traditional Latin American maritime zones as well as the more recent zones on the basis of UNCLOS deliberations -- and in particular with the sui generis aspect. If we regard the 200 mile EEZ or fishery zone, or in general the 200 mile limit, as a new creation or institution of international law, this may warrant the submission that it is the existence of such a new rule which must be supported by a sufficient amount of State practice. Following this line of thought it may be argued that State practice does not prove the existence of full or unlimited sovereign rights of coastal States in the sense that such a State may appropriate the resources of the extended zone in the manner it chooses and neglect the need for conservation. Indeed, the very development of the 200 mile zones has been intimately connected with the idea of conservation. This goes for the traditional Latin American practice as well as for that inspired by UNCLOS. The preambles of the 1947 proclamations by Chile and Peru refer to the two declarations of 1945 by President Truman of which one concerned the continental shelf, the other conservation zones [52]. The duty of the coastal States to protect the living resources of the sea -- as opposed to the mere right of exploitation -- is of paramount importance also in the ensuing practice, as in the joint declaration of Chile, Peru and Ecuador of August 18, 1952 [53]. Conservation is also an indispensable element in the more recent practice, whether or not the coastal State concerned has copied the exact formula of RSNT or ICNT on conservation and management in addition to exploration and exploitation.

Consequently, it may seem that State practice gives a strong case for the submission that what international law allows today, is coastal State jurisdiction in a special zone, which is based on sovereign rights in combination with the obligation to take effective measures of conservation. In modern law also, the obligation to conserve can probably be built on other more general considerations, independently of the specific practice relating to the 200 mile zone.

In regard to the participation of other States it may seem more difficult to build up a line of argument to the effect that there is an obligation under international law. State practice does not give the impression that this is an indispensable element as part of the reason for the creation of a new zone, as is the case for conservation. And the large existing number of agreements may easily be explained away as resulting from considerations other than those of a legal

obligation. There may, however, also be room for the contention that State practice up to now does not prove the existence of a right to an exclusive zone in a certain meaning of the term: namely, that the coastal State may establish a 200 mile zone for its own benefit alone, without regard to the fishing interests of others. Such a line of thought, according to which there is not sufficient basis, and in particular no uniform practice, on a truly "exclusive zone", might to some degree be built on a reference to the 1974 judgments by the ICJ, which refused to accept the right of Iceland to establish an exclusive zone [54]. According to the Court, only more limited powers were accorded to certain coastal States in the zone between 12 and 50 miles. The coastal State was not entitled to claim exclusive rights with a general prohibition against foreign fishing. Iceland should have entered into negotiations in order to share the catch, with a "preferential" part for its own fishermen. While this judgment as such cannot, in all likelihood, be upheld as against subsequent State practice, the premises of the Court may nevertheless lend themselves to the theory that only a more limited type of jurisdiction is established in favor of coastal States in the special zone, entailing the obligation to give access to certain interested other States.

As the term "exclusive" in regard to the EEZ is clearly a term of art, the extensive use of the term as such in State practice can obviously not be invoked to nullify these possible contentions on the basis of the 1974 judgments. It may, however, be maintained that the more recent practice of States tends to prove that there is at least one aspect where the EEZ is truly "exclusive": viz., the exercise of jurisdiction. There seems to be no basis in practice for a system of joint jurisdiction, or to the effect that limitations on foreign fishing beyond 12 nautical miles from the baselines can only be achieved by the means of agreement. Both national legislation and bilateral treaties seem to confirm very strongly that the regulatory power, including the allocation of fishing rights, is vested with the coastal State. Leaving aside the possible objection that the present regime is of a transitory nature [55], state practice seems to have arrived at a definite solution, in the sense that the special zone is subject to the exclusive jurisdiction of the coastal State. The only open question is whether the present practice of allocation by agreement or otherwise, on the basis of coastal State sovereign rights, is to be regarded as a limitation on these sovereign rights or merely as a matter of political expediency.

A strong objection against the use of the 1974 judgments as precedents in regard to the 200 mile EEZ's or fishery zones is of course that the practice on "sovereign rights" makes the zones entirely different from the system of "preferential rights" according to negotiations which was envisaged by the Court in 1974.

Where regional commissions are concerned it is probably too early to draw any definite conclusion. But it is to be expected, and it is a trend already evident inter alia in the Northeast Atlantic Fisheries Commission (NEAFC) [56], that the conservation measures within the 200 mile zones will be decided by each individual coastal State. The role of the regional commissions will in this respect be to serve as a forum for discussion and coordination of the different national measures, and to assist the coastal State in the gathering of data and possibly the recommendation of solutions [57].

We may then turn to a more detailed examination of some of the possible limitations on the exercise of coastal State rights; to the extent that such limitations, with the above reservations, might be argued to emerge from the present evidence of national legislation and bilateral agreements.

1. Among the rules embodied in a new customary law on zones of special jurisdiction, which should be mentioned in the first instance, are those concerning the setting of a "Total Allowable Catch" (TAC).

Now, what does a "Total Allowable Catch" imply? Having established that the coastal State has sovereign rights in regard to the regulation of fisheries in the extended zone, one may wonder whether there is any interest in specifying that the coastal State can establish a TAC. As the coastal State may decide in general what parties are to be allowed to fish, as well as the amounts to be caught and the conditions which shall otherwise apply, it goes without saying that the TAC can also be fixed by the coastal State. The TAC may in itself be regarded as nothing more than the figure which emanates from the addition of the quotas allotted to State A to those of State B to those of State C, etc; together with the quantities to be taken by the coastal State itself.

Consequently, the fact that States in practice have indeed fixed a TAC may be seen as nothing more than as one of several expressions of the exercise of sovereign rights on fisheries in the extended zone. In that light it does not add anything to the principle already stated, namely that of sovereign rights.

Now, obviously the rules on TAC which we find in the international documents which have served as an inspiration for national policies and the formation of international custom have been intended as something more than a mere repetition of the principle of sovereign rights. The idea of a TAC is connected to the limitation of coastal State rights in the EEZ. Under the ICNT the coastal State rights in the zone are not the same as those which apply to the seabed and subsoil according to the Continental Shelf by virtue of the 1958 Convention, or the custom which is relevant to the shelf.

Even the term "allowable" seems to convey the idea that there must be a limitation on the rights of the coastal State, as well as on the rights of others. There is to be no complete freedom of action; even the "sovereign" rights are restricted to what is "allowable". It may be argued that "sovereign" is yet an adequate terminology; as the constraints operating are those of nature, and not those laid down by an international organization or by another State, and as it is a general characteristic of a State's sovereignty that it is limited to such natural resources as are found within its territory or in other areas subject to its sovereignty. It may, nevertheless, be said that the idea of an "allowable" catch has juridical connotation which makes it different from the biologically-oriented idea of a "sustainable yield" (be it "maximum" or "optimum").

More precisely, the idea of a TAC may seem to imply two important restrictions on the coastal State's so-called "sovereign rights". The first restriction is primarily resource-oriented. There shall be no right to catch whatever amount the coastal State or others might wish to utilize because of short-term economic benefits, or because there is no effective regulation of the fisheries in question. There must be a TAC, and fishing efforts must be kept within that maximum. This may not, however, exclude the possibility that for certain stocks the existing total harvesting capacity, or the actual fishing effort, is so slight compared to resources that the overfishing is unthinkable in practice, and that the formal fixing of a TAC in tons or numbers can therefore be dispensed with.

The second aspect of the TAC is politically-economically oriented: It deals with the allocation of the right to fish in whole or in part to other States that that exercising the "sovereign rights". The fixing of the TAC is here, together with the fixing of the coastal State's own harvesting capacity, instrumental in deciding the amounts which shall be open to the fishing fleets of other countries. The TAC is relevant in establishing the total quantity which may be caught by others, while further provisions of the ICNT impose certain restrictions on the freedom of the coastal State in its sharing-out of that total quantity.

As this second role of the TAC is an element in the rules concerning the other State's rights to fish it may perhaps be examined most easily in that connection.

As regards the first element we encounter the difficulty that the limitation of a State's right to utilize living resources which are within its jurisdiction may have a certain basis in more general and more fundamental considerations of international law than those of special maritime zones. Insofar as a fishery can be said to take place on the high seas,

article 2, paragraph 2 of the 1958 High Seas Convention qualifies the right to take part in such a fishery with the obligation to pay due regard to the rights of other States to exercise the same right. Both the advent of the EEZ, with the limitation of the rights of the other States, and the ICNT terminology according to which the EEZ's are not comprised within the "high seas", have put this article 2 in a somewhat different light. But even if an activity such as fishing is conducted wholly within the limits of national jurisdiction it seems that traditional international law must contain some restrictions on the right to exploit a renewable resource. In particular this must be the case where there is a "shared resource"; when the same stocks of fish migrate into the zones of other states. More novel is perhaps an obligation to limit the total catch where the entire stock is found within one single EEZ, and where the coastal State's own harvesting capacity exceeds the total "allowable" catch so that no other State's right is involved. Even here other States may have an interest in conservation, e.g. with a view to future changes in the available stocks and a possible reduction of the coastal State's own harvesting capacity, and where the fishing efforts are transferred to other populations of fish.

Given that there are certain such more far-reaching principles concerning the limitation of catches, the role of the custom in the EEZ's and other zones may first of all be to give evidence of and to reinforce such general principles. Further, the practice may serve to establish a more firm and precise obligation to avoid over-exploitation. There is here a certain procedural element, which may prove to be of great value in the efforts to obtain an optimum utilization in the interest of the entire world community: The principles and practice concerning the TAC makes it a condition or a corollary of the State's right to fish within its own waters that it undertakes a serious assessment of the available resources and of the fishing efforts which may be undertaken without serious or even irreparable damage.

The evaluation of State practice on TAC's meets with considerable difficulty. In the first place, obviously a State may want to limit the catch in its zone and conserve the resources for reasons of its own, and the existing practice need not be the result of any legal obligation. Second, national legislation often lays down the sovereign rights or more generally the jurisdiction of the coastal State in regard to resources, without specifying the different elements or instruments in the exercise of that jurisdiction, such as a TAC. Among this latter group one may mention, in particular, countries which have extended their limit of fisheries jurisdiction to 200 miles in accordance with recent trends, but which have at the same time retained their earlier legal framework for regulation within the fishery zone, such as the United Kingdom, Denmark, Canada and Ireland [58]. The

proclamation of the Federal Republic of Germany of 1976, creating a 200 mile fishery zone, states in its article 2 first that fishermen from member States of the European Communities shall have the right to fish in the extended zone, and then that fishermen from third countries may fish "only with special permission or on the basis of agreements with those countries" [59]. Several other of the more recent members of the 200 mile club have, on the other hand, followed the UNCLOS texts by making provisions for the establishment of a TAC (and the allocation of quotas for foreign fishing). As examples of a more or less close follow-up of the texts one may mention the United States, USSR, Mexico, New Zealand, Norway and Portugal [60]. The Norwegian law does not make the fixing of a TAC mandatory; it is something which the King in Council "may" issue regulations on.

2. The second question is whether there is an obligation of full, or rather optimum, utilization. Or may the coastal State, by virtue of its sovereign rights refrain in whole or in part from the exploitation of certain resources; without permitting others to take the allowable catch instead? Considerations concerning the nutritional needs of the world population as a whole have played a certain role in the UNCLOS setting [61]. And it seems reasonable that a coastal State should not be given the right to exclude the citizens from other States from utilizing a certain resource, with perhaps great economic difficulties and dislocation as the result, unless the coastal State does at least obtain some benefit from its action in regard to its own citizens or those of a third State. Speaking again from the particular situation at UNCLOS and the first (in practice, 1976) series of extensions to 200 miles in accordance with UNCLOS patterns, one may have a certain basis for claiming that the acceptance of a 200 mile system in a comprehensive LOS Convention, or the recognition by other States of such zones already established, was subject to the condition that a coastal State should not exclude or curtail foreign fishing without sufficient reason. But the passage of a relatively short period of time may have made the ideas of such a quid pro quo rather obsolete. With the vast number of extensions carried out the coastal States do not have the same incentive to arrive at a compromise and give rights to others in order to obtain an international agreement and recognition in the 200 mile zone [62]. Such lines of thought may influence even the appraisal of the State practice which is carried out in lieu of the proposed LOS Convention.

Generally speaking, the object of "optimum yield" is of such a character that the national legislation which is based on such a criterion [63] may be understood to represent no more than the ideas of a sound resource policy from the country's own viewpoint, irrespective of the possible requirements of international law.

3. We are probably on more firm ground if we consider the obligation not to over-exploit the available resources. This is a principle which has been accorded a prominent place in the different laws and other texts which represent the practice of States, and the ideas which are at the basis of the development which has occurred. Reference may be had to what has been said earlier, on conservation as an indispensable part of the rationale for extended coastal State jurisdiction.

4. We have also in the above to some degree considered the question as to whether there can be an obligation to allow the citizens (or vessels) of other States to take part in the exploitation of living resources within the 200 mile EEZ or fishery zone. Such an obligation may, on the one hand, be closely connected to the possible rules and reasons we have just been through: concerning the world's nutritional problems, the TAC and the possible surplus which cannot be harvested by the coastal State and which must by virtue of that very fact be left to others in order to attain the objective of optimum utilization. But the granting of access to foreign fishermen may also have reasons of its own, independent of the full utilization and the coastal State's harvesting capacity. It may seem a paradox, but the practice of several States whose laws obviously allow for foreign participation in a far greater range of cases than those provided for by the texts of UNCLOS III may have the impact of reducing the possibilities of a uniform customary law on full utilization, harvesting capacity and surplus. The fact that several coastal States obviously grant access without feeling bound by such criteria may in itself be interpreted to the effect that the coastal State has a complete freedom of choice as to whether or not foreign States shall be allowed to fish, and that there is no legal right of access.

Carroz and Savini [64] list three categories of agreements. They are:

> "Agreements providing for the phasing out of operations by foreign fishing vessels in newly established zones of national jurisdiction as local fisheries gradually take the place of these vessels.
>
> Agreements granting reciprocal fishing rights to vessels of both parties in their respective zones of jurisdiction.
>
> Agreements prescribing the terms and conditions under which the fishing vessels of one party may operate in waters under the jurisdiction of the other. Most agreements belong to this category" [65].

Personally I would mention at least one more category, viz. that of agreements based on voisinage or in general special concessions granted to neighboring countries or to other members of a regional organization such as the European Economic Community [66]. Here it is the special relationship between the States concerned which explains the mutual granting of access; while the two first categories of phasing-out and of reciprocity usually will be more directly related to the interests in natural resources.

Further, we see that the third category of agreements is not of the same order as those of phasing-out, reciprocity and voisinage etc. Agreements which specify the conditions for access, licensing etc. may also cover the other categories listed; e.g. where a reciprocity agreement is only allowed by national legislation under the condition that the rights of access deriving from the agreement are limited to a certain number of vessels, which may obtain a license from the authorities of the coastal State upon request [67].

At the same time, we see that phasing-out, reciprocity etc. are only examples of the different conditions and considerations which may apply in the bilateral relationship of sovereign States; when A grants B access to its fishing zone, or vice versa. Admittedly, the cases mentioned are important ones, but the list is not exhaustive. In State practice the issue of fishing permits to foreign vessels may, e.g., also be a source of revenue; furthering the coastal State's economic development in general [68]. A special difficulty is that of agreements between the coastal State and private companies, or simply the issue of permits to foreigners by virtue of domestic law. In such cases the terms and conditions are seldom subject to open publication [69].

Going from there, the examination of the law and practice of bilateral agreements may seem to land us with the observation made by the ICJ in 1969 in the North Sea Continental Shelf Cases, when the Court discussed the content of the obligation to negotiate a solution on boundary issues: There are per se no limitations as to the considerations which sovereign States may find relevant in their common regulation of their mutual relationship, nor as to the terms and the conditions they might want to decide on.

5. This means that we are far into the next question, namely that of criteria for allocation. Are there mandatory criteria for allocation, or is it up to the unrestricted sovereign right of the coastal State to decide on what grounds other States may be permitted to fish?

Here again we may distinguish between two fundamentally different aspects: On the one hand there is the right to apply certain criteria, on the other the obligation to allocate

according to a certain pattern, and thereby a limitation on the exercise of sovereign rights by the coastal State.

There is a degree of interdependence between the two: If there are obligations under customary law to extend rights of fishing to, e.g., interested landlocked or geographically disadvantaged States, the fact that such States demand their share will prevent the coastal State from allocating according to other criteria. At least this will apply in regard to that part of the TAC which is taken up by the "mandatory quotas"; which, in theory, may even be the entire TAC or the entire surplus, which is not caught up by the coastal State itself.

The right to give out quotas to other States would per se seem to be nothing special in customary international law. The sovereignty of a State over its land or sea territory gives it the full freedom of choice as to whether it shall exploit the resources found within its territory, or refrain from doing so. And the State is itself the master of whether other States should be invited to join in the exploitation; and, if so, of which States should be given this opportunity and of the conditions to apply. The same should be the case in regard to resources subject not to "sovereignty" but to "sovereign rights"; a situation well-known from the continental shelf and now applicable in the economic zone.

The fact that State A has allocated resources to State B according to one or more criteria is per se only evidence of the general right and jurisdiction over fisheries within the EEZ. What really needs evidence and support from the practice of States in order to prove the existence of a separate rule of customary law is the obligation to apply a certain criterion x to the exclusion of or in preference to y. In particular it may be of interest to note that a State has refrained from allocating a quota to another State applying on the basis of criterion y. The coastal State has, e.g., been offered economic aid as a set-off for fishery concessions, but has instead chosen to give out rights to a land-locked State, without obtaining any favour in return, but because of the special interests and special characteristics of that State. Or, one may have evidence to the contrary: Allocation has taken place without any reference to, or even contrary to, the principles which are found in the ICNT and which may aspire to the status of customary law. The coastal State sells its concessions to the highest bidder, and that's that.

It may at first glance seem evident that there can be no mandatory rules concerning the criteria if, and as far as, there is no obligation to give quotas to other States at all. There can be no obligation to apply any special criteria if allocation does nevertheless take place. If, say, the entire TAC is covered by the coastal State's own harvesting capacity, there should be no obligation to share the rights of exploitation; at

least according to such customary rules as are based on the ICNT. Consequently, it may be argued, there must also be a complete freedom of action to refrain from using the State's own harvesting capacity in full, and to share out quotas according to discretion. But even this is not so simple as it may seem. It may be advocated that when the interests of the coastal fishery population are not found strong enough to warrant a full utilization of their catching effort in accordance with one of the rationales for the establishment of the EEZ, the priorities of certain groups of other States must apply. And one is, from the practice in other fields, familiar with the mechanism of the most-favoured-nation clause: once a favour is extended to State A it must also be extended to B and C. Certain ideas concerning what is now articles 69 and 70 (cf. also article 62) of the ICNT, might have had a similar effect, using the concept of priority. It is believed, however, that such a system can only apply in so far as it has been laid down in a treaty. As far as the customary law here before us is concerned it seems difficult to establish any rule of most-favoured-nation or priority within that part of the TAC which the coastal State is free to reserve for its own fishing population.

In all these questions one may be tempted to concur with the International Court of Justice in the 1969 Continental Shelf Cases, when the Court was asked to evaluate the agreements offered as evidence of a customary rule on delimitation. It was found in the judgment that the agreements laying down a delimitation according to equidistance were not conclusive as evidence of a legal obligation, but might be the result of convenience and of both parties' agreement as to a reasonable and practical solution [70]. The same may seem to be the case with agreements and other arrangements concerning fishing rights. They do not necessarily represent a mandatory rule of law, as opposed to the free choice of two parties according to their mutual interest.

It may be expected that the practice of States will evolve according to somewhat different patterns than those of the ICNT. While the ICNT gives a special preference to land-locked States, which clearly are placed in a better position than those who have traditionally fished in the zone in question [71], the need for the coastal State to reach an understanding may in practice be greater in regard to the latter category. Here it may be of particular relevance that the EEZ's have been established, and practice developed, without awaiting the final outcome of UNCLOS III and a formally binding Law of the Sea Convention. Because of the lack of such a basis for extended fishery jurisdiction it was important for coastal States to obtain agreement and recognition from those other parties which might in practice be in a position to contest the legality of the new zone and cause jurisdictional difficulties; and those were primarily the traditional and the stronger fishing

nations; more than those which are accorded rights under the ICNT with reference to considerations of equity and the political situation at the LOS Conference, with its particular emphasis on the needs of developing countries.

In articles 69 and 70 of the ICNT on the rights of land-locked and geographically disadvantaged States, important changes took place in the transition from the ICNT of 1977 to the ICNT/Rev.1 of 1979. In particular, article 70 is no longer limited to developing countries. And there is even a possibility of participation within the part of the catch which is covered by the coastal State's own harvesting capacity. Where that capacity "approaches" a point which would enable the coastal State to harvest the entire TAC in its EEZ, the coastal State and other States concerned shall cooperate in the establishment of equitable arrangements [72].

It seems unlikely that any one of these specific systems -- that of 1977 or that of 1979 -- could have attained the status of customary law. The same must apply where there has been an amendment from the 1976 Revised Single Negotiating Text (RSNT) to the ICNT, as in the enumeration of coastal State competences in the EEZ in article 56 (former RSNT Part II article 44). Those latter changes will, by the way, probably have little or no significance in regard to the exploitation of living resources. It may be noted that the texts of national legislation often follow very closely those of the UNCLOS negotiating texts. As might be expected, texts from 1976 and early in 1977 follow the RSNT [73], while some texts made later in 1977 conform to the wording of the ICNT [74].

As the system of optimum yield, harvesting capacity and surplus is now less clear even in the UNCLOS texts, with some possibility of access even when the coastal State can harvest the entire TAC, it may become even more difficult to arrive at a firm rule of customary law. As of now, State practice presents us with a number of cases where the rights of foreign States are laid down as related to the surplus [75]. It is difficult to find support in State practice for any custom going beyond this. Where States have a greater flexibility according to their national laws [76], and where bilateral agreements go beyond the surplus, e.g. when the two parties are exchanging quotas which may be greater than their respective surpluses [77], this may be explained as a result of convenience. There is no basis for a contention to the effect that we have any firm or even uniform practice going further than to the surplus. What might be theoretically possible, however, is an obligation to seek arrangements on phasing-out or other forms of accommodation for foreign interests hit by a sudden change in the limits of fisheries jurisdiction, as we have here a fairly wide-spread practice. But again it may be questionable to regard this practice as the expression of a rule of law [78]. Going further, we may ask if practice gives

us evidence of at least a certain "standard of reasonableness" for the conduct of coastal State authorities in regard to the difficulties which extended jurisdiction has caused to foreign fishermen. An interesting feature is here the practice of certain Latin American countries, on lenient enforcement in a 10 mile zone on either side of a boundary [79].

6. This leads us to the next principle which seems to appear from State practice, namely an obligation to cooperate in the management of living resources. Cooperation, which is inherent in the more far-reaching obligation of conservation, is of course the primary objective of the regional commissions, in the areas where they are in operation. Frequently mixed commissions or other institutional arrangements for this purpose have also been set up in bilateral agreements [80], e.g., by providing that the parties "shall consult at least annually with a view to coordinating their respective national management programmes and exchanging relevant data" [81].

1. United Kingdom v. Iceland, ICJ Reports 1974 pp. 1 et seq. and Federal Republic of Germany v. Iceland, ICJ Reports 1974 pp. 174 et seq.

2. ICJ Reports 1974 pp. 1, 24-25 and 174, 193-194.

3. ICJ Reports 1974 pp. 1, 23 and 174, 192.

4. Cf. with a particular view to the assessment of UNCLOS III and the EEZ in regard to environmental law, the article by the present author "The Law of the Sea Conference - Success or Failure" in 3 Environmental Policy and Law 1977 pp. 3 et seq.

5. Cf. the wording used by the ICJ in Icelandic Fisheries Jurisdiction Cases, ICJ Reports 1974 pp. 1, 23 and 1974, 191.

6. See thus, e.g., the laws of the Bahamas (Fisheries Resources Jurisdiction and Conservation) Act, 1977, sect. 6, reproduced in ST/LEG/SER.B/19 p. 194), Cuba (Act of February 24, 1977 concerning the Establishment of an Economic Zone), art. 2 (ibid., pp. 205-206), the Federal Republic of Germany ("sovereign rights for the conservation and exploitation of fish stocks", see sect. 1 of Proclamation on the Establishment of a Fishery Zone, December 21, 1976, ibid., p. 219), India (Territorial Waters, Continental Shelf, Exclusive Economic Zones and Other Maritime Zones Act. 1976, art. 7 ibid., p. 84), Mexico (Act of February 10, 1976 and paragraph 8 of article 27 of the Constitution, ibid., pp. 244 and 245), Pakistan (Territorial Waters and Maritime Zones Act, 1976, sect. 6, with the wording "exclusive sovereign rights", ibid., p. 103), Sri Lanka (Maritime Zones Law, 1976, sect. 3, ibid., p. 131), and even the USSR (Decree of December 10, 1976 on Provisional Measures to Conserve Living Resources and to Regulate Fishing in the Sea Areas Adjacent to the Coasts of the USSR, sect. 2). On the specific nature of this Decree, being presented as a provisional measure, etc., see infra, at notes 22-23.

7. Cf., e.g., Fisheries Agreement between Mexico and Cuba of July 26, 1976, art. II ("in the exercise of its [i.e., Mexico's] sovereign rights..., etc.), reproduced in ST/LEG/SER.B/19 p. 415 and Agreement between Spain and Canada ("its [i.e., Canada's] sovereign rights ..., etc.), ibid., p. 412. Cf. Carroz and Savini, The new international law of fisheries emerging from bilateral agreements, in Marine Policy, 1979, pp. 70 et seq.

8. Cf. Miles, Changes in the Law of the Sea: Impact on International Fisheries Organization, in 4 Ocean Development and International Affairs, 1977, pp. 409 et seq.

9. Cf. Carroz and Savini, loc. cit., at p. 83.

10. As opposed to the preamble, cf. the Agreement between USA and Mexico of November 24, 1976, where it is said (considering that...") in the preamble that Mexico will "exercise sovereign rights", while the operative art. II, cf. art. I allows for fishing rights of vessels of the United States in "the Zone" established by Mexico.

11. See Blix, Treaty-making Power, 1960, p. 119, and Lachs, Recognition and Modern Methods of International Co-operation, 35 British Yearbook of International Law, 1959, cf. also Mugerwa in Max Sorensen et al., Manual of Public International Law, 1969, p. 281.

12. Most agreements seem to take the establishment (or the intended establishment) of a zone of special jurisdiction as the point of departure, and purport to lay down conditions for the exercise of certain fishing rights in the zone. Cf., e.g., the 1977 U.S. - Spain agreement reproduced in ST/LEG/SER.B/19 p. 426, which starts from "acknowledging" the U.S. fishery management authority, and the 1976 Canada - Spain agreement, where it is considered in the preamble that Canada "proposes to extend its jurisdiction" and where one is "taking account of" traditional Spanish fishing interests (ibid., at p. 411).

13. ST/LEG/SER.B/19 p. 226.

14. Ibid., pp. 420 (U.S. - Mexico) and 426 (U.S. - Spain), Carroz and Savini, loc. cit., at p. 83.

15. ST/LEG/SER.B/19 p. 228.

16. Cf. Carroz and Savini, loc. cit., pp. 79 and 82 (footnote).

17. On the right to such zones under international law after 1958-1960 see the Icelandic Fisheries Jurisdiction Cases, ICJ Reports 1974, pp. 1 et seq. and pp. 174 et seq.

18. E.g., Benim, Brazil, Ecuador, Sierra Leone and Somalia.

19. Which expression is usually connected to the territorial sea as opposed to a zone of special jurisdiction, see e.g. ICNT art. 2 ("the sovereignty of a coastal State extends

... over... the territorial sea") as opposed to art. 56 and 77 on "sovereign rights" in the EEZ and on the continental shelf.

20. Cf. Fleischer, Norway's Policy on Fisheries 1958-1964, in Developments in the Law of the Sea, 1958-1964 (1965), pp. 91, 97.

21. ST/LEG/SER.B/15 p. 45.

22. This seems to be the view of Fitzmaurice, see his article on "The Territorial Sea and the Contiguous Zone" in 8 I.C.L.Q. (1959) pp. 73, 120-21.

23. Cf. also Fleischer, loc. cit., p. 106.

24. See the instructive table in FAO doc. COFI/78/Inf. 9 (Annex).

25. ST/LEG/SER.B/19 p. 484.

26. ST/LEG/SER.B/19 p. 264.

27. F. Kovalyov, The Economic Zone and its Legal Status, International Affairs, February 1979, pp. 58 et seq.

28. E.g., the law of Portugal, reproduced in ST/LEG/SER.B/19 p. 108. Cf. also Carroz and Savini, Loc. cit. at p. 83 concerning the 1978 agreement between Canada and the European Economic Community.

29. Public Law 94-265, approved April 13, 1976, sec. 202.

30. Garcia Amador, The exploitation and conservation of the resources of the sea (1959, translation from Spanish), p. 81; quoted to this effect inter alia by the present author in Fiskerijurisdiksjon (1963).

31. ST/LEG/SER.B/1 pp. 6 and 16.

32. See inter alia FAO doc. COFI/78/Inf. 9 (Annex); cf. note 20 to Part III.

33. ICJ Reports 1974 pp. 1 et seq. and pp. 174 et seq. (Icelandic Fisheries Jurisdiction Cases), in particular at pp. 23, 192.

34. ST/LEG/SER.B/19 p. 264. Cf. also the similar provision in sec. 102 (2) of the US Fishery Conservation and Management Act, 1976.

35. Cf. part III, supra.

36. See ICJ Reports 1969 pp. 1, 22 (North Sea Continental Shelf Cases).

37. Cf. art. 2 of the 1958 Geneva Convention on the Continental Shelf.

38. Cf. the article of the present author on "The Right to a 200-mile Economic Zone or Fishery Zone" in 14 San Diego Law Review 1977 pp. 548, 567.

39. ST/LEG/SER.B/19 p. 264.

40. Ibid., pp. 193 and 194.

41. Ibid., p. 228.

42. Ibid., p. 68.

43. Ibid., p. 259.

44. Ibid., p. 98.

45. Cf. infra, part V.

46. Such as conservation measures actually taken or prescribed more directly in the provisions of national legislation or in bilateral or multilateral arrangements (including regional commissions). See infra, part V.

47. ST/LEG/SER.B/19 p. 228.

48. See Fishery Conservation and Management Act, 1976, sec. 103, according to which the US exclusive fishery management authority shall not include "highly migratory species of fish"; and, e.g., the US - Spain treaty reproduced in ST/LEG/SER.B/19 art. II, 1 and 7 (excluding "highly migratory species" as there defined from the term "living resources over which the United States exercises fishery management authority", and thereby from certain provisions of the treaty, but not from the definition of "fish", see art. II, 2).

49. ST/LEG/SER.B/19 p. 193 and 194.

50. Fisheries Case (United Kingdom v. Norway), ICJ Reports 1951 p. 132.

51. North Sea Continental Shelf Cases, ICJ Reports 1969 p. 41-44.

52. See ST/LEG/SER.B/1 pp. 6 and 16, and pp. 38-39 and 112-113.

53. ST/LEG/SER.B/8 p. 41-42.

54. ICJ Reports 1974 pp. 1, 27 et seq. and 174, 196 et seq.

55. See supra, part III.

56. Thus, Norway in 1976 denounced its membership in the North East Atlantic Fisheries Commission.

57. Cf. Miles, Changes in the Law of the Sea: Impact on International Fisheries Organizations, in 4 Ocean Development and International Law 1977 pp. 409 et seq.

58. See U.K. Fishery Limits Act, 1976; Fishing Territory of the Kingdom of Denmark Act, 1976; Fishing Zones of Canada (Zones 4 and 5) Order, 1977, made under the Territorial Sea and Fishing Zones Act, 1964-65 (as well as later Orders); the 1976 Maritime Jurisdiction (Exclusive Fisheries Limits) Order of Ireland, reproduced in ST/LEG/SER.B/19 p. 222.

59. ST/LEG/SER.B/19 p. 219.

60. See U.S. Fishery Conservation and Management Act 1976, sec. 201(d) on the "total allowable level of foreign fishing"; USSR decree of 1976, reproduced in ST/LEG/SER.B/19 p. 264, 265; Mexico's act of 1977 concerning the Exclusive Economic Zone, art. 6, 7 and 8, Ibid., p. 246; New Zealand's Territorial Sea and Exclusive Economic Zone Act, 1977; act of 1976 relating to the Economic Zone of Norway, sec. 4, Ibid., p. 255; Portugal's act of 1977, art. 5, ibid., p. 109.

61. Cf. also the preamble of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, in which the preamble refers to modern techniques etc., "increasing man's ability to meet the need of the world's expanding population for food."

62. Cf. Fleischer, The 1977 Session of the United Nations Law of the Sea Conference, 3 Environmental Policy and Law, 1977, p. 100, 105, where it is pointed out that "there was earlier a question of recognition" of the right to an EEZ, and of "permitting" the interested coastal States to establish such zones, but that the landlocked etc. States are no longer in a position to claim rights of participation in return for their "recognition" or "permission".

63. Cf., e.g., US Fishery Management and Conservation Act, 1976, sec. 2(b)4, on plans which will achieve and maintain "the optimum yield from each fishery".

64. Carroz and Savini, The new international law of fisheries emerging from bilateral agreements, Marine Policy 1979 pp. 79 et seq.

65. Op. cit., at p. 82.

66. The basis for mutual fishing rights is here not a treaty, but the issue of Community regulations by the EC Council, in particular Regulation no. 2141/70 of October 20, 1970. See on this Regulation inter alia Fleischer, L'acces aux lieux de peche et le Traite de Rome, in no. 141/1971, Revue du Marche Commun, and Vignes, La reglementation de la peche dans le Marche Commun au regard du droit communautaire et du droit intenational, in 16 Annuaire Francais de Droit International 1970 pp. 829 et seq.

67. It seems that the legislation of, e.g., the USSR of 1976 provides that foreign fishing is to be carried out solely on the basis of agreements, and in accordance with permits issued by USSR authorities within the limits of certain catch quotas (sec.s 3-6, ST/LEG/SER.B/19 pp. 264 and 265). Similarly, the 1977 law of the Bahamas specifies in sec. 9 that every foreign State party to a treaty shall submit an application for a license in respect of every fishing vessel wishing to fish in the exclusive fishery zone.

68. See, inter alia, Miles, op. cit. p. 428, in particular on the use of extended jurisdiction as a means of deriving foreign exchange or other economic rent for the area of the Fishery Committee for the Eastern Central Atlantic (CECAF); a practice to which non-locals have accommodated themselves.

69. Carroz and Savini, op. cit., at pp. 79, 82.

70. ICJ Reports 1969, at pp. 43-45.

71. See ICNT art. 62, para. 3, where the need to minimize economic dislocation is mentioned as one factor to be taken into account in the allocation of the surplus, while landlocked and geographically disadvantaged States are accorded special rights under art.s 69 and 70 (going, since ICNT/Rev.1 of 1979, even beyond the surplus).

72. ICNT/Rev. 1 art. 69, para. 3, and art. 70, para. 4.

73. E.g., acts of 1976 by Guatemala (ST/LEG/SER.B/19 p. 65), Mexico (ibid., p. 245), and of 1977 of Cuba (ibid., p.205).

74. E.g., acts of 1977 by Democratic Yemen (ST/LEG/SER.B/19 p. 56) and Guyana (ibid., p. 72).

75. Examples of such legislation mentioned in FAO doc. COFI/78/Inf. 9 p. 5 are the laws of USA, Portugal, USSR, Mexico, Fiji, The Gambia, New Zealand and Norway. As for Norway, however, see note 27 *infra*.

76. E.g., the legislation of Norway, which empowers the King to issue regulations on the allowable catch, and on access for foreign fishermen to "allotted shares of the allowable catch" (not only the surplus). See ST/LEG/SER.B/19 p. 255.

77. This may be an element in reciprocity arrangements, where it may be convenient to give a quota to another State in order to obtain concessions in return, and transfer part of the harvesting capacity to the areas under control of that other State. In this connection, it might of course be argued that the "harvesting capacity" of the first coastal State was thereby being reduced; a line of argument which, however, might cause difficulties in regard to third States wanting to claim the "surplus" (or "quasi-surplus") thus created.

78. Phasing out over a 10 year period was, as is well known, an important element in the discussion at UNCLOS I - II and the ensuing practice of the 12 mile special zone. An objection to invoke this practice as evidence of a legal obligation is precisely that: it was connected closely to the 12 mile limit and special political, moral or legal obligations which some States then felt. Consequently, the relevance in the new "200 mile situations" may be open to doubt.

79. Cf. art. 2 of agreement of August 23, 1975 between Ecuador and Colombia, ST/LEG/SER.B/19 p. 393-394.

80. See Carroz and Savini, op. cit., pp. 94-96.

81. Art. XI in agreement of November 24, 1976 between Mexico and USA, reported in ST/LEG/SER.B/19 p. 424.

COMENTARIOS DEL EMBAJADOR LUIS VALENCIA RODRIGUEZ:

En primer lugar, quiero que se me permita extender una cálida felicitación al distinguido profesor Fleischer por el magnifico estudio exhaustivo que nos ha hecho esta tarde respecto de esta complicada materia.

Debo también aclarar en principio que comparto muchos de los puntos de vista expuestos por el profesor Fleischer y tengo que reafirmar que, en efecto, el primer aspecto sobresaliente que se deriva hasta el momento de esta III Sonferencia sobre el Derecho del Mar, es el cabal reconocimiento de que el Estado ribereño tiene grandes derechos dentro de la zona de las 200 millas. Y aquí no quiero hacer referencia alguna a si estas 200 millas constituyen el mar territorial, quizá un mar territorial en materia económica, aunque no con todos los atributos que se derivan de la soberanía clásica; pero sí deseo manifestar que, dentro de una interpretación inclusive destructiva, se trata de una zona sui generis que está naciendo con la nueva Convención que ahora se haya en gestación.

Quiero, por otra parte, resaltar que en la actualidad no existe en realidad una norma de aplicación general a través de un tratado multilateral, sobre los límites de las zonas en que el Estado costero ejerce esos derechos y atributos de soberanía; aunque hay que reconocer que la mayoría de los Estados han proclamado 200 millas, ya sea de lo que se denomina zona económica con el calificativo de "exclusiva", o sin ese calificativo ó 200 millas de derechos especiales de pesca. Y tampoco existe un criterio general en la práctica de los Estados sobre la índole, el contenido y la categoría de esos derechos y atribuciones. De ahí que reviste especial importancia estudiar en detalle cuál es esa práctica, como lo acaba de hacer el profesor Fleischer y analizar las distintas disposiciones contenidas en el Texto Integrado que seguramente puede convertirse, en el año próximo, en un Proyecto de Convención.

Debemos también resaltar el significado de lo que se llama, en el Texto Integrado, "derechos de soberanía", especialmente en el artículo 56, concepto que por su misma naturaleza todavía no ha tenido una precisión jurídica exacta; sin embargo, podemos decir que si el Estado costero tiene en esa zona derechos de soberanía o derechos soberanos, es porque detrás de esos derechos hay soberanía en las 200 millas, soberanía restringida, eso sí, pero en todo caso una cierta soberanía. Y nada más cierto es esta asignación que con lo expuesto por el profesor Fleisher, cuando nos manifestó que un acuerdo bilateral entre un Estado costero y otro Estado, para ejercer actividades de pesca dentro de la zona de las 200 millas, puede considerarse, en efecto, como un reconocimiento de parte del segundo Estado acerca de los derechos de soberanía que ejerce el Estado ribereño.

En este sentido, también es verdadera la afirmación de que un acuerdo bilateral constituye también el fundamento de las normas obligatorias del nuevo derecho internacional, que ahora está en proceso de evolución.

No voy a entrar en este momento a analizar las sutilezas jurídicas que contiene el Texto Integrado, ni cuando se refiere a la jurisdicción exclusiva o cuando hace mención de otros usos económicos dentro de la zona económica exclusiva, o también a los usos tradicionalmente reconocidos con respecto a las libertades de navegación y sobrevuelo. Lo fundamental es reconocer que existen a favor del Estado ribereño, derechos de soberanía reconocidos en el Texto Integrado, y también lo que es cierto es que el concepto de estos derechos de soberanía contiene, obviamente, la idea de una posición distinta por parte del Estado ribereño en la posición más segura frente al derecho internacional, que la simple mención de jurisdicción, y también es una verdad lo que sostiene el profesor Fleisher, en el sentido de que el uso del término de ju-

risdicción, en ningún caso, puede debilitar lo que debe entenderse por derechos de soberanía.

Con estos antecedentes me voy a permitir extraer algunas conclusiones:

PRIMERA CONCLUSION, que tiene especial importancia porque reafirma el contenido de lo que son los derechos de soberanía, y esto es que en la práctica de los Estados ribereños, al estudiar sus atributos y sus facultades hasta el límite de las 200 millas, es ahora una práctica ya universal, pues incluye a países del Norte, así como del Sur, de América, Africa, Europa y la Unión Soviética, países de Asia y Australia. Estamos pues, aquí, frente a una práctica que está volviéndose universal.

SEGUNDA CONCLUSION. Teniéndose en cuenta cuáles son los derechos de soberanía que el Estado ribereño ejerce en las 200 millas, cabe concluir que todas las especies ictiológicas, todos los recursos vivos que se encuentran dentro de las 200 millas, están sujetos al ejercicio de esos derechos soberanos por parte del Estado ribereño, con las modalidades que el mismo Estado costero consienta. El caso más claro es el que se refiere a las especies altamente migratorias; ellas, como cualquier otra, también están dentro del ejercicio de los derechos soberanos por parte del Estado ribereño.

La excepción consiste en que para ciertos aspectos concretos, principalmente la conservación, y me refiero especialmente al artículo 64, párrafo 1, los Estados costeros están dispuestos a cooperar con un organismo internacional de carácter regional o mundial en la adopción de medidas de esa naturaleza. Pero también, sobre este punto, debo llamar la atención a la aplicación del párrafo 2 del mismo artículo 64, en virtud del cual se extiende a favor del Estado costero toda la parte relativa al ejercicio de los derechos soberanos.

Por otra parte, cabe también sostener que el artículo 64, frente al artículo 56, es un artículo de carácter restrictivo y, por consiguiente, debe también ser interpretado de manera restrictiva.

TERCERA CONCLUSION. De acuerdo con los textos el artículo 61 y del artículo 62, se puede concluir que el Estado ribereño sigue siendo el único que, según el Texto Integrado, puede establecer y determinar quién puede explorar y explotar los recursos vivos dentro de las 200 millas y las condiciones para esa exploración y explotación, por supuesto, de acuerdo con los términos de la Convención.

CUARTA CONCLUSION. Es cierto que sobre el Estado ribereño recae el peso de la adaptación de medidas de conservación para las especies vivas; pero esta obligación tiene su parte correlativa, como es el ejercicio por el Estado costero de los derechos de soberanía para regular todo lo relativo a la explotación, conservación, ordenación y exploración de esos recursos; si no fuera así, esa obligación prácticamente constituiría una carga insoportable e injusta para el Estado ribereño. Se convirtiría el Estado ribereño en una especie de guardián o conservador de los recursos vivos para la explotación por parte de otros Estados.

QUINTA CONCLUSION. Debemos reconocer que es facultad soberana del Estado ribereño establecer la máxima captura permisible, porque si no se reconoce este derecho, toda la estructura de la zona económica exclusiva, en materia de exploración y explotación de los recursos vivos, se derrumbaría inmediatamente. En consecuencia, dentro de cualquier organismo regional o mundial del que el Estado ribereño forme parte, ese Estado no puede perder el derecho para determinar lo que debe ser la máxima captura permisible, y no puede ser que se adopte una decisión de esta clase sin el consentimiento del Estado ribereño.

Y, por último, SEXTA CONCLUSION. Las preferencias que otros Estados, y me refiero al caso de los Estados sin litoral y situación geográfica desventajosa, tendrían, según el Texto Integrado, en las zonas económicas regionales, subregionales o vecinas, se hallarían reguladas por los artículos 69 y 70 del Texto Integrado. No hay duda de que el Estado ribereño asume la obligación de permitir que esos terceros Estados tengan acceso a la explotación de los recursos vivos en las 200 millas. Pero esta obligación está sujeta a dos condiciones fundamentales: primera, que esos terceros Estados tengan acceso al exceso de la captura permisible, si es que ésta existe y, segunda, que el régimen de acceso esté regulado por arreglos o convenios entre el Estado ribereño y los terceros Estados, según hemos visto que se desprende del ejercicio de los derechos soberanos. Sólo así puede entenderse que el Estado ribereño sigue teniendo esos derechos en sus zonas sobre los recursos vivos.

Por otra parte, únicamente de esta manera puede fomentarse un constructivo espíritu de cooperación entre el Estado ribereño y los terceros Estados, es decir, cuando estos últimos reconozcan y respeten el alcance y el contenido de los derechos soberanos que el primero ejerce sobre los recursos vivos, sobre todo aquellos existentes dentro de la zona de las 200 millas.

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In applying the theme of this conference to the living resources, Professor Fleischer has focused mainly on national legislation and bilateral agreements. As the author of the principal paper for this panel he was, I think, duty bound to do so.

As a commentator, however, I have more freedom and as a result I have chosen to deal with a more limited aspect of state practice, that is multilateral cooperation. More specifically, I intend to look at the role of international fisheries organizations in the North Atlantic in relation to the management of the living resources within the 200 mile zone.

Before doing so, I must make some general observations on the fate of the International Commission for the Northwest Atlantic Fisheries and of the Northeast Atlantic Fisheries Commission.

On the 24th of October last year a Convention on future multilateral cooperation in the Northwest Atlantic fisheries was signed in Ottawa and this convention entered into force on the first of January this year. It established a Northwest Atlantic fisheries organization, I'll call it NAFO, to replace ICNAF. Accordingly, in the Northwest Atlantic Ocean we have a new convention and we have a new organization.

In the Northeast Atlantic, developments did not go equally well. After a series of preparatory meetings, a diplomatic conference was held in London from the 20th of February to the 3rd of March 1978 to draft a new convention for future multilateral fisheries cooperation in that part of the Atlantic Ocean. This conference failed for purely political reasons. Agreement was reached on the substance of a new convention, but in the final stages of that conference, the Eastern European countries objected to the European Economic Community, the EEC, becoming a contracting party to the new document to the exclusion of its member states.

This development was rather remarkable in that the Eastern European countries had not objected earlier to a similar arrangement in NAFO.

Since the failure of this conference, no further negotiations have taken place. However, the old NEAFL, if I

may call it that, continues to meet, but participation in these meetings is very restricted. This is because all the EEC member states as well as Norway and Sweden have withdrawn from the 1959 convention.

Turning my attention now to NAFO and the management of fisheries within 200 miles, in the preamble of the NAFO convention the signatories express their basic objective very clearly. That is, to encourage international cooperation and consultation with respect to the fishery resources of the Northwest Atlantic and, I quote, "within the framework appropriate to the regime of extended coastal state jurisdiction."

In implementing this objective the convention makes a distinction between the convention area and regulatory area. The convention area covers the whole of the Northwest Atlantic including coastal state waters while the regulatory area is the convention area minus coastal state waters.

NAFO consists of four bodies: The General Council, the Scientific Council, the Fisheries Commission and the Secretariat. The General Council is charged with supervising and coordinating the administrative, organizational, financial, and internal affairs of the organization, thus I will not say more about this body. The same applies to the secretariat which has the usual functions.

The Scientific Council is a forum for cooperation in respect of all scientific and statistical matters. It exercises this function for the whole of the convention area, which means that scientific cooperation under the NAFO convention also covers coastal state waters. In addition, the Scientific Council is charged with providing scientific advice to coastal states and to the Fisheries Commission. However, the Council has no right to provide such advice at its own initiative. A coastal state or the Fisheries Commission must request it.

In submitting a request for advice, the coastal state is obliged under the convention to specify rather precise terms of reference for such advice, while the Fisheries Commission is under no such obligation. The reason for this difference is that the drafters of the convention wished to make sure that any advice to a coastal state would meet the requirements of that state.

The functions of the Fisheries Commission are restricted to the regulatory area. It is responsible for the management and conservation of the fishery resources of that part of the convention area. This restriction is, of course, the result of the extension of fisheries limits in the Northwest Atlantic and it is the major substantive difference between ICNAF and NAFO.

In implementing its functions and powers with respect of the regulatory area, the Fisheries Commission closely resembles its predecessor, or any other traditional international fisheries organization. This means that it may adopt proposals for joint action designed to achieve the optimum utilization of the fishery resources and that these proposals become binding upon the contractual parites in accordance with a certain "opting out" procedure.

However, apart from the Fishery Commission's more limited area of responsibility, there is one other major substantive difference between NAFO and ICNAF. The new convention had to deal with the question of the relationship between the measures of the Fisheries Commission and those of the coastal state. This particular problem turned out to be the single most important obstacle in the negotiations, and after rather difficult negotiations, a set of rules emerged. I will go into these rules in some detail because I think they are rather interesting if you look at state practice and multilateral cooperation in relation to the 200 mile zone.

A first rule is that in exercising its functions in respect of the regulatory area, the Commission must seek to ensure consistency between, on the one hand, any of its proposals in respect of stocks that occur both within the regulatory area and within coastal state waters or any of its proposals that would have an effect on stocks that occur in whole or in part in coastal state waters and, on the other hand, any measures taken by a coastal state in respect of fishing activities in its waters.

A second rule is that the appropriate coastal states and the Commission must, and I quote from the convention, "promote the coordination of their proposals, measures, and decisions."

A third rule in the NAFO convention is that proposals of the Commission for the allocation of catches in the regulatory area must take into account the interest of those Commission members that have traditionally fished in that area. Additionally, in the allocation of catches from the Grand Banks and the Flemish Cap, special consideration must be given to the contracting party whose coastal communities are especially dependent upon fishing for stocks related to these fishing grounds and which has undertaken special efforts for the conservation of such stocks.

Now, obviously, the latter of these rules, the third one, is designed to give Canada a special preference in the Grand Banks and Flemish Cap fisheries. Its wording clearly demonstrates that it is the result of rather difficult negotiations.

Of more general importance are the first two rules. It should be noted that it is the Commission and not the coastal state that must ensure consistency. This suggests that it is the Commission which must bring its measures in line with those of the coastal state and not the other way around.

The rule that the coastal state and the Commission must both promote the coordination of measures appears, in my view at least, to be linguistic window dressing. It does not eliminate the fact that in respect of stocks that occur both within and beyond the 200 mile limits, the Commission is in a weaker position than the coastal state.

I intend to say less about the Northeast Atlantic situation for two reasons. First, as I mentioned, there is no new convention and, quite frankly, I consider it very unlikely that there ever will be one. Second, a draft convention for that area has borrowed quite a few elements from the NAFO convention.

The draft NEAFC convention does not make any distinction between convention area and regulatory area. There is only a convention area which covers the Northeast Atlantic including coastal state waters. The convention establishes a new Northeast Atlantic Fisheries Commission, whose structure is very similar to that of the old one. In the negotiations, the EEC insisted for a while on a system of weighted voting which would give the EEC more votes that the other member states, but this position was dropped in the final stages of the negotiations.

The new organization would be responsible for the conservation and the optimum utilization of fishery resources in the convention area, which is, if you look at the formulation, a somewhat broader mandate than that of the Fisheries Commission of NAFO. The new convention would also provide a forum for consultation and exchange of information on the state of fishery resources in the convention area and on managment policies and this also seems a somewhat broader formulation than that used for the Scientific Council of NAFO.

The new organization would be charged with making recommendations "concerning fisheries conducted beyond the areas under fisheries jurisdiction of contracting parties." The Commission could also make recommendations concerning fisheries within coastal state waters, provided that the coastal state concerned requests it, and that the recommendation in question receives its affirmative vote.

As far as scientific advice is concerned, the new convention would continue to rely on the International Council for the Exploration of the Sea. The problem of the relationship between convention measures and coastal state measures is dealt

with in precisely the same way as in the NAFO convention, except that there are no special provisions on the allocation of catches beyond the 200 mile limit.

From these two conventions certain trends seem to emerge.

First, as an inevitable result of the extension of fishery limits, neither Commission will have regulatory powers in respect of fishing within coastal state waters. The Northeast Atlantic convention is, at least in theory, somewhat more liberal in that it allows the Commission to adopt recommendation for coastal state waters at the request of and with the consent of the coastal state.

On the other hand, both conventions recognize the need to continue multilateral cooperation in respect of scientific matters for the whole of their respective convention areas. Accordingly, science transcends once again the boundaries of states. As to stocks occuring both within and beyond coastal state limits, both Commissions are in a weaker position than coastal states. As I said, it is up to these Commissions to adjust their measures to those taken by the coastal state.

As the Northeast Atlantic convention copied in effect the NAFO convention, at least in these provisions, it may well be that the negotiators of the NAFO convention have set a pattern that will be followed elsewhere. Such a privileged position of coastal state does not reflect the relevant provisions of the Informal Composite Negotiating Text. In this respect, both conventions prove the correctness of one of the principal points made by Professor Fleischer, namely that the ICNT is merely a starting point for further development of international law through state practice.

The same applies to the fact that in the NAFO convention one of the coastal states has a certain preference in the allocation of catches in waters beyond coastal state limits. Such a preference has also no basis in the relevant ICNT provisions. Yet, it has now found recognition in state practice. This is even more remarkable if one realizes that the recognition of this preference rests, inter alia, on the special dependence of coastal communities on fishing and that it was the 1958 Law of the Sea Conference which gave for the first time recognition to the consideration. At that time, I might note, it was a preference beyond 12 mile limits. Now, the same formulation serves as a basis for a coastal state preference beyond 200 mile limits. I would conclude by saying this proves that indeed we live in a different world.

Dr. Choon-Ho Park
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There have been wonderful presentations and comments. I now would like to take you to a somewhat far away region, to East Asia where the state practice with respect to 200 mile zones is somewhat quite complicated. I wish to be very brief because when one is speaking soon after, or long after, a wonderful luncheon and we are very near cocktails, it is necessary to be very brief.

Dr. Fleischer gave us six limitations in his excellent presentation. I would like now to turn to some additional limitations of a particularly regional nature that exist in East Asia. There are other non-legal factors strongly operative in the coastal states' decision making with respect to their extensions of claims to 200 miles.

In East Asia -- when I say East Asia I include both Northeast and Southeast Asia -- the countries can be grouped into three different categories. The first one I'd arbitrarily call the radicals: Vietnam, North Korea, and Cambodia. All have exclusive 200 mile economic zones and in terms of its exclusivity they are very straightforward, but on the other hand, their claims are not given in very specific terms. In brief, they just say they claim 200 miles and everything within it belongs to them.

The second group is what I'd call the moderates: Japan, Taiwan and the Philippines. Each of these moderates had its own reason for claiming a 200 mile zone at the time it did. In the case of Japan, the major reason Japan extended its fishing zone to 200 miles in 1977 was because of the Soviet Union's provisional fishing zone up to that limit. In the case of Taiwan, they had a very special reason for their 200 mile claim. The Philippine fishing zone had been put into force, excluding Taiwanese, Japanese and South Korean fishermen. So Taiwan meant to enhance its position in bargaining with the Philippines by claiming its own 200 mile fishing zone. Taiwan hasn't come up with very specific terms, but where its zone overlaps with that of a neighboring country, the boundary would be established through negotiations. Taiwan's position was so uncomfortable that, when the Philippines enforced its claims, it (Taiwan) also had to do the same.

In the case of the Philippines, I understand that the proclamation was actually signed last year, but it was put into effect this year. Officially, it was dated May but many foreign

fishermen weren't quite aware until August that the fishing zone proclamation was in effect.

The third group I'd call the Conservatives: China, South Korea, Indonesia, Malaysia, and Thailand. But these are conservatives only for the time being. I'd call China a conservative only in the sense that it hasn't declared a 200 mile zone yet. On the other hand, we are all aware of the fact that China has been one of the most enthusiastic supporters of that limit, but it has a very special reason for not doing so or for not being able to do so. It's very interesting to note that all the seas on which China borders are semi-enclosed and that the opposite or adjacent states are situated so close to China that there is literally not a single spot where it can safely extend its limit up to 200 miles without running into conflict with the zones of other countries. Even on the Pacific side of Taiwan, if you draw a 200 mile zone, the Chinese or Taiwanese zone would end long before it reaches 115 miles because the Chinese zone is wedged in by the Philippine and Japanese sectors.

On account of its geographical circumstances, South Korea would face similar problems as China and is, therefore, unlikely to claim a 200 mile zone in the very near future.

The third conservative is Indonesia which hasn't really declared a 200 mile zone yet. Other countries yet to do so are Malaysia and Thailand; we can add Brunei and Singapore. These countries are aware of the serious problems that would arise once they extend their zones up to 200 miles. So they feel that it's better to remain silent at least for the time being.

Throughout the entire region, none of these countries can extend its 200 mile zone without conflict with other countries situated adjacent or opposite to it. The substance of the issue is so complicated that they would have to consider very carefully before they decide to extend their limits.

There are some additional problems which are essentially extra-legal in nature. The first is the political relations among them. Their relations are not conducive enough to negotiating issues of maritime jurisdiction. For example, we can take the example of Vietnam and China, China and South Korea, or the two Koreas. These countries have occasionally tried to negotiate, or at least tried to sit together, to see if they could negotiate anything, but often such occasions ended up with exchanges of unilateral assertions or abuses.

But more serious problems have emerged from territorial issues. There are five very serious offshore territorial issues in East Asia. The first one is between Japan and the Soviet Union over their so-called northern territory. One thing common

in all these five territorial issues is that none of the disputants recognizes or is ready to recognize the fact that there is a dispute over the ownership of the territory in question. Each claimant insists that the other party is claiming what it doesn't own. So, the mere attempt to talk the other party into recognizing the fact of dispute is itself a very difficult undertaking.

The second one is between Japan and South Korea over two rocks called the Takeshima in Japanese and the Dokto in Korean, situated between the two countries in the sea of Japan. This one started in 1952 when South Korea placed them under its control, and Japan doesn't recognize South Korean ownership. Since these are only two rocks without the capability to support human habitation, I wonder whether they will satisfy the definition of an island as given in the ICNT. The claimants call the barren rocks the sacred territory of the fatherland. In fact, they are merely "fly specks" on maps, so that you would need a magnifying glass to find them on an ordinary map.

The third on is between Japan and China over the Senkaku-Tiaoyutai Islands. The eight uninhabited islands, only three of them with vegetation, are called the Senkaku in Japanese and the Tiaoyutai in Chinese. As in the case of other territorial disputes, it is important to call the disputed islands by their right names, or you are in danger of losing some cubes of sugar in your tea, depending on where or to whom you are talking.

The fourth one is among China, Malaysia, the Philippines, Taiwan and Vietnam. The South China Sea has approximately 200 uninhabited islands. They are mostly coral outcroppings, reefs or sediments. The Philippines, Taiwan and Vietnam are holding a few islands each, the largest one called the Itu-Aba (the Tai-Ping in Chinese) being under the control of Taiwan. We have reports that the Philippines has found oil in one of the areas under dispute.

The South China Sea is in fact quite large, about 3.5 million square kilometers in size. If all the islands are used as base points, however, there isn't any place where the distance reaches 400 nautical miles from one island or headland to another. Which coastal state(s) own(s) the "fly specks" is, therefore, crucially important.

The fifth dispute is between Vietnam and Kampuchea over Phu Quoc and some 40 smaller islands in the Gulf of Thailand. This dispute also has a long history, having originated in the late 1950's, but there is no prospect for a simple resolution.

In East Asia the declaration of 200 mile zones is not likely to be made in specific terms. The coastal states that have claimed 200 miles have made it so unspecific that, in

waters with territorial disputes, it's difficult to see exactly how far the zone extends into the sea. They just refer to the distance of 200 miles from the baselines from which their territorial seas are measured. The only thing they say with respect to islands is that islands and archipelagos would also have their economic zones.

Since we shall probably talk more about maritime boundary problems tomorrow, let me just give you an example of state practice regarding the living resources in East Asian waters. Japan has a 200 mile fishing zone, but, as a provisional measure, its application has been suspended west of certain lines. The idea is to avoid conflict with China and South Korea on the west. But Japanese fishermen are operating immediately outside 12 miles of South Korean coast by virtue of the fisheries agreement signed in 1965 and South Korean fishermen are operating within 200 miles of the Japanese coast, especially off Hokkaido in northeast Japan. Thus, Japan's provisional measures are intended to maintain reciprocity with China and South Korea, pending adoption of 200 mile zones by these two states.

Japan and South Korea feel the need to settle their maritime boundary issues, but they find it difficult to do so because there are a number of related problems that have to be settled together. For instance, the 1952 declaration made by South Korea extends at some points to nearly 200 miles and is commonly called the Peace Line (to make peace with Japan), but there was a 14 year war over their fishing rights because of this proclamation. Although no longer enforced, the Peace Line would have to be withdrawn when they seek to agree on their 200 mile fishing zones. Then their territorial issue would surface, because, depending on which claimant owns the rocks, a large sea area would have to be abandoned by either party. In other words, neither side can expect to settle its 200 mile or fishing rights problems without reference to the continental shelf issues between the two countries. In fact, the two countries signed a continental shelf joint development pact in 1974, but it came into force barely in June 1978. The four year and six month time required for its coming into force implied a lot to be accounted for; a number of other problems that were not essentially related to the continental shelf issues had to be dealt with first.

The only practical thing they can do under the circumstances is, therefore, just to drag on until and unless both sides are dictated by some common interests to seek a comprehensive settlement. But this is not likely to take place in the very near future. Thank you very much, Mr. Chairman.

HIDEO TAKABAYASHI: Thank you, Mr. Chairman, I would like to comment on the treatment of the highly migratory species. The ICNT is based on the species theory that the living resources can be divided into four categories -- first, sedentary species, second, coastal species, third, anadromous species, and fourth, highly migratory species -- and that each species should be treated differently. But this approach is, I may say, of North Pacific origin, of which the United States, Canada, Japan and USSR are advocates, and adaptable to the situation of North Pacific fisheries. But if you apply this approach to the South Pacific area, problems will arise. For instance, in the Pacific Islands now under U.N. Trusteeship system, the only commercial valuable fish is tuna; and if these species are excluded from the exclusive authority of the coastal state it will be financially meaningless to establish a 200 mile zone. At the same time, I know that no one country could exclusively manage the life cycle for these species. Therefore, we should coordinated the international management and coastal state's regulations.

KALDONE NWEIHED:

"Buenas tardes. Kaldone Nweihed, de la Universidad Simón Bolívar de Caracas.

Quisiera, en primer término, agradecer al panel de esta tarde, por una magnífica orientación que hemos tenido sobre los aspectos de las pesquerías internacionales.

El profesor Fleischer nos ha dado una exposición cabal sobre el alcance de la zona de pesca, su concepto jurídico y, paralelamente, la diferencia entre los derechos que en ella se ejercen y los que se ejercen en la zona económica exclusiva.

El embajador Rodríguez Valencia restauró en nosotros la confianza de que la zona exclusiva es una zona nacional después de haber creído esta mañana, oyendo al profesor Oxman, de que ya se había pasado en definitiva para la altamar, y el profesor Koers nos dio, como nos tiene acostumbrados, una síntesis de la nueva posición de las Comisiones Internacionales de Pesca a la luz de este hecho irrefutable, irreversible, como lo es la zona económica exclusiva; terminando el profesor Park con su reseña acerca de las zonas de pesca en el sureste asiático.

Quisiera, pues, agregar una simple información con respecto a la legislación reciente de mi país acerca de la zona económica exclusiva, en el sentido de que esta nueva ley, promulgada el 20 de julio de 1978, sí prevee en su capítulo V provisiones para los tres principios a que se ha hecho referencia, sobre todo el de conservación, un principio que desciende del proceso latinoamericano del derecho del mar, el de la utilización óptima de los recursos, preservando el Estado costero el derecho de determinar la captura máxima permisible y, por último, el de dar acceso a otros países para que pesquen la captura excedente cuando ésta existe.

Es importante hacer resaltar el hecho de que la legislación venezolana, al igual que cualquier otra que pudiera también tratar el tema, emana sencilla y llanamente del derecho soberano de cualquier país allegislar sobre una materia determinada, y de ningún modo de una obligación contractual, hasta tanto la Convención ahora en estudio no se haya plasmado en definitiva.

Sería, por supuesto, cuestión de especulación, una vez firmada la Convención, determinar cuál sería la definición jurídica del fundamento de una ley como la venezolana, ¿sería acaso retroactivamente remisible a la Convención firmada después de la ley, o se daría la ley fundada en el derecho soberano del país a legislar? Es una pregunta que queda en el aire."

BOLESLAW BOCZEK: I'm Professor of International Law and Politics at Kent State University in Ohio. I would like to raise some further points and questions concerning the exact nature of the economic zone. Now, it is almost commonplace to state that this institution has become part of customary international law, but one must distinguish of course two things that have been raised through sovereignty, sovereignty pure and simple, and certain special sector jurisdictional rights and so on.

Now, the text of the conference of the law of the sea as far as I can remember, of course, takes account of this situation but there is one thing that concerns us. Namely, the text structurally does not place the provisions on the economic zone within the high seas but neither does it make it quite clear explicitly that the economic zone goes beyond 12 miles and is not subject in principle to sovereignty of any nation. So there might be concern that this is a sort of invitation to further extension of sovereignty, a kind of totalization of sovereignty in the further development of the practice, or at least it kind of creates presumption in case of a conflict between the interests of the coastal state with some other states, a presumption in favor of this coastal state.

I would like to ask the panel, anyone in the panel, why is it not explicitly stated that the exclusive economic zone beyond 12 miles is in principle not subject to sovereignty of any nation and therefore in principle has the same legal status as the high seas, unless there is some kind of a presumption that we now have two areas of salt water which are not subject to the sovereignty of any state but this is not stated as far as I know explicity.

CARL AUGUST FLEISCHER: I think in answering this very important question may I first state that this goes a bit beyond the topic of this afternoon as it relates to the question beyond the jurisdiction of the natural resources. Of course, this is not any formal objection on my part to answering the question but is just to put that fact very clearly.

Now, it should also be mentioned that we are in the law of the sea negotiations, as one has seen in the past, always faced with this very important question just raised. Namely, the question of so-called creeping jurisdiction. You allocate international custom or international treaty, specifically an international treaty, later adopted into some sort of customary law. It gives the coastal states a certain type of jurisdiction and suddenly that type of jurisdiction starts to creep over into other forms of jurisdictions and the result may well be that the special zone is transformed into some kind of territorial sea. Precisely this danger was before the 1958

conference when the UNCLOS I adopted the Continental Shelf Convention. The following two articles I think should be mentioned specifically here.

First, Article 2 says that the coastal state has not sovereignty but sovereign rights for certain purposes, namely, the exploration of the continental shelf and the exploitation of its natural resources.

Second, Article 3 of the Continental Shelf Convention says that the rights over the continental shelf of the coastal states do not affect the adjacent waters or the air space above. But that was the system of 1958 in which, clearly, the continental shelf area still remained a part of the high seas.

Now, coming to the economic zone, there were different views taken of the law of the sea conference but the compromise was the one I expressed in my presentation earlier this afternoon. The Latin wording is very common, but it is the same that has been used earlier in regard to what I call the traditionally maritime zones in Latin America, namely that this is a zone of a special character. The compromise which is reflected in the text of the UNCLOS III is that the economic zone is neither territorial sea nor high seas; and this is expressed very carefully with the same terminology as in the 1958 convention insofar as it concerns the territorial sea. The ICNT said that the sovereignty of a coastal state extends over the territorial sea. There, there is sovereignty. In regard to the exclusive economic zone one uses only the wording "sovereign rights" which means something less than sovereignty. The wording "sovereign rights", and the same idea, is reflected in state practice to a large extent, as I earlier mentioned.

Further, this is obviously a compromise, because if the economic zone had been termed directly a part of the high seas, that would have implied probably a stronger position for other states than the coastal states, or rather I would say that maybe that terminology will place certain coastal states at a danger, or at least they would appear that they would be exposed to danger of use of force and other infringements of their rights in the economic zone. So, fears of that kind obviously were behind the wish of the majority not include the economic zone in the high seas. But the text has not stopped there. One has also tried to allay the fears of the non-coastal states interested in utilizing the economic zone in a way, and especially to safeguard the rights of navigation and over-flight. We have Article 58, paragraph 2 saying that Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone insofar as they are not incompatible with this part, and among these articles, we have Article 89 which expresses that no state may validly purport to subject any part of the high seas to its sovereignty.

So, one is clearly basing oneself on the idea that there shall be no sovereignty. This is a part of Article 89, found in part 7 on the high seas. But there is a cross-reference in Article 58 in the economic zone part of the convention to 88 to 115 and that includes 89. So it shall apply to the exclusive economic zone insofar as they are not incompatible with this part, and as to that latter proviso, I agree with Mr. Oxman that the principle is that the economic zone shall not be subject to sovereignty, as opposed to sovereign rights. This is not incompatible with part 5 on the exclusive economic zone.

Now, finally, one also has to mention Article 59 of the ICNT, also referred to by Dr. Oxman. I think for the sake of completeness, and especially because of the kindness of the country of Mexico to host this conference, I think it should be expressly mentioned that this Article 59 as it now is at the very basis, at the very heart, of this compromise safeguarding the system of the convention against so-called creeping jurisdiction. This is the so-called Castaneda formula, which is named after its author who worked out this fundamental compromise, Secretary of State of Mexico Jorge Castaneda, and that Article says that in cases where this convention does not attribute rights or jurisdiction to the coastal states or to other states within the exclusive economic zone and the conflict arises, the conflict as such should be resolved on the basis of equity and in light of all the relevant circumstances. So, the system of the convention is that some rights of other states, like navigation, are safeguarded on the one hand, the rights of the coastal states on the other hand, and then there is the Castaneda formula as the compromise in the middle.

WILFRED RAZZEL: I listened with some interest this morning when the categories of countries were named, particularly Africa, Southeast Asia, Latin America. As you probably noticed, we didn't hear anything about the Southern Pacific. These countries that I'm speaking of, presently 12 countries in the South Central Pacific, have largely become independent in the last five years. To a great extent for their further economic advancement they are looking at the resources in the marine environment. They are not, and I say this because I feel it strongly, disadvantaged countries, although they may be very short in dollars. I had a nervous feeling this morning coming here on the bus. It was taking a long time. We might never reach our destination. That isn't an uncommon feeling in the South Pacific. One sets off many times in this way and never worries about getting there, but what I missed was the coconuts because that's a kind of reassuring thing. As long as you're surrounded by coconuts in the South Pacific you don't care if you ever get to where you're going, and for that reason, as long as we have the coconuts, maybe we're not so dependent on marine resources as other people would like to think we are.

Dr. Takabayashi made a very good point with respect to the case of the highly migratory species. These countries will be dependent for economic development on the utilization of those highly migratory species, and the question of jurisdiction has bothered us considerably. The Forum Fisheries Agency was organized primarily to look out for the interests of these island countries with the understanding that somewhere along the line someone would have to look out for the welfare of the fish, and it is with respect to the welfare of the fish that I think we will take our next step.

We are planning a conference among ourselves to establish those principles upon which we feel a wider organization should be based, following which we will invite other countries to participate in the next round of discussion with a view to developing an Article 64 type organization in the South and Central Pacific relative to highly migratory species on which we are dependent. If no one comes to the party, of course the party will be over, but assuming they do, we will ultimately have an organization which will include the coastal states who declare their sovereignty over the resources within their coastal zones of jurisdiction and those countries which wish to fish within those zones of jurisdiction. So in that sense, I think we will satisfy the requirements of Article 64 in the ICNT.

We have developed and we are developing further rapport with emerging countries in the Pacific, both Central and otherwise, as they come along. At the present time, there are 12 countries in the Forum and in the Agency. New Hebrides is expected to join in 1980 and quite possibly several others in the following year. I think perhaps the major reason I got up to speak was that there have been some comments about the difficulty of negotiation between neighbors whose basic premise is "we have nothing to talk about because you're obviously wrong". Fortunately, that doesn't happen in the South Pacific. We have 12 countries who have been able to get together, not always resolving their problems in the ways that were anticipated but, nevertheless, ultimately resolving their problems, and these are not countries that have always stood together. These are countries that have a thousand years of tradition of raiding and taking over bits and pieces of one another's territory, but they don't do that any longer and I think it worthwhile drawing it to your attention. Keep an eye on those countries. They may serve as good examples for the rest of us.

LUIS VALENCIA RODRIGUEZ:

"Por mi parte, yo solamente deseo hacer unos ligeros comentarios respecto de las tres intervenciones:

El profesor Takabayashi se ha referido de manera especial a las especies altamente migratorias. Y en relación a esta materia, hay olvido, y con toda certeza, a la situación de las islas del pacífico, muchas de las cuales, pues, tienen sustentación en la pesca y la administración del atún.

Yo les he preguntado que si se excluye de la competencia del Estado ribereño la regulación sobre la exploración y explotación del atún, prácticamente va a quedar sin contenido la zona económica exclusiva.

Tengo que referirme íntegramente a lo que ha dicho el profesor Takabayashi , pues en verdad para muchos Estados del mundo, la pesca de las especies altamente migratorias es esencia para su sustentación.

Me permití aludir a esta materia en mi intervención anterior, indicando que todas las especies, cualquiera que ellas sean, que se encuentren dentro de las 200 millas, están sujetas al ejercicio de los derechos de soberanía por parte del Estado ribereño. Considerar que el Estado ribereño ejerce el derecho de soberanía en las 200 millas con excepción de ciertas especies por el hecho de que son migratorias, estaría en contra del concepto fundamental de lo que es un derecho soberano. En consecuencia, entiendo yo que ni el artículo 64 del Texto Integrado ni en algún otro artículo de la Convención, se restringe de manera alguna la facultad que tiene el Estado ribereño para reglamentar la exploración y explotación de las especies altamente migratorias dentro de las 200 millas.

Lo que dice el texto del artículo 64, párrafo primero, es que el Estado ribereño y los demás Estados que pesquen en las 200 millas esas especies, cooperarán, ya sea directamente o por conducto de las instituciones internacionales, con dos objetivos:

Primer objetivo: Asegurar la conservación, porque esto es esencial para todos, para el Estado ribereño y para los demás Estados; asegurar la conservación y la preservación de esas especies.

Y, en segundo lugar, previo aviso, la utilización óptima de dichas especies en toda la región, teniendo en cuenta que se deben conservar esas especies y conservarlas para bien común.

De manera que estos son los objetivos que persigue el artículo 64, y para ello cooperan los Estados. Esa cooperación, según el párrafo 2 del artículo 64, se hace sin perjuicio de las disposiciones de la parte V del Texto Integrado; en ella, los artículos 61 y 62 son fundamentales y no están derogados por el artículo 64.

En virtud del artículo 61, el Estado ribereño sigue manteniendo, respecto a las especies altamente migratorias, su derecho para determinar la captura permisible en su zona económica exclusiva. Ese es un derecho que no está restringido por el artículo 64. En segundo lugar, según el artículo 62, que tampoco está restringido, el Estado ribereño tiene la facultad para promover el objetivo de utilización óptima de especies migratorias, que es su primera facultad; segunda, determinar su capacidad de explotar los recursos vivos en la zona económica exclusiva, facultad del Estado ribereño en virtud del artículo 56, y tercera, como condición, cuando el Estado ribereño carezca de la capacidad necesaria para pescar toda la captura permisible, sólo entonces dará acceso a otros Estados al excedente de la captura permisible. Es-

tas facultades no están, por lo tanto, derogadas en cuanto a las especies altamente migratorias en virtud del artículo 64.

El profesor Fleischer se refirió a los atributos del Estado ribereño en la plataforma continental. Tenemos al respecto que esta materia aún se halla pendiente en la Conferencia, y sobre el cual se ha formado desde el séptimo período de sesiones un grupo de negociación especial, el Grupo de Negociación Sexto, que presidé el embajador Andrés Aguilar. El grupo aún no ha podido llegar a ningún acuerdo, por lo que se ve que la materia es altamente controvertida; pero, en esencia, el punto fundamental es que la plataforma continental comprende el lecho y subsuelo de las zonas submarinas que constituyen la prolongación natural del territorio del Estado ribereño hasta donde su prolongación natural termina. El problema está en determinar cómo se establece la terminación jurídica exterior de la plataforma.

Ahora bien, en cuanto a los derechos en esta plataforma, el artículo 67 reconoce que el Estado ribereño ejerce derechos de soberanía sobre la plataforma para los efectos de exploración y explotación de sus recursos naturales, tanto vivos como no vivos. Este punto me parece además que está absolutamente claro en el Texto Integrado. Lo que se discute ahora es únicamente la extensión máxima de la plataforma; pero, inclusive, dentro de la extensión misma, el Estado ribereño ejerce, así como en la zona económica exclusiva, derechos de soberanía para los fines de la exploración y explotación de los recursos.

El profesor Nweihed ha preguntado que cuál sería la situación de las reclamaciones unilaterales con respecto a derechos soberanos hechas antes de la Convención. Por supuesto, aquí habría que manifestar que cualquier obligación que establezca la Convención, sería obligatoriamente contractual sólo cuando las partes hayal ratificado la Convención.

Otra cosa sería que, en virtud de los principios del derecho internacional, esta Convención se transforme, con el pasar del tiempo, en costumbre; eso es diferente. Mientras tanto, cuando la Convención haya sido ratificada, sólo entonces será obligatoriamente exigible a las partes de la Convención.

Pero, ¿qué sucedería entonces con las reclamaciones unilaterales? Este punto no afecta únicamente a pocos Estados; estimo que va a afectar a muchos Estados dentro de la Convención, y esto hace ver la necesidad de que se estudie la cláusula especial dentro de las llamadad Cláusulas Generales de la Convención, que preveen esta situación, porque de lo contrario van a surgir muchos problemas de interpretación y aplicación, y muchos casos que tendrían únicamente que ser resueltos a través de los procedimientos judiciales en el Tribunal del Mar o por arbitraje, o en la conciliación obligatoria. Muchas gracias."

JON VAN DYKE: Just a quick question. Dr. Park ran through five disputes in Asia involving tiny islands which he referred to as fly specks. He said that many of them aren't capable of human habitation. Article 121 seems to make a distinction between islands that are habitable and those that are not capable of sustaining human habitation. I wonder if the panelists could touch upon the state practice with regard to claims over these uninhabited islands. When the states are claiming them, do they also claim a 200 mile zone and the continental shelf resources that might go along with such territory?

CHOON-HO PARK: Very briefly, I would like to say, as I said earlier, that the ICNT has a reference to human habitation, but the real point would be: human habitation for what? If, as in the case of the Japan-South Korea dispute over two rocks, human habitation is for some human beings to be there just to demonstrate effective control or just control, but actually having everything supplied including water, then such habitation could not be regarded as habitation in the normal sense. Thus, the definition of island as given in the ICNT is still ambiguous. I think one of the reasons the definition is given that way is that it would have been very difficult to be specific; the deliberations at the Conference would go on and on indefinitely. On the other hand, no state would say it actually owns the islands but would not use them as base points. This leads to another question. Since China regained control in 1974 of territory that used to be under foreign occupation, some islands in the Paracel group are reported to have been reinforced as fishing and guano ports, and artifacts have also reportedly been excavated to enhance the argument for Chinese use of the islands since olden times. Such reinforcement is going to be another point in fact in connection with the legal status of other obscure offshore islands. The ICNT, as of now, doesn't say that an island should be defined with reference to a particular point in time. Thus, I really cannot come up with any specific answer to the question, but I just want to point out that there still is ambiguity hidden under the surface of the ICNT definition.

CARL AUGUST FLEISCHER: There are some instances, but very few, I think, where the ownership state has expressly claimed the right to the continental shelf and an exclusive economic zone around an island. Among such examples are Rockall, an island in the East Atlantic claimed by France; and I think there are a few others. But, on the other hand, those claims are to a certain extent contested by other states. So I think you can draw no certain line or no certain conclusion as to present state practice. I think that evaluation of state practice will depend on one of the preliminary questions raised. Namely, is it a certain type of island that needs a special basis in

state custom, or is it the opposite? Is there at the moment a general right for any state, for any coast, with respect to the 200 mile limit, so that it is the exception that must be proved by custom? I do not want to answer, or try to answer, this question. I will only mention it. In the same connection I think it may be advisable to answer at least the second question of the previous speaker. Namely, what was the reason for having a separate part on the continental shelf in the ICNT? One of the reasons obviously is that the state may claim a continental shelf which, according to the '58 convention and according to the International Court of Justice, is something it has by the very fact of nature. So, the state may have the right to a shelf even if it does not claim an economic zone. Second, there is the question of vested coastal state rights. The economic zone is, or was at a certain time of LOS negotiations, a new creation of international law, at least in the mind of a lot of participants. But the continental shelf and the right of the coastal state to the continental shelf was traditional law beyond any doubt as far as the principles were concerned. Therefore, it is very difficult to avoid having provisions which confirm the traditional right to the continental shelf, whether they are vested rights or coastal state rights. In that connection it becomes important in regard to the question of islands, where there is no discrimination in the traditional continental shelf law, and especially in the 1958 Continental Shelf Convention between different types of islands. Article 1 of the Continental Shelf Convention says that the continental shelf comprises the submarine areas around islands as well as those contiguous to mainlands.

EDUARDO FERRER:

"Eduardo Ferrer de la Universidad Católica de Perú.

En la exposición del profesor Oxman, en la mañana, que fue muy buena, muy clara, muy completa, casi en la parte final, dejó presentes ciertas ideas de las cuales interpreté que se inclinaba a decir que, más que todo, la zona económica no era zona de jurisdicción nacional, sino zona del alta mar.

Yo quería aclarar la posición que tenemos bastantes personas sobre este punto y me parece que hay bastantes adelantos sólidos para sostener que la zona exclusiva ni es mar territorial ni es alta mar; pero tampoco es una simple mezcla de las dos, tampoco, e inclusive, la frase sui generis iría a describirla totalmente, porque eso se puede interpretar de muchas formas.

En mi opinión, la zona exclusiva es una zona distinta al alta mar y al mar territorial. Es una tercera zona, que antes no existía; así como hace diez años las 200 millas parecían un sueño, eran manifestadas por un pequeño grupo de Estados, hoy en día son una realidad; también las especies marítimas cambian a través de la historia, y una consecuencia de este nuevo derecho del mar, es que se está creando una nueva especie marítima, distinta al mar territorial y distinta al alta mar.

Razones, creo que hay varias, voy a tratar de resumirlas.

Primero, en el Texto Unico hay una parte dedicada en forma expresa a la zona económica exclusiva, separada del mar territorial, separada del alta mar, formalmente está separada.

Segundo, cuando se habla de alta mar se dice que algunas disposiciones de la Convención

sobre alta mar no serán aplicables a la zona económica exclusiva. De ahí se interpreta, creo yo con claridad, que no es parte de alta mar.

Tercer razón: es indiscutible, en mi opinión, que en la zona económica el Estado costero tiene derechos de soberanía para los fines de exploración y explotación de los recursos de la zona, limitados efectivamente, porque hay una absoluta libertad de navegación, pero son derechos de soberanía y jurisdicción.

Y esos derechos, como cuarto argumento, no se dan en el alta mar. En el alta mar nadie, ningún Estado, ninguna persona, tiene derechos ni remotamente de jurisdicción.

Y, finalmente, en el alta mar, nadie tiene derechos especiales, todos tienen derechos iguales o no tienen derechos, digamos que son derechos conjuntos a la comunidad internacional. En cambio, contrariamente, en la zona económica el Estado costero tiene definitivamente derechos de soberanía y jurisdicción.

Estos son argumentos sólidos sobre un tema que podría extenderse más, obviamente.

KALDONE NWEIHED:

El tema de las islas es sumamente irresistible. Están aquí entre nosotros expertos sobre esta materia, como son el doctor Lewis Alexander y el doctor Hodgson quienes en la X Reución, cuando este Instituto pertenecía a la Universidad de Rhode Island, nos dieron una magnífica exposición sobre qué debería entenderse por islas en derecho internacional.

Lo que quisiera subrayar a efectos, es que cuando la palabra "isla" se trata tanto en la Convención de Ginebra de 1958, aún vigente, como en el Texto Integrado actualmente en discusión, se define desde el punto de vista geográfico: Una isla es una porción de tierra, etcétera, etcétera; pero cuando se trata de la palabra "roca", no existe tal definición. El artículo 12 entra directamente a decir que las rocas que no tengan vida económica propia, o que no sean habitables, no engendran plataforma continental ni zona económica, pero sí mar territorial y zona contigua.

Ahora bien, resultará sumamente difícil, y éste será el punto de conflicto potencial en el futuro, determinar eso de que una roca es un espacio no habitado, porque roca puede ser, según la intención del legislador, un simple espacio donde su microsomía, su pequeñez, aparentemente es el elemento principal en su definición. Pero los geólogos entienden por "roca" algo muy distinto; entonces, surgen problemas cuando el legislador quiere aplicar el término "roca" no a una isla, como es Rockall, por ejemplo, sino a una extensión plena, como lo es la Isla de Aves, de Venezuela, del Caribe Oriental, o como son centenares de pequeñas islas, que tiene Jamaica en el Mar Caribe.

En el Texto en consideración debería hacerse la distinción y tratar de definir lo que una roca debe de ser o, cuando menos, cambiar la palabra por una un poco más adecuada, desde el punto de vista morfológico y biológico. Muchas gracias."

PART III

POLLUTION OF THE MARINE ENVIRONMENT

INTRODUCTION

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Perhaps, before asking Professor Gold to introduce the major paper I might make a few comments, in my capacity as Chairman, and perhaps, to some extent also, in my capacity as a co-author of the leading paper. It seemed to us, in planning this seminar, that we should not attempt to be unduly ambitious and cover all aspects of marine pollution in one morning. We thought, probably, the most appropriate method of narrowing our scopes, was by looking, especially closely, at ship-generated pollution that has, of course, received most attention, from the Law of the Sea Conference. And you will find that this, indeed, is the focus of the opening paper. I hope, however, that some of the commentators will feel free, if they wish, to make brief comments, perhaps, on some other aspects of marine pollution, in the course of the morning.

And perhaps, last then, in my capacity as co-author, I might introduce the paper, just in a few minutes. The focus of the paper is indicated by the title, "Ship-Generated Pollution: The Creator of Regulated Navigation." For almost three thousand years of legal history, the ocean was conceived entirely in physical terms, as an area to be traversed. Even with the advent of steam, the immense surface waters of the ocean were perceived as a challenge to the art of navigation. And the system of ocean law concerned itself especially with facilitating transit over the trade routes of the world. Even in the first half of the twentieth century, navigation and trade continued to be accepted, almost without challenge, as the predominant values deserving legal protection. Regulation at sea would seem to be, in the main, an unnecessary evil. Even though the case for some degree of regulation of shipping could be made, it was normally confined to the purposes of preserving human life and cargo against the perils of the sea. Despite the international character of the shipping industry, even these purposes were generally believed to be best served by national measures. Where the need for promotion at the international level was conceded, it was commonly argued that, in the last resort, an international regulatory effort should be enforced only under the laws of the national flag. This tradition of minimal regulation in world shipping, and the emphasis of national measures, and flag states jurisdiction, resulted in the need to provide a rationale that would be consistent with the concept of common interest in the theory of international law. And it is very much this concept of common interest that our opening paper is concerned with.

As long as the ocean was viewed in terms of two dimensional space, and nothing more, it was plausible to present the concept

of common interest in the law of the sea, as one of the reciprocal rights of transit, and nothing more. In retrospect, we would judge this version of common interest as an interest common only to the trans-oceanic shipping states, at best, and not as an interest common to the world community at large, although it must be conceded that the great ocean business of the Victorian age appeared to serve a much smaller world community rather well. In the period since 1945, our perception of the ocean has altered fundamentally. It is now no longer merely a surface area, but a three dimensional extension of human society, viewed not only as a space to be traversed, but also as a resource to be conserved and harvested, and as a natural environment to be preserved. In the new age, when economic and ecological interests are primary values deserving legal protection, the concept of common interest in the law of the sea has had to be developed. Within a modern context of navigational issues, rights of transit, reciprocal or otherwise, have to be balanced now against a number of interrelated economic and ecological considerations. Specifically, the interest in the preservation of the marine environment from ship-generated pollution is truly a common interest -- one which is shared equally by the world community as a whole. In the language of McDougal and Lasswell, it might be said to be a relatively pure example of an inclusive public order interest. But, the problems of implementation of the common interest -- such matters as adoption of a treaty expressive of a common interest; its entry into force; its enforcement -- are so formidable that it must be regarded as necessary and therefore appropriate to embrace a variety of exclusive as well as inclusive competences to serve the common interest. If this is conceded, we argue, there should be no objection in principle to coastal state initiatives which clearly serve the common interest in the prevention and control of ship-generated pollution. This has been accepted at UNCLOS III, to some extent, both in the context of standard settings, and in that of enforcement. And it seems certain, that regardless of the precise outcome of the forthcoming convention these contributions will have a lasting influence on the formation of the customary international law of the sea. It seems inevitable to us, that the 1980's and 1990's will witness a variety of coastal state initiatives within extended limits of national jurisdiction, each purporting to serve the common interest in preserving the ocean environment against ship-generated pollution.

Not all of these anticipated initiatives will be accepted by other states as clearly serving the common interest. Some will be suspected of attempting to serve an unacknowledged special interest. In the future debate on the propriety of such practices, it may be predicted that the coastal state will normally find itself confronted by the Inter-Governmental Maritime Consultative Organization, IMCO. In such a confrontation -- between the coastal state and IMCO -- IMCO

will no doubt present itself as the global agency mandated to represent the common interest. And the coastal state may be asked, in effect, to show why its initiative should not be interpreted as protective of a special interest, in opposition to the common interest.

This future scenario of confrontation gives rise to two important questions. It is with these two questions that Professor Gold will deal at much greater length. These questions are as follows: First, to what extent can IMCO be expected to represent the common interest in the prevention and control of ship-generated pollution? And the second question is, what kinds of useful initiatives are likely to be taken by coastal states, as custodians of that common interest?

SHIP-GENERATED POLLUTION: THE CREATOR OF REGULATED NAVIGATION

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I. The Common Interest in the Prevention and Control of Marine Pollution

For almost three thousand years of legal history the ocean was conceived entirely in physical terms, as an area to be traversed. Even with the advent of steam, the immense surface waters of the ocean were perceived as a challenge to the art of navigation, and the system of ocean law concerned itself essentially with facilitating transit over the trade routes of the world. Even in the first half of the 20th century, navigation and trade continued to be accepted, almost without challenge, as the predominant values deserving legal protection. Regulation at sea was seen to be, in the main, an unnecessary evil.

Even where the case for some degree of regulation of shipping could be made, it was normally confined to the purposes of preserving human life and cargoes against the perils of the sea. Despite the international character of the shipping industry, even these purposes were generally believed to be best served by national measures. Where the need for promotion at the international level was conceded, it was commonly argued that, in the last resort, an international regulatory effort should be enforced only under the laws of the national flag.

The tradition of minimal regulation in world shipping, and the emphasis of national measures and flag state jurisdiction, resulted in the need to provide a rationale that would be consistent with the concept of common interest in the theory of international law. As long as the ocean was viewed in terms of two-dimensional space, and nothing more, it was plausible to present the concept of common interest in the law of the sea as one of the reciprocal rights of transit, and nothing more. In retrospect, we would judge this version of common interest as an interest common only to the trans-oceanic shipping states, at best, and not as an interest common to the world community at large, although it must be conceded that the "great ocean business" of the Victorian age appeared to serve a much smaller world community well.

In the period since 1945 our perception of the ocean has altered fundamentally: it is now no longer merely a surface area, but a three-dimensional extension of human society, viewed not only as a space to be traversed but also as a resource to be conserved and harvested and as a natural environment to be preserved. In a new age, when economic and ecological interests are primary values deserving legal protection, the concept of common interest in the law of the sea has had to be developed.

Within a modern context of navigational issues, rights of transit, reciprocal or otherwise, have to be balanced against a number of interrelated economic and ecological considerations. Specifically, the interest in the preservation of the

marine environment from ship-generated pollution is truly a common interest, one which is shared equally by the world community as a whole. In the language of McDougal and Lasswell, it might be said to be a relatively "pure" example of an "inclusive public order interest" [1]. But the problems of implementation, (e.g., adoption, entry into force, enforcement) are so formidable [2], that it must be regarded as necessary, and therefore appropriate, to embrace a variety of "exclusive" as well as "inclusive" competences to serve the "common" end. If this is conceded, there should be no objection in principle to coastal state initiatives which clearly serve the common interest in the prevention and control of ship-generated pollution. This has been accepted by UNCLOS III both in the context of standard-setting [3] and in that of enforcement [4], and it seems certain that, regardless of the precise outcome of the forthcoming convention, these contributions will have a lasting influence on the formation of the customary international law of the sea.

It seems inevitable that the 1980's and 1990's will witness a variety of coastal state initiatives within extended limits of national jurisdiction, each purporting to ship-generated pollution. Not all of these anticipated initiatives will be accepted by other states as "clearly serving the common interest." Some will be suspected of attempting to serve an unacknowledged special interest. In the future debate on the propriety of such practices, it may be predicted that the coastal state will normally find itself confronted by the Inter-Governmental Maritime Consultative Organization (IMCO) [5]. In such a confrontation, IMCO will no doubt present itself as the global agency mandated to represent the common interest, and the coastal state may be asked, in effect, to show why its initiative should be interpreted as protective of a special interest in opposition to the common interest. This future scenario gives rise to two important questions. First, to what extent can IMCO be expected to represent the common interest in the prevention and control of ship-generated pollution? Second, what kinds of useful initiatives are likely to be taken by coastal states as custodians of that common interest? [6]

II. IMCO and the Common Interest

Apart from a small number of regional bodies [7] IMCO is the only international agency which can be said to represent the common interest in the prevention and control of ship-generated pollution. Recently a number of scholars have evaluated the various functions of IMCO for the first time in some detail [8]. In this paper we shall limit ourselves to a brief review of the origins, evolution, structure and procedures of the organization, with special reference to its role and influence in pollution matters.

Reference is often made to the ten-year gestation period between the approval of the constitutive Convention [9] of 1948 and the establishment of IMCO in 1958. More accurately, we should probably speak of a "seven-decade gestation", since the Washington Conference of 1889 was asked to consider a proposal to create a permanent international maritime commission to facilitate the reform of international maritime law [10]. The resistance to such a body for well over half a century came, of course, from the major shipping states, which felt that "the creation of a central body might introduce political distractions into a sphere which is essentially technical" [11]. Although it is doubtful whether shipping was of purely technical significance even in 1889, this view prevailed and, to some extent, prevails to this day. Instead of being named the 'International Maritime Organization' or 'International Shipping Organization', the new body was carefully designated the Inter-Governmental Maritime Consultative Organization. Some emphasis on the third word was intended. The numerous reservations which were attached to the IMCO Convention were designed to ensure that IMCO would confine itself to a consultative advisory and administrative role in matters of a technical nature. Had it not been for the Torrey Canyon, it might very well have done exactly that. But the timing of this and subsequent spillages dictated that IMCO would acquire an unintended prominence in pollution issues and a de facto responsibility for regulatory action [12].

IMCO finally held its first Assembly in 1959, and since that year has been directly and indirectly concerned with the problems of vessel-source pollution, despite the fact that the IMCO Constitution does not specifically confer jurisdiction over pollution issues on the Organization. Work on pollution matters has generally been undertaken under the heading of technical matters and marine safety. Initially, this was reflected in IMCO's succession to the United Kingdom in the administration of the 1954 Pollution Convention, and then in its decision to undertake work which would lead to various amendments of that Convention. A major amount of IMCO's work since then has been related to the problem of marine pollution, and a distinct body has been set up within the structure of IMCO to deal with pollution-related problems.

IMCO's three main organs, the Assembly, the Council, and the Maritime Safety Committee (MSC), and two other subsidiary IMCO bodies, the Legal Committee and the Marine Environment Protection Committee (MEPC), determine the effectiveness and comprehensiveness of IMCO's work on marine pollution. Certain limitations are imposed by the international character of the Organization, notably the inevitable political compromise necessary for negotiating the setting of standards. Further limitations arise from IMCO's status as a consultative, rather than a regulatory, organization. In its marine pollution work, these limitations directly affect the ability of IMCO to develop

a program from proposal through to implementation while maintaining effective pollution prevention standards.

The Assembly is the supreme body of IMCO and is made up of representatives of governments who are IMCO members. The Assembly deals with both substantive and administrative matters, much as other U.N. specialized agencies do. It acts through the passing of resolutions which are forwarded to member states, in the form of IMCO recommendations, for legislative action. These resolutions are not binding on member states even though they cannot be effective unless implemented by states who enforce them on their own ships.

The Council is the governing body of IMCO, meeting twice yearly when the Assembly is not in session. It is made up of representatives from 24 member states. Six positions are reserved for representatives of states with major shipping interests. Six more are for states with a large interest in sea-borne trade. The remaining twelve positions are filled from the general membership.

The Maritime Safety Committee meets twice per year and is the agency centrally concerned with technical matters related to shipping. Membership is open to all IMCO members wishing to participate, and representatives are usually technical experts from IMCO members' government departments concerned with shipping [13].

Prior to 1967, no permanent legal committee existed with IMCO. The Legal Committee was finally created by the Assembly after the Torrey Canyon disaster had presented its overwhelming legal complications. From its inception, the Committee has examined a variety of legal issues, including the problems of liability and compensation for pollution damage and the rights of coastal states to take pollution prevention measures. The Committee generally provides studies and advice on legal problems dealt with by the Council.

The Marine Environmental Protection Committee (MEPC) is a permanent subsidiary organ of the Assembly. It was created in 1973, partly as a result of the 1973 Marine Pollution Conference. Membership is open to all IMCO members. The MEPC has two responsibilities: (1) concern with the environmental considerations of shipping; (2) responsibility for the implementation and amending of the 1973 MARPOL Convention. In fulfilling the latter function, the MEPC has quasi-legislative authority with respect to amendments to this Convention. This has so far resulted in the 1978 Protocol. The MEPC also coordinates IMOC's pollution control and prevention programmes with the efforts of other international agencies and organizations.

It is, of course, the membership of these IMCO committees which determines the actual effectiveness of all proposals put forward to the IMCO Council and Assembly and which decides how the proposals are to be formulated. In the past, the major maritime states exerted such influence in the deliberations of these bodies that many coastal and non-maritime states considered IMCO to be little more than a "shipowners' club". In addition, the structure of the MSC and the IMCO Council guaranteed shipping states a majority. Shipping interests also dominated representation in the Assembly. It has to be remembered that IMCO membership in 1958 consisted of 27 governments, most of which were developed northern hemisphere states [14]. However, by 1979 IMCO membership had reached 100, of which 70 percent were states from the Third World. In 1978, changes in the representation on the Council and the MSC gave non-shipping nations more influence [15]. Nevertheless, shipping interests remain entrenched in the IMCO structure. Although such influence may have diminished, due to the increased representation of other states in the Organization, shipping interests will continue to militate against proposals which may impose higher costs on the shipping industry or threaten to weaken the exclusivity of flag state jurisdiction.

The internal and external functioning of IMCO is influenced not only by member states' political and economic interests, but also by the lobbying activities of a number of non-governmental international organizations. IMCO currently grants consultative status to 41 such organizations [16]. Although the position of such organizations is strictly advisory, their influence is considerable, as they often contribute greatly to the IMCO decision-making process. They rarely play a political role, but they lobby strongly for or against proposals which affect their interests. Those groups primarily related to the shipping industry have not only made a significant contribution on strictly technical matters, but have also exerted a restraining influence on measures suggested for the prevention of ship-generated pollution. At the same time, on pollution policy questions, non-shipping interests have not been sufficiently represented to provide a counter weight against the shipping lobby [17].

Even the existing internal structure of IMCO decision-making remains inherently susceptible to shipping influence. The composition of the Council guarantees the major maritime states permanent, though rotating, membership. In addition, the technological superiority of the states involved in international shipping allows a more subtle dominance of decision-making in forums such as the MSC. These considerations, in conjunction with the lack of significant contributions from non-shipping international organizations concerned with oil pollution, have retarded IMCO's ability to formulate and recommend effective measures to deal with the problem.

Nevertheless, IMCO has made substantial progress towards the development of a pollution prevention regime for shipping through its own recommendations and IMCO-sponsored conferences, seminars and conventions. Much of the credit for this achievement is due to the diligence of an unusually able Secretariat. There is no question that IMCO's maritime expertise makes it the most appropriate forum for the consideration of ship-generated pollution prevention measures, and it is likely to remain so.

As a consultative organization, IMCO cannot itself apply and enforce the rules and standards it generates. Instead, it can only urge that member states implement IMCO recommendations as national legislation. However, they are only recommendations which are not binding on members. Nevertheless, the functional utility of most of the recommendations has resulted in a generally workable framework for setting international rules and standards. Obviously, the framework does not work when the recommendations are not considered to be in the interests of the shipping industry [18].

The most important output from IMCO relating to marine safety and pollution prevention is in the form of international conventions. Such conventions have the merit of representing formal legal commitments, by national governments, to stipulated principles and practices. However, the convention approach is slow and cumbersome. Two factors contribute to the length of the time which will pass from the recognition of a problem by IMCO to the entry into force of a convention addressing the problem. The first is the difficulty involved in the drafting and adopting of proposals within IMCO and in the formulation of a draft convention. Although these steps may take a substantial period of time, the second time factor, related to entry into force, has involved even more protracted delays. Most IMCO conventions include two conditions for entering into force: that a minimum number of states ratify the convention; and that the ratifications represent, in aggregate, a specified total tonnage or percentage of world tonnage. The elapsed time for entry into force varies greatly, depending upon the stringency of a convention's conditions and the complexity and importance of the issues involved. Where expensive technical modifications or the provision of facilities are required to meet the terms of the convention, entry into force may be delayed considerably or may not occur at all. On average, about five years elapse before an IMCO convention enters into force [19].

Even when conventions actually enter into force and are enacted as national legislation, enforcement is required to give them effect. Unfortunately, national enforcement is the weakest link in the chain of internationally promoted effort to deal effectively with marine pollution. IMCO itself has, of course, no enforcement powers. The problem lies in the

pervasive doctrinal attachment of flag state enforcement. In practice, the prospect of enforcement by coastal states or states in whose port foreign ships may be situated, is limited. Some conventions have recognized coastal and port state jurisdiction, but only in very limited circumstances, and only if the states concerned have ratified the convention and it has entered into force [20]. As a consequence, the effectiveness of IMCO programs rests solely on the willingness and the ability of flag states to enforce the required rules and standards strictly and comprehensively.

There are almost no statistics which illustrate the effectiveness of flag state enforcement in enacting IMCO conventions. However, a measure of its efficiency is found in a report which was submitted by the Canadian government to IMCO relating to contraventions of the 1954 Pollution Convention [21]. In the period of 1967-77, eighty violations of this Convention were recorded by Canadian authorities and reported to the flag states of the offending vessels. Only seventeen of these reports were followed by a flag state investigation and actually resulted in a conviction. Thirty-nine of the reports received no comment whatsoever from the flag state concerned. The remaining twenty-four incidents were investigated by the flag state, but no prosecutions followed. These figures appear to indicate that it is the flag state doctrine which is preventing an effective implementation of internationally accepted rules and standards.

The problems imposed by the weaknesses of this enforcement regime are particularly acute in marine pollution matters, as enforcement is of little or no benefit to the flag state whilst, at the same time, lack of enforcement may be particularly damaging to coastal states. This factor, and the others which circumscribe IMCO's ability to formulate and implement comprehensive pollution prevention measures, are hardly designed to discourage unilateral action by coastal states on pollution matters. Such unilateral action is thus often a response to the virtual regulatory void created by the failure of the flag state doctrine and IMCO's own limitations.

If IMCO should fail to provide the means for the development of a comprehensive and effective international regime for marine pollution prevention, unilateral actions will not be the sole recourse for coastal states. As we shall see in the next section, other pollution prevention measures, such as marine traffic regulation systems, are particularly well suited to regional, as well as national and local, application. Bilateral systems are already in effect in the Strait of Juan de Fuca and the English Channel. Rampant unilateralism is to be avoided, if possible, but the current regime relating to pollution prevention appears to be promoting, rather than discouraging, unilateral acts.

Although we have confined ourselves to a rather brief and gloomy assessment of IMCO's capabilities in the ship-generated marine pollution prevention process the overall importance of the Organization is without question. During its brief existence IMCO has certainly moved into the foretront of those whose aim is to create a safer ocean environment. It has stepped into a seven-decade void and has taken over all aspects of safety at sea ranging from maritime communications to safety of life at sea to technical assistance for developing countries. IMCO's achievements can best be judged by the remarkable list of conventions which have been concluded under the Organization's auspices (APPENDIX I). For example, the recently concluded International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, and the Protocol to the 1973 MARPOL Convention, dealing with questions of tanker safety and pollution prevention, are breaking new ground in areas previously closed to discussion at the public international level.

On the other hand, there is still a nagging question whether IMCO will succeed in preventing itself from falling once again under the influence of the industry over which it has acquired very limited regulatory power in recent years. At the same time, it must be remembered that it is common for regulatory bodies to be co-opted by the industries they are designed to regulate. The rest of IMCO's credibility and capability as guardian of the common interest in the prevention of ship-generated pollution may come in the early 1980's, when a growing number of coastal states will have the opportunity to exercise a similar responsibility by adopting certain types of protective measures. One important method by which the coastal state might contribute to the environmental management of coastal waters would be by the establishment of new regional, national and local coastal regulatory approaches.

III. The Prevention of Ship-Generated Pollution: The New Safety Systems [22]

Shipping has traditionally been the most unregulated of all the transportation industries. Many consider that this lack of regulation has enhanced the international character of the industry and nurtured its great expansion in the 19th and 20th centuries. However, today there is every indication that the unregulated state of the international shipping industry is at an end. There is no question that ship-generated pollution has been the main catalyst of the wider international, regional and national regulation of navigation.

The basic purpose of all new regulatory approaches in the industry is to establish greater navigational safety, and thus reduce ship-generated pollution to the lowest possible incidence. The new norms are derived from three different sources:

a. international and regional regulations;

b. national (coastal) regulations; and

c. regulations originating from within the shipping industry.

The new rules themselves are usually concerned with:

a. the safety of vessel construction;

b. the competence of those who operate vessels; and

c. the control of the vessel during the navigational passage.

As it is, obviously, far beyond the scope of this paper to examine the derivation of all or most of the new regulations, we intend to examine item c., navigational control. There is little doubt that the actual control over international navigation in coastal waters, as well as in certain parts of the high seas, provides one of the greatest changes in the traditional rules of international law of the sea. We intend to attempt to illustrate this notable change in international marine policy. As a caveat we must state that against the background of some three millennia of unregulated ocean transport, the changes which are taking place are as yet in an embryonic state -- perhaps, if we wish to use the aviation analogy -- at the level of the "barnstorming" and very unregulated days of flight in the 1920's. Nevertheless, we see a clear trend towards ocean regulation, and it might even be predicted that the full control of traffic at sea will, within a comparatively short period of time, be as common-place as traffic control in the skies. All of this brought about by the effects of ship-generated pollution in a period of less than three decades!

The arguments both for and against greater regulation of navigation are known to all of us, and have often been the subject of discussion at past LSI conferences and workshops. The principles which form the basis of such regulations have occupied the United Nations Seabed Committee and UNCLOS III for over a decade and have received more than their fair share of debate. What is less frequently discussed is what these new safety systems will actually entail.

A. Systems Controlling the Movement of Vessels during their Navigational Passage

When considering today's aircraft-laden skies, it would be unthinkable to have aviation without strictly applied traffic

control systems. Yet, despite the very considerable increase in vessel traffic, the oceans are only now beginning to have traffic control systems.

The growth in vessel traffic has been one of the most significant factors in the development of marine traffic regulation to promote marine safety. Lloyd's Register of Shipping indicates that the number of ships over 100 g.r.t. grew from 27,610 in 1900 to 36,311 in 1960 and by 1976 the total had reached 65,887 [23]. Over the same period, gross registered tonnage increased from 28.9 million tons to 372 million tons in 1976 [24]. In addition to this increase in the number of vessels, the development of navigational aids, such as Loran, Decca, and Consol, now permit ships to navigate with accuracy along the most direct route from port to port. The cumulative effect of these changes in commercial navigation was to increasingly concentrate ship traffic on major shipping routes.

Despite the spectacular growth in the number of vessels involved in commercial navigation, the collision rate has remained almost constant, although the number of collision incidents has increased [25]. If considered only in the marine safety context such statistics may be acceptable, but in the context of accidental marine pollution damage such figures remain unacceptable. The catastrophic pollution incidents which have resulted from collision and groundings dictate that nothing less than a substantially improved record for safety at sea is consistent with the protection of the interests of coastal communities.

At present there are three common forms of marine traffic regulation. These are: traffic separation scheme (TSS), vessel traffic reporting systems (VTRS), and vessel traffic management systems (VTMS). The development of each of these modes of traffic regulation predates the advent of accidental marine oil pollution as a national and international problem. Concern with the problem has led a number of states, as well as IMCO, to apply or consider the application of these systems as a means of pollution prevention. How these systems are implemented, and which type is applied to a particular area, will vary with the pollution problem presented. TSS is a passive method, while VTRS and VTMS involve interaction between coastal traffic centers and vessels in adjacent waters and provide the possibility of actual control of vessel traffic. Although there are significant differences between these passive and active modes of marine traffic regulation, many of the problems involved in their implementation and enforcement are the same. All three types of traffic regulation entail a departure from the tradition of the autonomy of a ship's master to sail a vessel on any route he chooses. As a result, they are all placed in the same basic position with regard to the introduction of regulation to the shipping industry. This is

the problem of overcoming the trappings of custom and tradition which no longer serve the best interests of ocean use.

1. Traffic Separation and Routing

Traffic separation and traffic routing were first proposed as far back as 1847 [26]. These early proposals were based on the now well accepted principle of weather routing. In 1855, it was proposed that separate lanes be designated for steamers traveling in opposite directions across the North Atlantic [27]. Little came of this proposal although it was given consideration at the 1889 Washington Conference [28]. The first internationally agreed-upon traffic separation routes were established in 1898 on the basis of a gentlemen's agreement among passenger shipping companies using the North Atlantic route [29]. However, traffic separation received its first intensive application in the Great Lakes. Following the loss of 22 ships due to collisions between 1900 and 1910, the shipowners' Lake Carriers Association introduced traffic separation in 1926 [30]. This system and its successors remain in effect today. The viability of these early voluntary routing schemes in preventing collisions is reflected in Regulation 8, Chapter V of the International Convention for the Safety of Life at Sea, 1960 (SOLAS '60) [31]. This provision recognizes that: "... the practice of following recognized routes across the Atlantic ... has contributed to the avoidance of collisions ... and so should be recommended to all ships concerned."

Several proposals for one-way traffic lanes near Europe were put forward in the mid-1950's, but little was done until 1961, when a joint British, French and German group was formed to study applications of traffic separation in the congested Dover Strait. An investigation by this group revealed that an overwhelming 96 percent of mariners surveyed favored traffic routing in those waters [32]. The report of the joint working group, including their proposals for TSS, was forwarded to and accepted by IMCO's Maritime Safety Committee. On June 1, 1967, two main through-traffic lanes and two inshore traffic zones were put into operation as voluntary routing schemes. This was the first modern application of traffic separation. IMCO's early involvement made it the logical forum for future development of traffic routing and separation. Thus IMCO became directly involved in devising traffic separation schemes and incorporating them into IMCO Assembly Resolutions dealing with the principle and method of traffic separation. Very quickly the Organization then became involved in recommending predetermined routes, deep water routes, and areas to be avoided by oceangoing ships.

In 1971 the IMCO Assembly adopted an amendment to SOLAS '60 which, among other changes, recognized IMCO as "the only international body for establishing and adopting measures on

an international level concerning routing" [33]. The amendment also provided that the selection of routes "will be primarily the responsibility of the Government concerned." Aware of the need for sanctions to deter noncompliance, the Assembly passed a further Resolution which recommended that Governments make it an offense for ships of their flag to contravene traffic separation schemes.

The mandatory wording of the 1971 Resolution was adopted in the 1972 Collision Regulations [34]. However, under Rule 10 of the Regulations, the use of TSS is not made mandatory but only sets out guidelines to be used in the navigation of ships within traffic schemes. Rule 10 only regulates vessel movement within a traffic zone; vessels not using the scheme are only required to avoid it by as wide a margin as possible. In response to this aspect of the Rule, which suggests that use of TSS may be voluntary, at least one country, Canada, attached reservations to its accession to the 1972 Convention. In actual fact, Canada did not consider that it was prohibited from providing for the compulsory use of traffic schemes.

By 1973, IMCO had recognized the importance of TSS in the protection of the marine environment. The effect of TSS on collision rates is now well established. In the Dover Strait the annual statistics for collisions and groundings have shown a gradual decrease not reflected in world statistics [35]. In areas subject to other traffic schemes there has been a marked decrease in the number of collisions of vessels traveling in opposite directions [36].

As a result, evidence of the benefits of TSS to marine safety and pollution prevention has led to a proliferation of traffic routing systems. By 1979, more than 100 schemes had been approved by IMCO and many others had been designated unilaterally [37]. It must be remembered that until July 1977, when the 1972 Collision Regulations came into force, there were no mandatory international rules relating to the use of TSS. All existing schemes were simply advisory. Even the new Collision Regulations did not make the use of TSS mandatory. There is thus a pressing need for proper policing of such schemes. For example, surveillance of the Dover Straits scheme revealed that in 1973 there were, on the average, some 34 daily contraventions [38]. By 1977, this average had dropped to 21. A survey of contraventions of a voluntary TSS in the Strait of Juan de Fuca in 1977 indicated that as much as 15 percent of the major shipping traffic using the Strait did not comply with the scheme and that noncompliance by foreign vessels had created serious navigational hazards. It has been suggested that if as few as 10 percent of the vessels fail to comply with a TSS, its effectiveness is severely diminished [39].

The problem of the surveillance and policing of TSS would not be so pressing if moral judgment, force of law, and existing

economic disincentives were more effective in promoting compliance. Adverse judgments and high insurance premiums for persistent transgressions of TSS may provide significant disincentives in the future but have not so far done so. Economic disincentives are of some importance as there may be economic advantages, such as a shorter steaming time and distance, to be gained from noncompliance.

As with other aspects of the regulation of international shipping, it appears that in this area much more effective regulation is needed. However, the means of enforcement remains effectively circumscribed by the flag state doctrine. At present, even the enforcement of the Collision Regulations is the prerogative of the flag state. In practice, however, it is the coastal states that are in the best position to ascertain transgressions and to remedy them. The importance which coastal states now place on compliance is shown by the recent practice assumed by France of enforcing compliance through the use of military patrol vessels [40].

2. Vessel Traffic Reporting System and Vessel Traffic Management Systems

Although the specific application of TSS still present some problems, a new generation of traffic regulation systems has been developed which provides for a much more comprehensive regulation of vessel traffic in the interests of marine safety and pollution prevention. Interestingly, like TSS, this newer group of systems predates the problem of accidental marine pollution. The VTRS and VTMS programmes were originally designed to serve the interests of ship safety and to facilitate the movement of vessel traffic in an orderly fashion. With the appearance of the problem of accidental oil pollution, such systems were recognized as having the potential to provide the core of comprehensive pollution preventive programs.

Systems for the regulation of vessel traffic, more sophisticated than one-way sea lanes, originally appeared as a means of ensuring safe and orderly traffic flow in congested inland waterways and ports. One of the first of these was the Marine Traffic Control system which came into operation on the St. Lawrence Seaway in 1959 [41]. This program involved the monitoring of vessels and vessel traffic movement through the Seaway based upon vessel radio-telephone communications. With increased traffic congestion, the St. Lawrence traffic system, like many other inland schemes, now includes extensive use of closed circuit television and radar surveillance to control traffic movement. By the mid-1960's traffic control systems had become a common feature in major North American and European ports. Radio communications, usually VHF radio-telephone, provided the communications infrastructure for these programs

and continues to do so. Their effectiveness has been proven in the substantially lower accident rates despite significant increases in the traffic density [42].

The structure and specifications of this type of vessel traffic system are functions of the characteristics and uses of the area controlled. These would include the hydrographic, geographic and meteorological characteristics of the area, the numbers and types of vessels and the cargoes carried, and the significance of competing interests for the use of navigational areas. The most easily identifiable differences among systems related to the degree of technological and regulatory sophistication of each system. Four different types of systems may be identified through these criteria.

The simplest of these, apart from TSS, are those which employ only bridge-to-bridge radio-telephone communications. Such systems are usually supplemented with regulations requiring or suggesting that a vessel report its position and course over a designated radio frequency at a predetermined location or time. All vessels in the area hear this information, provided they are operating on the same radio frequency, and are thereby informed of vessel movement in a particular area. The transmissions may or may not be monitored by a shore station. This type of system is generally employed in open water areas where there are few navigational hazards and a low traffic density. Systems such as this have proven useful in introducing mariners to the practice of reporting information which will be of use to others in an area where a more comprehensive traffic program will be introduced in the future.

Slightly more sophisticated are the Ship-to-Shore-to-Ship schemes which require vessels to obtain clearances from a shore station prior to entering and proceeding through a traffic control area. The clearance may be conditional on the provision of information by the ship relating to machinery and equipment conditions, ability to navigate without risk of collision, and intended course, speed and destination. Ships may also be required to report any subsequent incident which might involve a risk of pollutant discharge. This type of scheme usually includes the benefits of the ship-to-ship system, and the information available to mariners is supplemented by the shore station which may inform vessels of traffic density, meteorological conditions, and other information essential to mariners. So informed, mariners are able to plot a safe and expeditious course. This system also provides coastal authorities with information relating to the use of coastal waters by shipping and permits early action to be taken in the event of actual or threatened pollution discharges.

The more complex programs include a degree of traffic movement monitoring sufficient to permit some control by the shore station over vessel movements. These usually include

some or all of the features of the above systems but, in addition, the shore station, often designated as a Traffic Control Centre or Traffic Management Centre, maintains information on, and a plot of, the movement of each vessel in the area. The shore station is able to fully regulate ships moving within the control zone to the degree allowed by the information collected. This system is particularly suited to traffic control beyond the coastal margin and is similar to the basic design of both the French and the Canadian VTRS.

The most sophisticated forms of marine traffic control are the Ship-to-Shore-to-Ship schemes of traffic management. VTMS usually supplement VTRS procedures with comprehensive radar surveillance. This surveillance provides information sufficient to monitor the presence and movement of all ships in the control area at all times. The total information provided permits to the shore station to fully regulate traffic flow, including the ability to advise a recommended course and speed, and to inform ships in advance of potentially hazardous situations.

VTMS is usually found only in ports where the traffic congestion and the economic benefits of the smooth flow of traffic justify the costs of the high technology involved. They are common in busy European and North American ports and inland waterways. The only application of VTMS to be found outside port facilities is a system which is being operated in the Strait of Juan de Fuca. This is a joint U.S.-Canadian operation employing three shore-based stations with radar surveillance computer-linked to a central traffic control station.

The VTMS often takes on many of the aspects of air traffic control and in many cases may not be well suited to applications beyond ports and confined waters. VTRS, accompanied by radar surveillance less comprehensive than that necessary for VTMS, is now increasingly proposed as a suitable means of regulating vessel traffic in coastal areas. At least two such systems are already operating. The French government appears to be operating a rudimentary programme of this type off the coast of Brittany. The Canadian Coast Guard has been operating a sophisticated VTRS in Canada's Atlantic waters since 1976.

3. VTRS in Action: The Canadian Example

The most advanced VTRS now in use in coastal waters is the Eastern Canadian Traffic Regulations System (ECAREG). ECAREG is a comprehensive programme designed to promote marine safety, prevent the occurence of pollution incidents and, at the same time, provide for the earliest possible response to pollution discharges and other marine emergencies. There is no question that this system is the prototype for future marine

traffic regulation programs. Its structure and operation have been studied by French and U.S. authorities as a model for their own national pollution measures [43].

The experience of Canadian transportation authorities with VTRS dates to the development of the St. Lawrence Seaway traffic control system which came into operation in 1959. Following the Torrey Canyon disaster in 1967, studies into the viability of applying traffic regulation to coastal waters were undertaken, as was the development of more effective standards for pollution prevention. It was the grounding of the tanker Arrow in Chedabucto Bay, Nova Scotia, Canada in 1970, which provided the necessary impetus for the further development and application of VTRS in Canadian coastal waters. A Royal Commission inquiring into the Arrow incident concluded that:

> "The first attack against the problem of pollution must be in the field of prevention," and "Navigation was once left to the skills and whims of the master, but this doctrine can no longer apply," and went on to recommend that "Navigational systems be established at all major harbors ... in which use will be made of LORAN, DECCA, radio DF, usual navigation aids and shore based radar surveillance with ship to shore communication of the ship's position and apparent potential hazards" [44].

These comments typify the position many coastal state authorities have found themselves in when facing the aftermath of a tanker casualty.

The Canadian response would result in the most comprehensive pollution prevention programme currently in existence. The ECAREG system provides the infrastructure for its application. (See APPENDIX II) The earliest response to the recommendations of the Royal Commission took the form of a compulsory reporting and surveillance system with a TSS in Chedabucto Bay in 1974 [45]. In July 1976, a voluntary reporting system applicable to all waters off Canada's eastern seaboard was initiated. In October 1978, the Eastern Canada Traffic Regulations (ECAREG) made this reporting system compulsory. The stated objects of ECAREG are to reduce the danger of pollution to Canadian coastal waters and to make these increasingly congested waters safer for shipping [46]. The ECAREG traffic zone currently includes the waters of the Gulf of St. Lawrence and the twelve mile Canadian territorial sea, other than those areas covered by localized VTMS and VTRS. Current Canadian enabling legislation would permit extension of this system a further 188 miles seaward and regulations relating specifically to tankers may be applied to this distance in the very near future [47].

All ships of 500 g.r.t. or more entering the ECAREG zone from a berth or from the open sea are required to request, twenty-four hours in advance, a clearance to enter twenty-four hours in advance, a clearance to enter from the traffic control centre. Clearance requests must be accompanied by information such as the identification of the vessel and her master, position, course, speed, destination, estimated time of arrival in the traffic zone, the nature of her cargo, draft, and any deficiencies in machinery, equipment, or navigational aids.

Regulations frequently enforced through the ECAREG systems include Rule 10 of the Collision Regulations and ship standards relating to pollution prevention, such as the Oil Pollution Prevention Regulations [48]. The system provides a means of detecting violations of marine safety and pollution prevention rules and standards prior to ships reaching coastal waters.

Whilst within the control zone, ships are required to notify the traffic centre of any accident or fire on board the ship, any defects which occur to machinery or equipment, of any other ship in apparent difficulty, malfunctioning navigational aid or any pollutants discharged or sighted. With such information the traffic centre can make the earliest possible response to actual or potential discharges.

The heart of ECAREG is the Marine Traffic Regulator (MTR) who is responsible for receiving and passing on information and orders at and from the traffic centre. In the event that a vessel requesting a clearance is not in compliance with Canadian standards and regulations, there are several options available to the MTR. The appropriate measures to be taken will usually be determined by Coast Guard Steamship Inspectors who are usually mariners with considerable experience in Canadian waters. Generally, there are several options: the clearance can be withheld and the vessel required to remain outside Canadian waters or at its berth until the traffic centre advises the ship to proceed; the clearance may be granted but made conditional upon the vessel proceeding through Canadian waters only in good visibility or other conditions appropriate to the vessel's disability; the clearance may be granted but be made conditional upon the vessel receiving a technician aboard to carry out repairs, or a clearance may be accompanied by an order to proceed to a specified port for repairs.

In order to fulfill its marine safety and pollution prevention purposes, some ECAREG personnel are invested with special powers and violations of the traffic regulations are subject to heavy fines. Violation of the mandatory reporting requirements of Canadian VTRS is punishable by a fine of up to $100,000 on summary conviction [49]. The Canada Shipping Act (CSA) provides that it is only necessary to prove that the vessel has committed the offense to establish that the offense was committed by someone on board. To deal with actual or

potential discharges, some MTR's and Steamship Inspectors have designated Pollution Prevention Officers (P.P.O.) under the CSA. The powers of a particular P.P.O. depend upon the terms of his certification by the Ministry of Transport, but such powers may be extensive. They may include: ordering any vessel within 200 miles to provide information; boarding any vessel bound for a Canadian port to determine compliance with CSA standards; ordering a vessel to proceed out of Canadian waters or Fishing Zones if noncompliance is suspected; and ordering any ship suspected of carrying a pollutant to proceed to a designated port at a prescribed course and speed. In the event of a substantial pollution discharge or threat, a P.P.O. can order all vessels in a specified area to report to him, and he may order any ship to participate in clean-up operations. It is an offense to provide false information to a P.P.O. or to obstruct him in the performance of his duties. These offenses and failure to comply with a request of a P.P.O. are each punishable by a fine of up to $100,000. In addition to these powers, the P.P.O. is empowered, with the consent of the Minister of Transport, to seize a vessel and any pollutant on board if he suspects that any of the CSA pollution regulations have been contravened.

There is no evidence so far of any abuse of these powers which are rarely exercised except with regard to substandard vessels and incidents which pose a threat of pollution. In addition, the marine safety aspects of the ECAREG system are as important as the pollution prevention procedures in daily operation. The traffic centre not only provides essential information to mariners but also serves as the communications centre for a number of other marine services which benefit shipping. Vessel reports allow the centre to keep an accurate watch over navigational aids which are malfunctioning or out of position. In winter months the system provides mariners with ice-breaking services and ice information. Most importantly, in the event of marine casualty or emergency, the MTR is able to provide an informed, timely and coordinated response.

4. Some Conclusions

To date, the development of VTRS and VTMS has been basically a national matter. Implementation has involved coastal states acting unilaterally, or, where the waters to be regulated do not fall under the jurisdiction of a single state, bilateral agreements have preceded the implementation of joint programs. For example, this type of regional development of marine traffic regulation commenced with the English-French Dover Straits Information Service and the joint U.S./Canada VTMS in the Strait of Juan de Fuca. At this state it is too early to determine whether lack of uniformity in regulations will become a problem. IMCO has only been involved in very preliminary work related to traffic regulation. These

efforts have included the formulation of an IMCO standard marine vocabulary, work on a guide to use of VHF radio-telephone communication, and a study of the legal implications of VTRS [50]. Despite this work there is, as yet, no evidence to suggest that IMCO will feature as significantly in the development of VTRS and VTMS as it has in the application of TSS. In the absence of IMCO standards and rules for these more advanced forms of traffic regulation, it is likely that significant developments in this field are likely to occur on the regional level in areas such as the English Channel and southern North Sea, where high traffic density and a variety of competing interests demand that shipping traffic be as well-organized as air traffic. In the interim, there thus seems little likelihood that VTRS will be implemented on other than a unilateral basis.

The technology applied in VTRS and VTMS is borrowed from air traffic control (ATC). Both ATC and marine traffic regulation are designed to organize traffic in the interests of safety. With this in mind, it is reasonable to ask why a maritime equivalent of ATC would meet with opposition both in its implementation and enforcement. There are, obviously, several basic differences between the two systems, but these do not negate their essential basic similarity which consists of the safe organization of traffic.

The initial differences between ATC and vessel traffic regulation arise from the dissimilarities in aerial navigation and sea transport. In ATC the wide and unobstructed vision afforded by surface-to-air radar gives the ground controller a clearer picture of the situation than is available to the aircraft pilot. On the water, with the exception of winding inland waterways and congested ports, this position is reversed and it is the ship's navigating bridge which provides the better view. Even the languages used in marine communications differ from the uniformity of the English language used in ATC. However, this type of difference only affects the direct applicability of ATC systems to the marine traffic situation. This has been recognized when implementing vessel traffic systems which do not presume to control the actual navigation of the vessel, but only to guide its passage. No system of marine traffic regulation has so far suggested that responsibility for the safe navigation of a vessel rests anywhere but with those in command of the ship.

Two further attributes which differentiate ATC from marine traffic regulation relate to the tradition of regulation in the air industry and the framework of its international regulation. In the first place, commercial navigation of the air is of a much more recent vintage than ocean shipping. Secondly and, more importantly, aviation has developed as a commercial activity under an umbrella of national and international regulation. Due to the void of regulation in

international shipping, a tradition has developed which emphasizes the virtual autonomy of a ship's master to navigate in whatever manner he sees fit. As a result, some mariners oppose the principle of traffic regulation due to a mistaken belief that the ultimate responsibility for the safety of ships will pass to the shore station. In addition, some of the opposition originates from simple conservatism or professional pride. Aircraft pilots have rarely opposed ATC because regulation has always been an accepted part of aerial navigation.

The regulatory framework of air transport is overseen by an international organization, the International Civil Aviation Organization (ICAO), a body far different from IMCO. ICAO is an international body with juridical as well as consultative powers [51]. Such a regime, and others like it, were designed to overcome the many limitations which IMCO faces relating to enforcement. In particular, they were intended to overcome the problems which resulted from the application of maritime-based concepts of international law to international air transport. To a large extent they have been successful. The problems which are present in the applications of marine traffic control arise from the absence of similar provisions in conventions sponsored by IMCO. However, it must be added that the "attitude" of states in their ICAO participation has also been very different. It can even be said that, in administrative terms, IMCO and ICAO are probably not so different. Yet the willingness of states to cooperate internationally at ICAO and the unwillingness of maritime states to do so at IMCO has created real and effective differences.

Perhaps the most significant difference between ATC and vessel traffic regulation is simply that the latter cannot operate in the existing regime of the so-called freedom of the seas. The doctrine of the exclusivity of flag state enforcement is not designed to accommodate coastal state regulation and enforcement. There is no question that in the absence of an international maritime transit agreement, similar to that relating to the regulation of air traffic, the issue of coastal competence will become more insistent as coastal states move to protect their own interests by implementing and enforcing TSS, VTRS and VTMS.

The introduction of ATC and the international agreements which permitted it can only be attributed to technological change which dictated such necessity. Marine traffic regulation is a similar response to changes in the world shipping industry. The growing awareness by many states that reliance upon the mariner's discretion is no longer an adequate means of protecting all of the interests in ocean use is slowly eroding some traditional aspects of navigation. These changes will entail a modification of traditional attitudes of mariners as well as maritime states. As other uses of navigable waters

compete with shipping and as coastal state demands for adequate pollution prevention measures increase, traditional shipping practices will have to be transformed to accommodate these interests. Traffic regulation is the most recent example of this process and it is the one which most clearly demonstrates that, although commercial navigation is still a vitally important use of the oceans, it is no longer the only interest in need of protection.

The customary framework of international law challenges both the right of coastal states to implement traffic regulations and the right to enforce them. These issues are of equal importance. The effectiveness of these systems depends as much on how strictly they are enforced as it does on how well they are designed.

The restrictions upon coastal jurisdiction in international law have been codified in the Geneva Conventions of 1958. Article 1(1) of the Geneva Convention on the Territorial Sea and Contiguous Zone 1958 recognizes that:

> "... the sovereignty of a state extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast described as the territorial sea."

Article 1(2) qualified this by providing that:

> "... this sovereignty is exercised subject to the provisions of these Articles and to the other rules of international law."

Article 17 provides that:

> "... vessels exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal state in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation."

Laws and regulations relating to navigation would include those relating to marine safety and pollution prevention. It would appear, therefore, that foreign ships are not immune from coastal state regulation of vessel traffic in the territorial sea.

Beyond the territorial sea the question of coastal competency is less clear. In the contiguous zone, coastal state jurisdiction is restricted by Article 24(1) which states that:

> "In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to: (a) Prevent infringement of its customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea; (b) Punish infringement of the above regulations committed within its territory or territorial sea."

Interpretations of the meaning of "sanitary regulations" are not in agreement on whether coastal pollution prevention competence falls within this jurisdiction. The wording of Article 24 describes contiguous zones as "high seas", indicating that the doctrine of the primacy of flag state jurisdiction would, of course, apply. Beyond the contiguous zone, the Convention on the High Seas 1958 enshrines the flag state doctrine as the exclusive jurisdiction. The Convention simply does not recognize coastal state competence to permit traffic regulation.

Despite its present status as the only international treaty expressly addressing the question of jurisdiction over ocean use, the Geneva Conventions of 1958 can now no longer be considered as the definitive statement of the international law. The passage of time and events since 1958 have brought about the many changes in national and international practices and perceptions relating to ocean use we have been discussing at successive LSI meetings. These changes have led to the ongoing discussions at UNCLOS III and, of course, also to unilateral actions, such as those entailed in the introduction of marine traffic regulation to coastal waters. In the absence of an international agreement dealing with this, unilateral implementation of traffic control systems is likely to continue and will be expanded into ocean space once considered part of the high seas. We have already indicated that the functional realities of the control of navigation have received surprisingly little coverage at UNCLOS III. In the RICNT only Article 211(1) specifically mentions any form of traffic system:

> "States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards for the prevention, reduction and control of pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment including the coastline and related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary."

However the as yet tortuous language of the other sections of Article 211 indicate that there is at least some allowable

leeway in coastal states' competency for setting pollution prevention standards. (See APPENDIX III)

The issues which marine traffic regulation raise are essentially those involving the relationship of the so-called freedom of the seas with the right of coastal states to employ reasonable measures to protect legitimate community interests. It seems obvious that the flag state doctrine no longer provides a regime which adequately protects such interests. It follows that changes are necessary in order to bring this regime into conformity with contemporary requirements. We will have to await how and when this will occur.

IV. IMCO and the Coastal State: Joint Guardians of the Common Interest

There is much justifiable impatience and frustration with the lack of concerted international action to prevent ship-generated pollution. The fact that IMCO's efforts are often delayed, and frequently even aborted, has not been lost on many coastal states. Apart from some limited efforts to lay down ship routing systems, IMCO has not, so far, been able to make much progress with other regulatory measures. This has, of course, resulted in the full frontal attack by coastal states, not only on the freedom of navigation, but also on the freedom of the sea and its inherent "license to pollute". If IMCO continues in the 1980's to confine itself largely to promotional activities and is not given the regulatory responsibility for the prevention and control of ship-generated pollution, it is unlikely to be accepted as a credible representative of the common interest in the preservation of the ocean environment. By default, only coastal states will be available to act as the guardians of the common interest on such an issue.

At least in the area of vessel traffic control it seems inevitable that only the coastal state can undertake the adoption of such measures. Frequently these may initially have to be adopted by unilateral means in the absence of any agreement to proceed jointly with neighboring states. Unilateral measures of this kind, if conscientiously designed and applied, should be regarded as necessary and desirable initiatives serving the common interest in the preservation of the coastal environment from ship-generated pollution. For purposes of vessel traffic control, the coastal state should be seen not only as a guardian of the common interest but also as the guardian with the primary responsibility for taking appropriate action. Such action, it should be remembered, is designed not to secure an acquisitive management -- but to protect all vessels from the danger of collision, stranding, and effects of weather, as well as to protect the coastal state itself from environmental damage.

Yet IMCO should be given credit for its recent efforts to overcome its original constraints, and is, after all, the only existing global agency in the regulation of shipping. Even in the area of vessel traffic control, IMCO should be regarded as a guardian of the common interest in the prevention of ship-generated pollution. Its responsibility in this area should, however, be accepted as secondary to that of responsible coastal states. During the period of coastal state initiatives, IMCO's chief responsibility should be in monitoring the different emerging traffic control systems around the world. In the foreseeable future, when a sufficient number of such systems are in operation, IMCO should undertake to establish guidelines which would assist in the eventual establishment of an international convention on marine traffic control.

It should be conceded that vessel traffic control is the most obvious area in which to argue for the "joint-guardianship" of the common interest. It may still be possible to put forward the view that IMCO and coastal states have a shared responsibility in other areas such as the safety of vessel construction and the competence of those who operate vessels. In these areas, however, the primary responsibility in the initial stages might be seen as falling upon IMCO, rather than the coastal states, since a proliferation of construction and training standards should be discouraged as early as possible. Nevertheless, if IMCO should fail to take the appropriate measures in these and other areas, and thus fail in its duty as guardian of the common interest, then the world community is entitled to expect that interest to be protected by responsible coastal states.

APPENDIX I

IMCO CONVENTIONS AND THEIR PRESENT STATUS

Conditions for entry into force

Convention	Date of adoption	No. of States	Other Conditions	Relevance to Pollution Control (0-3)	Number of ratification	Date of entry into force	Time taken for entry into force
1. Oil Pollution 1954	12.5.54	10	5 states with 0.5m gt	3	60	26.7.58	4 years 2 months
1962 Amendments	13.4.62	—		3	—	18.5 and 28.6.67	5 years 1 month
1969 Amendments	21.10.69	—		3	—	20.1.78	8 years 3 months
1971 (Great Barrier Reef) Amendments	12.10.71	40		3	20	—	—
1971 (Tanks) Amendments	15.10.71	40		3	21	—	—
2. SOLAS 1960	17.6.60	15	7 states with 1 million gross tons of shipping	1	98	26.5.65	4 years 11 months
1966 Amendments	30.11.66	65			46	—	—
1967 Amendments	25.10.67	65			34	—	—
1968 Amendments	26.11.68	65			37	—	—
1969 Amendments	21.20.69	65			26	—	—
1971 Amendments	12.10.71	65			17	—	—
1973 (General) Amendments	20.11.73	65			7	—	—
1973 (Grain) Amendments	20.11.73	65		0	6	—	—
3. Facilitation	9.4.65	10		1	29	5.3.67	1 year 11 months
4. Load Lines	5.4.66	15	7 states with 1m gt	1	81	21.7.68	2 years 3 months
1971 Amendments	12.10.71	61		1	25	—	—
1975 Amendments	12.11.75	61		1	17	—	—

	Convention	Date of adoption	No. of States	Other conditions	Relevance to Pollution Control (0-3)	Number of ratification	Date of entry into force	Time taken for entry into force
5.	Tonnage 1969	23.6.69	25	65% of world gt	0	38 (about 60% tonnage)	--	--
6.	Intervention 1969	29.11.69	12		3	33	6.5.75	5 years 6 months
7.	Civil Liability 1969	29.11.69	8	5 states with 1m tanker tonnage	3	37	19.6.75	5 years 7 months
8.	Nuclear Carriage 1971	17.12.71	9		2	6	15.7.75	3 years 8 months
9.	Fund 1971	18.12.71	8	750m tons of imported oil	3	15	16.10.78	6 years 10 months
10.	Collision 1972	20.10.72	15	85% of world's shipping by no. or tonnage	3	55	15.7.77	4 years 9 months
11.	Container 1972	2.12.72	10		0	18	6.9.77	4 years 10 months
12.	Dumping 1972	13.11.72	15		3	39	30.8.75	2 years 9 months
13.	MARPOL 1973	2.11.73	15	50% of world gt	3	3 (about 0.3% tonnage)	--	--
14.	Intervention Protocol 1973	2.11.73	15		3	3	--	--
15.	SOLAS 1974	1.11.74	25	50% of world gt	1	25	25.5.80	5 years 6 months
16.	INMARSAT Convention	3.9.76		States representing 95% initial investment shares	1	15	16.7.79	2 years 10 months
17	INMARSAT Operating Agreement	3.9.76			0	-	--	--
17.	Limitation of Liability 1976	19.11.76	12		1	0	--	--
18	Fishing Vessels 1977	2.4.77	15	50% of world fishing vessels	0	0	--	--
19.	MARPOL Protocol 1978	17.2.78	15	50% of world gt	3	0	--	--
20.	SOLAS Protocol 1978	17.2.78	15	50% of world gt	2	0	--	--
21.	STCW 1978	7.7.78	25	50% of world gt	2	0	--	--

1. International Convention for the Prevention of Pollution of the Sea by Oil, 1954.

2. International Convention for the Safety of Life at Sea, 1960.

3. Convention on Facilitations of International Marine Traffic, 1965.

4. International Convention of Load Lines, 1966.

5. International Convention on Tonnage Measurement of Ships, 1969.

6. International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties.

7. International Convention on Civil Liability for Oil Pollution Damage, 1969.

8. International Convention relating to Civil Liability in the field of Maritime Carriage of Nuclear Materials, 1971.

9. Convention on International Compensation Fund for Oil Pollution Damage, 1971.

10. Convention on International Regulations for preventing Collisions at Sea, 1972.

11. International Convention for Safe Containers, 1972.

12. International Convention on the Dumping of Wastes at Sea, 1972.

13. International Convention for the Prevention of Pollution from Ships, 1973.

14. Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, 1973.

15. International Convention for the Safety of Life at Sea, 1974.

16. Convention on the International Maritime Satellite Organization (INMARSAT), 1976 INMARSAT Operating Agreement.

17. Convention on the Liability for Maritime Claims, 1976.

18. Torremolinos Convention for the Safety of Fishing Vessels, 1977.

19. Protocol relating to the International Convention for the Prevention of Pollution from Ships, 1978.

20. Protocol relating to the International Convention for the Safety of Life at Sea, 1978.

21. International Convention on the Standards of Training, Certification and Watch keeping for Sea farers, 1978.

APPENDIX II

Registration
SOR/78-669 22 August, 1978

CANADA SHIPPING ACT

Eastern Canada Traffic Zone Regulations

P.C.1978-2590 16 August, 1978

His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to section 730 of the Canada Shipping Act, is pleased hereby to make the annexed Regulations respecting traffic movements within the Eastern Waters of Canada, effective October 1, 1978.

REGULATIONS RESPECTING TRAFFIC MOVEMENTS WITHIN THE EASTERN WATERS OF CANADA

Short Title

1. These Regulations may be cited as the Eastern Canada Traffic Zone Regulations.

Interpretation

2. In these Regulations,

"berth" includes any wharf, pier, lock, anchorage or mooring buoy; (poste)

"Commissioner" means the Commissioner, Canadian Coast Guard; (commissaire)

"Eastern Canada Traffic Zone" means Canadian waters on the east coast of Canada and fishing zone 1 as prescribed by the Fishing Zones of Canada (Zones 1, 2, and 3) Order

(a) south of the sixtieth parallel of north latitude, and
(b) in the St. Lawrence River east of the meridian of 66 degrees 23' west longitude

but does not include the waters of Ungava Bay or Canso Zone as defined in the Canso Zone Marine Traffic Regulations or the waters within the Vessel Traffic Management and Information Systems for Halifax Harbour and Approaches, the Bay of Fundy and Approaches, Port aux Basques Harbour and Approaches, Placentia Bay and Approaches and St. John's

Harbour and Approaches as defined in Notices to Mariners; (zone de trafic de l'est du Canada)

"marine traffic instruction" means an instruction issued by a marine traffic regulator to one or more ships, for the purposes of these Regulations; (instruction relative au trafic maritime)

"marine traffic regulator" means a person authorized by the Commission to regulate marine traffic for the purposes of these Regulations; (regulateur du trafic maritime)

"person in charge of the deck watch" includes every person who has immediate charge of the navigation or security of a ship, but does not include a pilot; (responsable du quart a la passerelle)

"traffic clearance" means an authorization by a marine traffic regulator for a ship to proceed subject to the conditions specified in the Authorization and bearing the identifier ECAREG CANADA (autorisation)

Application

3. (1) Subject to subsection (2), these Regulations apply within the Eastern Canada Traffic Zone to

(a) every ship of 500 tons, gross tonnage, or more;
(b) every ship that is engaged in towing or pushing one or more vessels, where the combined tonnage of that ship and its tow amounts to 500 tons, gross tonnage, or more; and
(c) every ship carrying a cargo comprised partially or entirely of a pollutant or dangerous goods or engaged in towing or pushing one or more vessels carrying a cargo comprised partially or entirely of a pollutant or dangerous goods as prescribed in the

(i) Oil Pollution Prevention Regulations,
(ii) Pollutant Substances Regulations,
(iii) Dangerous Goods Shipping Regulations, or
(iv) International Maritime Dangerous Goods Code (IMCO).

(2) Sections 6, 7, and 8 do not apply to a ship that is being towed.

Responsibility

4. (1) Subject to subsection (2), the master and person in charge of the deck watch shall comply with every marine traffic instruction.

(2) Notwithstanding subsection (1), the master or persor in charge of the deck watch may take any action that may be

required by the ordinary practice of seamen to ensure the safety of life and the safety of the ship or any other ship.

(3) The master shall supply all information that is required of him under paragraph 5(a).

(4) Issuance of a traffic clearance for a ship does not relieve the master and person in charge of the deck watch from their obligation to comply with any other applicable law.

(5) When communications required by these Regulations cannot be conducted owing to radio transmitting or receiving difficulties, a ship may continue with its voyage and the master shall make the required communication as soon as possible.

(6) Traffic clearance requests and reports required by these Regulations shall be addressed to ECAREG CANADA and communicated by means of any convenient Canadian Coast Guard Radio Station.

5. For the purpose of regulating marine traffic, a marine traffic regulator may

(a) require the master of a ship to supply information in respect of that ship;
(b) issue a marine traffic instruction; and
(c) issue a traffic clearance.

Traffic Clearance

6. (1) Traffic clearances shall be obtained and the requests for such clearances shall be made by the master of a ship as follows:

(a) before the ship enters the Eastern Canada Traffic Zone from seaward, except where it enters during a voyage between two ports both within the Zone, it shall obtain a traffic clearance and the request shall be made at least twenty-four hours prior to entering the Zone or, where the last port of call is less than twenty-four hours from the Zone, as soon as practicable;
(b) before the ship departs from any berth, except where it is proceeding to another berth in the same port, it shall obtain a traffic clearance and the request shall be made not more than two and not less than one hour before the ship is due to depart; and
(c) before the ship proceeds after being stranded, stopped due to breakdown of the main propulsion machinery or steering gear or involved in a collision, it shall obtain a traffic clearance and the request shall be made as soon as the master ascertains the intended time of resumption of the voyage.

(2) A traffic clearance for a ship to depart a berth is valid for a period of one hour after the time specified for the departure.

(3) Notwithstanding subsection (1), if an emergency occurs as a result of which it is necessary for a ship to move prior to obtaining a traffic clearance, a traffic clearance request shall be made as soon as possible thereafter.

(4) Subject to subsection (5), every traffic clearance request made pursuant to paragraph (1)(a) or (b) shall contain the following information:

(a) name of ship and radio call-sign;
(b) name of master;
(c) position and, if applicable, speed;
(d) as applicable, the estimated time of
    (i) entry into the Eastern Canada Traffic Zone, or
    (ii) departure from a berth;
(e) destination, estimated time of arrival and intended route through the eastern Canada Traffic Zone;
(f) last port of call, if applicable;
(g) draft;
(h) brief description of main cargo and pollutant cargo or dangerous goods by classification;
(i) deficiencies, if any, in respect of the requirements of the Charts and Publications Regulations;
(j) defects, if any, in the ship's hull, main propulsion machinery, steering gear, anchors and cables, radar, compass or essential radio communication equipment;
(k) any release of pollutants from the ship or any damage sustained that may result in pollution;
(l) name of Canadian or United States agent, as applicable; and
(m) date of expiry of the Non-Canadian Ship's Compliance Certificate, if issued.

(5) Where a traffic clearance is obtained for a ship and has expired because of a revised time of departure, a new traffic clearance shall be obtained but the request therefore need contain only the name of the ship and its radio call-sign, position and estimated time of departure.

(6) Every traffic clearance request made pursuant to paragraph (1)(c) shall contain the ship's name and radio call-sign, position and the circumstances giving rise to the request.

Calling-in-Points

7. (1) Subject to subsection (2), when a ship crosses the seaward boundary of the Eastern Canada Traffic Zone, either on entering or leaving that Zone, a report containing the

following information shall be forwarded by the master to a marine traffic regulator:

(a) name of ship and radio call-sign;
(b) position of ship and time of crossing the Zone boundary;
(c) any significant change in the information supplied in the traffic clearance request;
(d) weather conditions detrimental to safe navigation; and
(e) prevailing ice conditions, if applicable.

(2) Paragraphs (1)(c) and (d) apply only where a ship is entering the Eastern Canada Traffic Zone.

(3) When a ship arrives at a berth within the Eastern Canada Traffic Zone, a report containing the followig information shall be forwarded by the master to a marine traffic regulator:

(a) name of ship and radio call-sign;
(b) port of arrrival; and
(c) time of arrival.

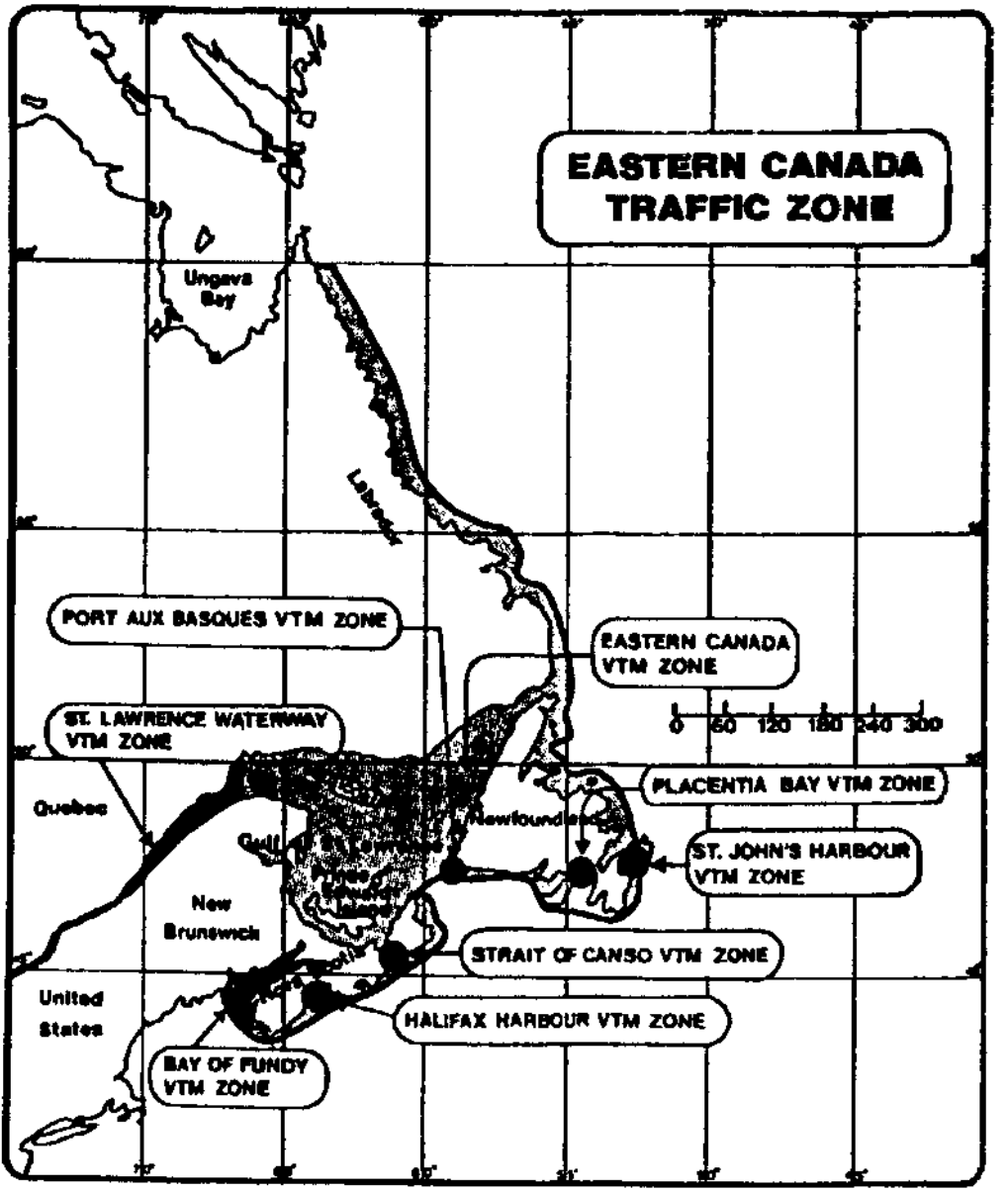
Additional Reports

8. A report containing the name, radio call-sign and position of a ship and information pertaining to the circumstances involved shall be forwarded to a marine traffic regulator by the master of the ship when he or the person in charge of the deck watch becomes aware of any of the following circumstances:

(a) an accident on board or to the ship, or fire on board;
(b) defect, if any, in the ship's hull, main propulsion machinery, steering gear, anchors and cables, radar, compass or essential radio communication equipment;
(c) a ship in apparent difficulty or involved in a casualty;
(d) an obstruction dangerous to navigation;
(e) an aid to navigtion malfunctioning, damaged, missing or off position;
(f) any pollution of the waters;
(g) any ship creating a hazard to traffic;
(h) any other danger to navigation; and
(i) any significant change in information previously supplied.

Equivalents

9. Where these Regulations require a particular procedure, the Commissioner may, on written request, permit any other procedure if he is satisfied that such other procedure is at least as satisfactory for the purposes of these Regulations as the required procedure.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PLACENTIA BAY VTM ZONE
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VTM ZONE
New
Brunswick
STRAIT OF CANSO VTM ZONE
United
States
HALIFAX HARBOUR VTM ZONE
BAY OF FUNDY
VTM ZONE

APPENDIX III

Informal Composite Negotiating Text/Revision 1
(Doc. A/CONF. 62W. 10/Rev.1, 28 April 1979)

Article 211 - Pollution from vessels

1. States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards for the prevention, reduction and control of pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline and related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.

2. States shall establish laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or vessels of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competence international organization or general diplomatic conference.

3. States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or a call at their offshore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Whenever such requirements are established in identical form by two or more coastal States in an endeavor to harmonize policy, the community shall indicate which States are participating in such cooperative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such cooperative arrangements to furnish, upon the request of that State, information as to whether it is proceeding to a State of the same region participating in such cooperative arrangements and, if so, to indicate whether it complies with the port entry requirement of that State. The provisions of this article shall be without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2.

4. Coastal States may, in the exercise of their sovereignty within their territorial sea, establish national laws and regulations for the prevention, reduction and control of marine pollution from vessels, including vessels exercising the right

of innocent passage. Such laws and regulations shall, in accordance with section 3 of Part II, not hamper innocent passage of foreign vessels.

5. Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones establish laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organizations or general diplomatic conference.

6. Where international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and where coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where, for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization of the protection of its resources, and the particular character of its traffic, the adoption of special mandatory methods for the prevention of pollution from vessels is required, coastal States, after appropriate consultations through the competent international organization with any other countries concerned, may for that area direct a communication to the competent international organization, submitting scientific and technical evidence in support, and information on necessary reception facilities. The organization shall, within twelve months after receiving such a communication, determine whether the conditions in that area correspond to the requirements set out above. If the organization so determines, the coastal State may, for that area, establish laws and regulations for the prevention, reduction and control of pollution from vessels, implementing such international rules and standards or navigational practices as are made applicable through the competent international organization for special areas. Coastal States shall publish the limits of any such particular, clearly defined area, and laws and regulations applicable therein shall not become applicable in relation to foreign vessels until fifteen months after the submission of the communication to the competent international organization. Coastal States, when submitting the communication for the establishment of a special area within their respective exclusive economic zones, shall at the same time notify the competent international organization if it is their intention to establish additional laws and regulations for that special area for the prevention, reduction and control of pollution from vessels. Such additional laws and regulations may relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards and shall become applicable in relation to foreign vessels 15 months after the submission of the communication to the competent international

organization, and provided the organization agrees within twelve months after submission of the communication.

7. The international rules and standards referred to in this article should include inter alia those related to prompt notification to coastal States, whose coastlines or related interests may be affected by incidents including maritime casualties which involve discharges or probability of discharges.

1. On the distinction between "inclusive interests" and "exclusive interests", see Myres S. McDougal, Harold D. Lasswell, and Ivan A. Vlasic, Law and Public Order in Space (New Haven, Conn.: Yale University Press, 1963), pp. 145-156. Applied to the law of the sea, the "common interest" is conceived as an "economic balance of exclusive and inclusive uses." Myres S. McDougal and William T. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea (New Haven, Conn.: Yale University Press, 1962), pp. 51-56. This work was, of course, written before it was possible to anticipate the massive shifting of the balance between exclusive and inclusive uses which has taken place since the early 1960's. It was also written before the environmental implications of ocean management were widely understood to be a necessary element in the new law of the sea. For a brief discussion of the applicability of the McDougal-Lasswell theory of interests to international environmental law, see Jan Schneider, World Public Order of the Environment: Towards and International Ecological Law and Organization (Toronto: University of Toronto Press, 1979), pp. 9-11.

2. See pp. 11-13, Infra.

3. Informal Composite Negotiating Text/Revision 1 (Doc. A/Conf. 62/WP. 10/Rev.1, 28 April 1979) Part XII, Section 5.

4. Ibid., Section 6.

5. IMCO is not yet named in the ICNT/Rev. 1. Part 12 refers merely to "The competent international organizations, global or regional." For a recent analysis of all such references in the UNCLOS III text, see J. D. Kingham and D. M. McRae, "Competent International Organizations and The Law of the Sea," 3 Marine Policy (1979):106.

6. It has recently been argued that the concepts of "custodianship" and "delegation of powers", advanced by Canada at the Stockholm Conference on the Human Environment and at the UN Seabed Committee, should be regarded as central concepts in international environmental law. Schneider, note 1, supra, pp. 108-110.

7. For example, BIMCO (the Baltic and International Maritime Conference), the Gulf of Bothnia Committee, and the Interim Baltic Marine Environment Protection Commission are all regional international organizations which deal somewhat with the problem of ship-generated marine

pollution in the Baltic area. Moreover, a number of national ship-owners' organizations throughout the world also deal, in varying degrees, with the problems presented by ship-generated marine pollution. Finally, it should also be noted that any number of regional fishery organizations too must come to grips with and deal with the problem of ship-generated pollution.

8. Harvey B. Silverstein, Supership and Nation-States. The Transnational Politics of the Inter-Governmental Maritime Consultative Organization (Boulder, Colo.: Westview Press, 1987), and R. Michael M'Gonigle and Mark W. Zacher, Pollution, Politics and International Law. Tankers at Sea (Berkeley, Calif.: University of California Press, 1979), ch. 3.

9. Convention of the Inter-Governmental Maritime Consultative Organization, 289 U.N.T.S. (1958):48.

10. Protocol of Proceedings of the International Marine Conference, 1889, vol. 3 (Washington: U.S. Government Printing Office, 1890), pp. 346-445.

11. Sir Osborne Mance, International Sea Transport (London: Oxford University Press, 1945), p. 7.

12. See M'Gonigle and Zacher, note 8, supra, ch. 3.

13. In the past, the composition of MSC membership has been controversial at times. It required an opinion from the International Court of Justice at one stage. See I.C.J. Reports 1960, pp. 150-178.

14. See Silverstein, note 8, supra, ch. 2.

15. IMCO Resolution A 316 (E.S.V.).

16. IMCO Resolution A 407 X lists these organizations.

17. During the period 1958 to 1972 no private international ecological, oceanographic, conservation or pollution control organization had consultative or representative status with IMCO. By 1977, only one such organization, "Friends of the Earth", had attained consultative status.

18. J. Plano, International Approaches to the Problem of Marine Oil Pollution. Institute for the Study of International Organization (Brighton: University of Sussex, 1972), p. 19.

19. IMCO News, January 1979, p. 14.

20. J. H. Beattie, "Traffic Routing at Sea 1857-1977," 31 J. Nav. (1978):167.

21. IMCO Dec. MSC/MEPC/WP.

22. Part III of this paper (and, to a lesser extent, also Part II) were greatly assisted by the research efforts of Mark A. Benton, LL.M. student under Professor Gold's supervision in 1978/79. See Mark A. Benton, Routes: Vessel Traffic Regulation and Maritime Law. Unpublished LL.M. thesis, Dalhousie University, 1979.

23. Not included are the many vessels under 100 g.r.t. which greatly contribute to traffic congestion. See A. N. Cockcroft, "Statistics of Ship Collisions," 31 J. Nav. (1978):213.

24. Ibid.

25. Ibid.

26. See Beattie, note 20, supra.

27. L. Oudet, "The Economics of Traffic Circulation," 25 J. Nav. (1972):60; Comment, "The Establishment of Mandatory Sealanes by Unilateral Action," 22 Catholic Univ. L. Rev. (1972):108.

28. See Protocols, note 10, supra, pp. 264-281.

29. See Beattie, note 20, supra.

30. O. Burnham and C. Jansky, "Prescribed Courses for the Navigation of the Great Lakes of North America," 17 J. Nav. (1964):376.

31. 536 U.N.T.S. 27.

32. Of 3,755 replies to the questionnaire, only 107 were opposed to routing. "Traffic Separation in the Dover Strait." Report of a Working Group. 16 J. Nav. (1963): 5; and "The Separation of Traffic at Sea." Report of a Working Group, 19 J. Nav. (1966):411.

33. IMCO Resolution A.205 (VII).

34. International Conference on Revision of the International Regulations for Preventing Collisions at Sea, 1972. IMCO Sales No. 73.01.B.

35. R. K. Emden, "The Dover Strait Information Service," 28 J. Nav. (1975):129; and "The Dover Strait Information Service: Recent Progress," 29 J. Nav. (1976):263.

36. Cockcroft, note 23, supra, P. 213.

37. IMCO. Ship's Routing, 4th ed. (1978).

38. Emden, note 35, supra (1976), p. 165.

39. Comment, note 27, supra, p. 109.

40. As a natural reaction to the major pollution damage which occurred on the coast of Brittany in the aftermath of the AMOCO CADIZ grounding.

41. See Government of Canada, "Seaway Regulations," Sor/74-98; 75-86; 75-225; 77-100; 78-258.

42. N. Schimmel, "Traffic Regulations in Europort and Its Approaches," in Traffic Engineering. Proceedings of a Conference of the Royal Institutes of Naval Architects and Navigation. London (1973), p. 177.

43. Both the U.S. and French governments were spurred into action by the public outcry which followed the ARGO MERCHANT and SANSINENA disasters in 1978 and the AMOCO CADIZ in 1978.

44. Canada, Final Report of the Royal Commission Inquiry Into the Pollution of Canadian Waters by Oil and Formal Investigation into Grounding of the Steam Tank Arrow.

45. Government of Canada, "The Canso Zone Regulations," SOP/74-79.

46. Canadian Notice to Mariners 26/78.

47. The Canada Shipping Act (CSA), RSC 1980, 2nd Supp. C.17, s. 730(1)(0) empowers the Government to make regulations for traffice control in all Canadian Waters and Fishing Zones. As of January 1, 1977, the Atlantic Fishing Zone was extended to 200 nautical units (see SOP/77-62).

48. Government of Canada, Regulations, SOR/78-669 s. 8.

49. CSA s. 775.

50. IMCO News, January 1979, p. 20.

51. See Convention on International Civil Aviation, Chicago, 1944. ICAO Doc. 7300, Act. 47.

COMMENTARY

Dr. Jan Schneider
Covington and Burling

First of all, I would like to compliment Professors Edgar Gold and Douglas Johnston on their most interesting and innovative contribution, and Professor Kaldone Nweihed on his insights into IMCO, special attitudes of developing countries, Canada, and other matters. I would also like to say that I am delighted, and indeed honored, to find myself on the same panel as my distinguished colleague and old friend, Ambassador Andres Rozental.

Turning now to the general subject before us -- the question of marine pollution, with a special emphasis on vessel-source pollution -- I would again like to compliment Professors Gold and Johnston on their controversial paper. Having been in New Orleans for the past week, however, I unfortunately never received the paper prior to the ride here on the bus this morning. Thus, due to the change of scheduling -- and I, too, certainly hope that Dr. Hodgson is much better -- due to the change of scheduling, my remarks this morning will be something of an instant analysis. While I very much agree with a great deal (or, at least, a lot) of what was said in the paper, I must also admit to having somewhat of a different focus on the issues before us.

As regards vessel traffic management, one could certainly not disagree with Professor Gold, that the emergence of national and local traffic control systems in many countries is a welcome development from the environmental perspective. In the Channel, in the Straits of Juan de Fuca and elsewhere, traffic separation schemes and comprehensive vessel traffic management systems should, if observed, prove effective and valuable measures for the prevention of ship-generated pollution. No one, to the best of my knowledge, has ever before undertaken to describe the requirements and workings of these systems in simple terms comprehensible to us lawyers, and the main paper this morning certainly represents a major contribution to the literature in this regard. While, therefore, commending some of its basic conclusion to you, I would, however, like to try and approach the specific question of vessel traffic management, and the more general one of protection and preservation of the marine environment, from a different focus of inquiry.

I. Vessel Traffic Management at UNCLOS III

One rather gathers from Professor Gold's remarks this morning that he is somewhat skeptical about the achievements of the international community, in particular of the Third

United Nations Conference on the Law of the Sea (UNCLOS III) and the Intergovernmental Maritime Consultative Organization (IMCO), as regards prevention and control of marine pollution, especially vessel source pollution. With specific regard to the topic emphasized by Professor Gold, it is true that UNCLOS did not seek to elaborate, or even to take note of, specific vessel traffic management systems. But what did the conference do in this regard? Vessel traffic management systems are not useful unless they are respected, and indeed, unless their observation is mandatory upon ships navigating in their areas of application. What UNCLOS did, I would submit, is to establish the jurisdictional base for bringing this, and a lot of other developments, about.

As Professor Gold pointed out, under the 1972 Convention on International Regulations for Preventing Collisions at Sea, drafted under the auspices of IMCO, coastal states did not have the right to make mandatory observance of traffic separation schemes or vessel traffic management patterns in their proximate waters. Rule 10 of that convention merely prescribes certain modes of proceeding for vessels using a traffic separation scheme, and provides that "[a] vessel not using a traffic separation scheme shall avoid it by as wide a margin as practicable." Many ship owners and captains felt that any mandatory requirement to use sea lanes or separation schemes would violate the right to exercise innocent passage in the territorial sea.

Now, however, under the draft articles developed at UNCLOS III, the current version of which are found in the Informal Composite Negotiating Text/Revision 1 (known as the ICNT/Rev. 1), coastal state jurisdiction to prescribe mandatory adherence has been clarified -- or established. As regards sea lanes and traffic separation schemes in the territorial sea, Article 22, paragraph 1, expressly provides that:

> "The coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships."

And paragraph 2 of that same article adds specifically -- and I will read that, too:

> "In particular, tankers, nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes."

In addition, ICNT/Rev. 1 Article 41, on sea lanes and traffic separation schemes in straits used for international

navigation, provides a new means for developing such schemes for important straits. It allows states bordering such straits to designate sea lanes and prescribe separation schemes, conforming to generally accepted international regulations, and subject to adoption by the competent international organization, for vessels exercising the new "transit passage". Also, Article 53 clarifies and establishes the right of archipelagic state to designate sea lanes and separation schemes -- again, conforming to generally accepted regulations and subject to adoption by the competent international organization -- for vessels engaged in the new "archipelagic sea lanes passage". And, as mentioned by Professor Gold, a commitment to develop international routing schemes to minimize the threat of accidents which might cause pollution is later found in Article 211 of the ICNT/Rev. 1.

These new provisions drafted by UNCLOS provide the necessary clarification of coastal state and international rights and vessel responsibilities, so that states may now go back to IMCO and other global and regional organizations to work out acceptable vessel traffic management schemes that will be required and that will be efficacious. This, I believe, reflects the general function of UNCLOS III, to provide the overall conceptual framework for the codification and progressive development of the new law of the sea, including the developing international law for the prevention, reduction and control of marine pollution. Within this overall framework, further clarification, elaboration and advancement of the law can then go forward at multiple and interpenetrating levels of international organization, regional or bilateral accord, and national legislation or state practice ... points emphasized by Professor Nweihed.

But, expanding from Professor Gold's focus on prevention of pollution, I would like to look now at this overall process of the prescription and application, at multiple levels of international decision-making, for prevention and also reduction and control of marine pollution. In keeping with the concentration of this panel, I will, however, focus primarily on prevention, reduction and control of ship-generated pollution. (Since this approach will involve a lot of reference to the environmental work of the Third Committee of UNCLOS III, and since I know Andres Rozental is supposed to be speaking on the work of the Third Committee and its probable impact on the shipping interests of developing countries, there may be a lot of overlap in our provisions of background information. Any time that happens, I invite, and would indeed welcome, his joining in and making this a dialogue. From different perspectives, I think we both believe in forms of creeping jurisdiction. So, if I creep into his jurisdiction, he can come galloping back into mine.)

II. Codification and Progressive Development of Marine Pollution Law at Multiple Levels of International Interaction

On codification and progressive development of marine pollution law at multiple levels of international interaction, it should be noted that ten years ago, when the negotiations now approaching conclusion at the Third United Nations Conference on the Law of the Sea first began, there was very little customary or conventional international law concerning the prevention and control of pollution of the marine environment. Since then, states have really gone a long way toward filling this legal void at the broad multilateral level, supplemented and complemented by developments at the regional and at the national levels. Very briefly, what is the regime emerging from UNCLOS III? And how do the activities of the Intergovernmental Maritime Consultative Organization (IMCO) and the United Nations Environment Program (UNEP), of various regional organizations, and of nation states, fit into this overall framework?

A. UNCLOS III

To start with UNCLOS III, I hesitate to undertake any such analysis in the presence of the distinguished Chairman of the marine pollution negotiations, Sr. Jose Luis Vallarta of Mexico, but I will attempt it anyway. At UNCLOS III, states have managed to agree on certain general principles for the protection and preservation of the marine environment, and on necessary measures of global and regional cooperation and of technical assistance. Among other things, they will, for the first time in treaty form, establish the basic responsibility of states to protect and preserve the marine environment (as mentioned by Professor Nweihed); and they will create a positive obligation on the part of states both to monitor the risks and effects of marine pollution, and to undertake environmental assessments of the risks and effects of their ocean activities. States have also agreed on provisions for international rules and national legislation, and enforcement measures, for the prevention, reduction and control of pollution from all sources: pollution from land-based sources, from seabed activities, from activities in the International Area, from dumping, from vessels, and pollution coming from or through the atmosphere.

With particular reference to vessel-source pollution, there are important innovations both as regards standard setting or prescription, and as regards application or enforcement of the law, accomplished by UNCLOS III. As setting or prescription, and as regards application or enforcement of the law, accomplished by UNCLOS III. As to the former, standard setting, the most notable developments come in the area of coastal state rights. In skeletal form, for those not too familiar with the

marine pollution text, the regime developed in the ICNT/Rev.1 looks as follows: first, in the territorial sea, coastal states may exercise their sovereignty to establish anti-pollution laws and regulations, provided that such laws and regulations "shall not apply to the design, construction, manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards" [article 21(2)]; second, in the wider exclusive economic zone, coastal states can prevent dumping, and they may establish certain other laws and regulations giving effect to international rules and standards; and third, there are certain supplementary provisions for "special areas" within the economic zone with particularly sensitive oceanographical or ecological conditions.

Turning from standard setting to enforcement competence, UNCLOS III has also developed several important new concepts, especially as regards universal port state enforcement rights. While traditionally, as Professor Gold pointed out, the province almost exclusively of flag states (or states of registry), new enforcement powers have now been recognized to lie also with port and coastal states. Port states will be empowered to undertake certain enforcement procedures in respect of discharge violations -- even those occurring outside their own internal waters, territorial seas, and exclusive economic zones (that is to say, universal enforcement jurisdiction). Also, under carefully delineated circumstances, coastal states will be able to cause proceedings and other measures to be taken in respect of violations of international and national laws and regulations or applicable international rules and standards.

Enforcement powers are, however, to be subject to various highly detailed safeguards, to make sure that freedom of navigation is maintained, along with efforts to ensure environmental protection and preservation. (The conference has been groping towards a much heralded "delicate balance".) In the UNCLOS text there are also specific articles on intervention in cases of marine casualties (broader than the Intervention convention), on sovereign immunity, and on "ice-covered areas" (which are extra-special).

Obviously, there is not time here to go into the details of all these articles, their effect on coastal states or developing countries, or the positions of various countries on them. Any such elaboration I will leave to the distinguished next speaker. I will just briefly attempt to show how they have both given impetus to, and responded to developments in, various other international and regional arenas.

B. IMCO and UNEP

Professor Gold has this morning rather severely criticized competent international organizations. To begin with multilateral developments in the Inter-Governmental Maritime

Consultative Organizations (IMCO) and the United Nations Environment Program (UNEP), these organizations, it must be noted, have not remained idle in the past ten years, pending the long-awaited conclusion of UNCLOS III. First, as to IMCO, I personally find it a bit odd to be in the position of defending that organization. Professor Nweihed has, of course, already done a lot of this. Over the past ten years, however, several important conventions have been concluded (most of them under IMCO auspices) including: the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (known as the IMCO Public Law or Intervention Convention) and the companion 1969 International Convention on Civil Liability for Oil Pollution Damage (known as the IMCO Private Law of CLC Convention); the 1971 International Convention on Establishment of an International Fund for Compensation for Oil Pollution Damage (the IMCO Fund Convention); the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Dumping Convention); the 1972 Convention on International Regulations for Preventing Collisions at Sea (discussed earlier); the 1973 International Convention for the Prevention of Pollution from Ships (the much heralded Marpol Convention); and the 1974 International Convention for the Safety of Life at Sea (the SOLAS Convention). Subsequently, last year, following a long and highly serious spate of tanker accidents off the coast of the United States, IMCO responded very quickly (within eleven months), and held a special International Conference on Tanker Safety and Pollution Prevention in February of 1978. This conference concluded important protocols expanding both the Marpol and SOLAS Convention, just mentioned. Also, in the wake of this same spate of tanker spills, the new Convention on Training, Certification and Watchkeeping was also adopted under IMCO auspices.

This long grocery list, I would submit, represents an impressive record of achievements in a relatively short time. The main problem, as Professor Gold has noted, is that most of these international agreements took five to ten years to come into force, and neither Marpol nor SOLAS, nor of course, the 1978 Protocols, have yet come into force or are likely to do so in the near future.

While IMCO has led with the broadly multilateral approach, the United Nations Environment Program -- if I may now put on that hat, Professor Johnston -- UNEP has spurred and coordinated several regional efforts. For the Mediterranean, under the auspices of UNEP, the eighteen concerned countries in 1976 adopted a Convention for the Protection of the Mediterranean Sea Against Pollution (known as the Barcelona Convention). They concurrently concluded a Protocol on Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, and a second Protocol concerning Cooperation in Combating Pollution of the Mediterranean Sea by Oil and Other

Harmful Substances in Cases of Emergency. The provisions emerging from Kuwait closely track those previously emerging from Barcelona, and, as with the Mediterranean, the Gulfs countries are now also working on companion protocols on dumping and on seabed-source and land-based pollution. This, too, I would say, represents a very impressive beginning -- but only a beginning -- of a viable regime for the protection and preservation of the marine environment, which will take account of the legitimate needs of freedom of navigation.

C. Other Regional Efforts

The UNEP Regional Seas Program itself does not, of course, represent the only regional efforts. In anticipation of, or supplementary to, or complementary with, broadly multilateral efforts, several groups of states have proceeded to address themselves to problems of ship-generated pollution at the regional level. First of all, in the North-East Atlantic area, an early important step was the Agreement Concerning Pollution of the North Sea by Oil, signed at Bonn, West Germany on June 9, 1969. This early measure was soon supplemented by the 1972 Oslo Regional Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft. For a second example, as regards the Baltic, there is the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area; and, perhaps two subregional agreements in that area should be mentioned: The Copenhagen Agreement Concerning Cooperation in Measures to Deal with Pollution of the Sea by Oil and the Convention on the Protection of the Marine Environment (which has specific provisions for marine pollution.)

I am not going to go on cataloguing a lot of conventions. The main point that should, at least, be apparent even from brief mention of all these international agreements is that somewhat slowly, fitfully, and working at many levels of interaction, the international community has been groping toward an effective legal regime for the oceans, which will accommodate both the legitimate demands for protection and preservation of the marine environment and those for navigational rights and freedoms. The goal is far from attained, but there are a number of treaties and other agreements which, if brought into force and implemented, provide a sound foundation for future progressive development of the law of the sea.

D. National Legislation

A few words might be added about the contribution of national legislation in this on-going process. Professor Nweihed has already discussed Canadian policies at great length, and I won't go over them again. And I note, both on the panel and in the audience, a number of United States and Canadian friends who could easily be enticed to revive the old furious

debate over the legality of the Canadian Arctic Waters Pollution Prevention Act of 1970. Nevertheless, that controversy has, hopefully, been put to rest, bilaterally, internationally and otherwise, in the UNCLOS "ice-covered areas" article, and there is not time to discuss it further here. The point, however, that I would like to make, is, once again, that international law goes forward -- often somewhat sporadically and unevenly -- on many levels of interaction. The division seems to be, if you don't like a national measure, you label it despicable "unilateral action" while proponents can champion the same piece of legislation as "state practice" in advance of the progressive development of international law.

Finally, sometimes, of course, states agree to cooperate in the progressive development of law. In this respect, I was encouraged, on reading the joint press statement of Presidents Carter and Lopez Portillo a few weeks ago, with which I suspect Andres Rozental had a lot to do ... and I will quote a part from it:

> "Both Presidents noted that the common border offers unique opportunities for close collaboration in many areas. They expressed their interest in enhancing the environment along the border and preserving the quality of life in the region. Presidents Carter and Lopez Portillo agreed on the need for both countries to prevent events or actions on one side of the land or maritime boundary from degrading the environment on the other side. They also instructed their Administrations to give a high priority to such questions. They also agreed to work within the consultative mechanism to determine if it is possible or appropriate to conclude agreements for measures by both countries to lessen or eliminate environment damage in the future."

CONCLUSION

In conclusion, it follows from all this, states have, in fact, come a long way in the past ten years in the progressive development of a viable regime of international maritime law, taking better account of environmental variables and considerations, while at the same time accommodating the basic needs of freedom of navigation and maritime transport. There are, admittedly, a lot of deficiencies -- and, indeed, gaping holes -- in the current framework. For example, Professor Gold spoke at length about the efficacy of and a need for better vessel traffic management schemes for prevention of marine pollution. There is also a glaring need for further work on contingency plans and measures to deal with marine pollution emergencies. And, for another example, despite the 1969 and 1971 IMCO Civil Liability and Fund Conventions, the general

area of responsibility and liability for environmental damage from vessels and from other sources is certainly sorely deficient. In spite of these defects, however, the task of developing a workable, international, environmental law, for the prevention, reduction and control of marine pollution, which will also meet the legitimate needs of maritime transport, is well begun -- but only well begun. I think, in other words, that, while much of the criticism this morning is well deserved, we should at least also recognize the positive progressive developments. Thank you.

COMENTARIO DEL DOCTOR KALDONE NWEIHED:

Antes de entrar en la materia que a mí se me asignara, no puedo pasar por alto el importante dato de que México ha jugado un papel distinguido, específicamente en el área de la contaminación marina y control, y la observación del ambiente marino, como se desprende de haber sido sede de la conclusión del Tratado de Tlatelolco que toca la materia de una manera sustantiva; igualmente, fue la ciudad de México una de las cuatro importantes urbes del mundo en que se ha abierto a la firma uno de los tratados más importantes sobre derecho del mar, y también es importante e interesante notar, por casualidad, que nuestro distinguido orador, ayer, el señor embajador Manuel Tello, en representación del señor Castaneda, fue principalmente quien primero firmara en Londres, en junio de 1978, los protocolos sobre las Convenciones de 1973 y 1974 de IMCO, por lo que me permito concebir un signo de buen augurio.

La ponencia que me ha tocado comentar hoy, de quererla calificar con una sola palabra, la llamaría yo "revolucionaria" en materia del derecho del mar. Y no es para menos, ya que nos viene del Canadá, país que hace casi nueve años sorprendiera al mundo con su legislación ártica de abril de 1970, que abriera nuevos capítulos desafiantes en el derecho del mar y que hiciera posible que la Conferencia del Mar se tornara más susceptible a la cuestión ecológica. Por título lleva un texto que en castellano había traducido yo como: "La contaminación del mar por barcos como elemento generador de la navegación regulada"; después de haberla oído, estoy tentado a modificar el término "elemento generador", para sustituirlo por otro que dice "el elemento" o tal vez "el fundamento jurídico de nuevas tendencias en el derecho del mar". Ella se basa en dos puntos cardenales: uno, el hecho fenomenológico de la contaminación del mar, per se, como algo impactante en la conciencia mun-

dial, sobre todo después de haberse cursado ese turbulento caso marino que se llamó el "Torrey Canyon", en 1967.

Por otra parte, introduce el nuevo elemento de la regulación de la navegación por parte del Estado costero en una nueva sociedad, por así decirlo, con la organización internacional más apta para encarar este tipo de problemas de contaminación, como la IMCO, como se le suele conocer por sus acrónimos en inglés. De hecho, ligando lo que hemos escuchado con las ponencias del día de ayer, es preciso recordarles que efectivamente el punto de contacto, la línea de fuego, por así decirlo, entre las dos posiciones, que de una manera muy inteligente y clara esbozara el doctor Oxman ayer, y que fuera contestada por otros oradores, entre ellos el distinguido embajador Rodríguez Valencia, estos dos enfoques de encarar el problema de la zona económica sobre su administración, precisamente lindan en el terreno común de la navegación dentro de la zona económica, pues si este problema no existiera, tampoco existirían todas las demás trabas aparentes que hoy siguen pendientes por reglamentar, para que de una vez se llegara a un acuerdo definitivo sobre esta zona. Y, por otra parte, el tema de la ponencia de hoy viene siendo el punto de contacto sobre el derecho del mar como parte del derecho internacional público y el derecho mercantil marítimo, como derecho privado, un divorcio de más de dos millones de años que ha habido entre ellos. La separación que hoy vemos ya no es tan necesaria, puesto que el elemento perturbador de la contaminación del mar por buques, ha traído como consecuencia el tema inevitable de resarcir los daños y perjuicios, por lo que se han ligado estas dos ramas del derecho de una manera ahora indisoluble.

Hay ciertos puntos muy interesantes en la ponencia que me han llamado la atención y que voy a tratar de comentar brevemente, precisamente para dar tiempo a los demás comentaristas que me siguen, en tres partes, como son:

Primeramente, un comentario sobre la realidad ecológica que es el fundamento ético, filosófico, por así decirlo, de esta actividad nueva hacia el mar y la inversión de valores en su derecho, que está haciendo paulatina y gradualmente de la contaminación del medio ambiente marino y de la limpieza de los mares, un principio por encima del otro principio tricentenario, de la libertad irrestricta de la navegación en los océanos abiertos.

El segundo punto sería simplemente tratar de encajar la contaminación por buques dentro del cuadro general de la contaminación de los mares y de las diferentes fuentes que la acarrean.

Por último, un breve comentario sobre la actitud de los países en desarrollo frente a las nuevas leyes, a los nuevos reglamentos canadienses, franceses también, que le dan al Estado costero una directa inferencia en el control del tráfico, que viene hacia sus costas precisamente para la prevención de la contaminación.

El primer punto, que es más, tal vez, teórico que práctico, se refiere a lo dicho por los distinguidos autores de la ponencia, cuando hablan del año de 1945 como inicio de una nueva etapa en la concepción filosófica del derecho del mar, hablando simultáneamente de dos factores, como son el económico y el ecológico. Estoy de acuerdo básicamente con ellos. Quisiera simplemente dividir esta etapa en dos: la primera, que fue la puramente económica, acompañada desde luego de aquella tendencia conservancionista de la que hablamos ayer, por parte de los países latinoamericanos a principios de la década de los '50. La segunda es la de la nueva conciencia ecológica, per se, que de repente se asoma de una manera hasta agresiva a partir del Torrey Canyon.

Fueron los tres años, entre 1967 y 1970, testigos de una gran conmoción en el desarrollo práctico y teórico del derecho del mar, cuando

el Torrey Canyon causa una serie de medidas a nivel de la OCMI, que han sido tratadas muy elocuentemente por el ponente, el doctor Gold, cuando sin criticar a la OCMI le dio exactamente una valoración objetiva en cuanto a lo que ha hecho el caso del Torrey Canyon, al igual que analiza las trabas jurídicas que atan las manos de esa Organización. Esta conciencia ecológica, como acabo de decir, precisamente data de esa fecha, de esos tres años, y fue en Canadá. Yo diría que por modestia nuestros estimados ponentes no quisieron hacer hincapié en lo que se podría llamar el Tercer Ciclo en el Derecho del Mar, si entendemos por el primero al de Grocio, de la escuela tricentenaria de libertad de los mares y, por el segundo, la tendencia latinoamericana, después copiada por el resto del mundo en favor de la zona económica. El Tercer Ciclo, pues, se inicia así en conjunción con Estocolmo, con la Conferencia del Medio Humano, que es cuando el tema ecológico se impone en la agenda de la Conferencia del Mar, no sólo como corolario de la propuesta de Malta, después entregada al Comité de Fondos Marinos para que dicha actividad minera no fuera a causar daños al medio ambiente, sino como uno de los temas principales ya en la agenda de la Conferencia, algo que no había sucedido ni remotamente siquiera en CONFEMAR I y CONFEMAR II de Ginebra en el año de 1958 y en el año de 1960.

Cuando trata el profesor Gold de valorar la labor de la OCMI en la nota quinta de su ponencia, junto con el profesor Johnston, hay una interesante observación que no quisiera dejar de comentar, donde apunta que en el Texto Integrado la OCMI no está mencionada, salvo que hay una referencia general a las organizaciones internacionales competentes globales o regionales. Esto es cierto, y parece que sólo la OCMI tuviera que acudir a la Conferencia del Mar y no viceversa, en una relación amorosa por así decirlo, un poco unilateral, porque la OCMI, en su Conferencia de Londres de 1973, en sus resoluciones 23 y 25, sí hace hincapié en remitir sus

resoluciones a la Conferencia del Mar. Esta posición de aparente desigualdad es superada en la última Conferencia importante de la OCMI, cobrando la Organización nuevo vigor, cuando en febrero de 1978 invita a la reunión en que discutió la seguridad de los tanqueros y la prevención de la contaminación. Allá vemos a la OCMI volver con nuevos bríos, ya saliendo de su papel meramente consultivo, para dar recomendaciones e introducir técnicas en la construcción de los buques, para asumir con nuevo brío ese papel legislativo, cuando de una manera indirecta se da cuenta de las fallas que habían hecho prácticamente imposible que entrara en vigor la Convención de 1973, así como la otra sobre Seguridad de la Vida Humana en el Mar de 1974, conviene entonces en crear dos nuevos protocolos, mediante uno de los cuales, el segundo, se haría posible prescindir de la implementación del anexo segundo, referido a los tanqueros y químicos y su compleja construcción, para darle oportunidad a los países partitipantes de ratificar la Convención en una fecha máxima de junio de 1981, lo cual me parece sumamente positivo.

Un segundo punto, sin quererlo ampliar mucho, con respecto a la implicación y ubicación de la contaminación proveniente de buques, dentro del tema ecológico general en el medio marino como un todo. Sin duda alguna se trata del punto más álgido, más difícil y más espinoso. Los otros enfoques para encarar la contaminación marina, todos, o en su mayor parte, se prestan a una facilidad que emana de la naturaleza del derecho internacional en cuanto a competencia y jurisdicciones: o es el Estado costero quien legisla en sus aguas jurisdiccionales, lo cual, justamente, es el nuevo elemento hoy introducido, o se trata de reglamentación internacional, convencional, a través de los procesos de negociación bién conocidos por todos nosotros, que han llevado a la conclusión e implementación, por mal o por bien, de un lado o de otro, de tratados como aquellos que inciden, por ejemplo, en impedir los datos por radioactividad que proceden de lo internacional hacia lo nacional, al

igual que aquellos tratados contra la contaminación del mar por petróleo.

Bien sea saliendo del Estado nacional hacia lo regional para caer en lo internacional, o a la inversa, comenzando por el proceso internacional a través de tratados multinacionales o regionales, llegamos siempre a una feliz conclusión, de que todo dependería de la efectividad, de la amplitud de la receptividad que los tratados internacionales tendrían en un aspecto o en otro, caso éste específico de los tratados de vertimiento en el mar, que constituyen una naturaleza distinta a aquellos que se tratan en este tema de hoy, a pesar de que aparentemente en ambos casos son dañosos al mar y que potencialmente lo pueden contaminar.

Pero en el caso tratado en la ponencia que hoy hemos escuchado, existe lo que en castellano puro se llama "harina de otro costal", que es algo básicamente distinto; ahí se trata nuevamente de tocar aquel tabú que por muchos años ha impedido que se llegara con sinceridad al fondo mismo del problema del derecho del mar, porque en realidad ¿cuáles son las diferencias básicas que ponen en dos campos opuestos a las naciones que pugnan por llegar a un tratado equitativo, que no sean aquellos que tratan de la competencia de la jurisdicción y de implementación de las medidas relacionadas con la navegación en aguas jurisdiccionales?

Todo lo demás tiene fácil solución, porque no toca directamente temas fundamentales cuando se trata de la contaminación por buques, es decir, de la contaminación realizada precisamente bajo la patente de corso de una libre navegación, que hemos heredado ciegamente sin preguntarnos por qué, de una época en que el capitalismo mundial iba en avance en base de la libre navegación, pues tenemos derecho a preguntarnos hoy hasta qué punto sigue lícito el que nosotros sigamos dependiendo de unas teorías creadas hace tres siglos y medio, y que hoy en día ante los hechos desnudos e irrefutables de la

salud del océano, como pulmón para nosotros y nuestra generación venidera de hijos y nietos, hasta qué punto hemos de seguir esclavos de una mentalidad que pertenece a otras épocas, tanto como cronológica, económica, como social y filosóficamente.

Un último punto, y con esto termino este breve comentario, va precisamente sobre el punto específico que mi estimado amigo Edgar Gold ha tocado, cuando trató muy hábilmente y en tan poco tiempo de explicarnos los alcances de la nueva ley canadiense, del 16 de octubre de 1978, me plagio a mí mismo, repito mis palabras iniciales, tan revolucionaria como fuera la del 8 de abril de 1970.

Definitivamente, estamos ante una nueva posición que está destinada a partir de este mismo momento, en este círculo de especialistas en la materia, como también en la opinión pública fuera del mismo, de suscitar una nueva polémica en la que Canadá nuevamente tendría que tomar el liderazgo en esta materia, que de hecho lo está haciendo. Llevando, pues, esta posibilidad, la participación del Estado costero en el control de la navegación hacia sus puertos y costas, en resguardo de sus propios intereses legítimos. Para el tercer mundo en general, y gracias al hecho de que estamos en el Centro de Estudios Económicos y Sociales del Tercer Mundo, eso me daría más razón todavía para hacer hincapié al respecto, crearía pues tres problemas a tres niveles: uno, a nivel tecnológico; otro, a nivel económico y, el tercero, a nivel de aplicación geográfica. Por el primero entiendo fácilmente la disparidad en niveles tecnológicos entre los distintos países que componemos el tercer mundo. Algunos países, por razones obvias, pueden darse el lujo de instalar dichos dispositivos, de pagar por una transfererencia urgente de tecnología que permita a nuestros hombres llevar a cabo ese control, porque no lo vamos a delegar en manos de extranjeros, y para adquirir los equipos necesarios para que semejante

control pudiera ser algo parecido a la eficiencia que los canadienses son capaces de llevar a cabo.

A nivel económico, hemos de distinguir también el punto de vista hacia esa nueva modalidad que pudieran ser países de intenso interés económico, como los petroleros o sea, los de la OPEP, comparados con otros Estados que no lo tienen y que viven en paraísos lejanos de las rutas marítimas; valdría decir, algunos países de la lejana Iberia, Oceanía, de la que ayer tuvimos la grata visión dada por el profesor de Nueva Zelandia, si mal no recuerdo, y donde el problema no es tan viviente como en un país como Venezuela o México, donde además del tráfico petrolero se agrega el tercer elemento al que voy a hacer referencia para terminar, y que es el de la aplicación de estas medidas tomando en cuenta la posición geográfica del país candidato para su aplicación; no es lo mismo el caso del Canadá, una gran nación trioceánica y fuerte culturalmente, abierta a los mares sin trabas, que la posición de los 30 países e islas y entidades políticas que componemos el llamado Mar Interamericano, por nuestro querido amigo el doctor Hudgson. Este Mar Interamericano no presenta las mismas condiciones que el Canadá, y nos obliga a pensar en un enfoque regional o, al menos, subregional, para ese tipo de problemas, distintos al que el Canadá o Australia pudieran implementar. Lo mismo se pudiera decir del Mar Mediterráneo, del Mar Báltico, en donde, de hecho, ya funciona otro tipo de tratados contra la contaminación.

Así pues, tomando en cuenta estos tres niveles para decidir la aplicación de la ley nueva del Canadá, resumo y concluyo diciendo, primero, que se trata de una polémica abierta sobre una nueva moralidad, un desafío, prácticamente, que nos pone a los países del tercer mundo, sobre todo como los países interesados en la navegación libre, nuevamente ante el dilema de interpretar qué es el interés común, qué es el interés común que Johnston y Gold muy elocuentemente han tratado y han, hábilmente, desgosado en su ponencia.

COMENTARIO DE ANDRES ROZENTAL:

"Muchas gracias, doctor Johnston. La verdad es que no sólo me tocó improvisar mi comentario, en espera de que iba a ser mañana mi participación, sino que además, y esto es quizá lo más grave, fui precededido en esto por lo que yo puedo calificar de dos genios en la improvisación. En el caso de nuestro distinguido colega venezolano, en lo que a él le correspondió, y lo felicito por sus comentarios, y por mi colega a mi izquierda, que realmente no sólo invadió mi zona de jurisdicción en este panel, sino que la invadió en una forma absolutamente descarada, y me ha dejado con muy poco que añadir en lo que se refiere al tema que yo tenía asignado, que era según la carta que tengo aquí del doctor Johnston, "El desarrollo en cuestiones del medio ambiente marino en la III Comisión de la III Conferencia".

No obstante eso, trataré de por lo menos agregar o añadir dos o tres conceptos, a lo que se ha dicho en la manana de hoy sobre este tema.

Dentro de la III Conferencia de las Naciones Unidas sobre el Derecho del Mar, creo que no peco de exageración al afirmar que, probablemente, en ningún otro tema general, de los 300 y más artículos que componen el Texto Revisado y el Integrado de Negociación, se contraponen un mayor número de intereses conflictivos entre los Estados participantes, que en la sección que se refiere a la contaminación marina. No sólo entre los Estados participantes, sino también entre las organizaciones internacionales intergubernamentales que participan como observadores, caso del Programa de las Naciones Unidas para el Medio Ambiente, el cado de la OCMI y también de aquellos grupos que no son intergubernamentales de naturaleza, pero que han participado y han ejercido una influencia en la Conferencia, sobre todo en este tema, muchísimo más que en cualquier otro, como son los grupos de ambientalistas, por decirlo así en una forma genérica, pe-

ro que también tienen comunes metas entre sí.

Es por esto que creo que es lógico que haya habido escepticismo, y que se ha demostrado escepticismo no sólo en el trabajo excelente presentado por los profesores Gold y Johnston, sino también en la opinión pública nacional e internacional, sobre los logros específicos de la III Conferencia en materia de prevención de la contaminación marina.

Creo que esto se debe a algunos elementos que quisiera yo reseñar muy brevemente. Primero, la III Comisión de la Conferencia inició sus labores con una tesis generalmente aceptada, no totalmente aceptada, pero sí generalmente aceptada, de que era necesario limitar su trabajo al establecimiento de un marco general conceptual para codificar ciertas reglas de competencias, en lo que se refiere a la prevención de la contaminación marina en los espacios oceánicos; no se trataba en ese entonces, y creo que ésta es una afirmación que puedo defender (hubo excepciones), pero creo que en términos generales no se trataba de un catálogo, de una lista exhaustiva de normas específicas que pudieran interpretarse como creadoras de derecho internacional específico, para normar toda la vasta gama de casos que pueden preveerse como posibles contaminantes del medio marino. Para eso, siempre se pensó, y aunque hubo ciertas divergencias, en momentos dados; pero siempre se pensó en que sería la Organización Competente Internacional, tal y como se menciona en el Texto, o conferencias diplomáticas, en cuyas labores participarían un gran número de Estados, que se dedicarían a la codificación detallada dentro de lo que es el marco que establece la Conferencia y la Convención del Derecho del Mar.

De hecho, entonces, hace 10 años, cuando empezamos nuestras labores como ahora, la mayor parte de la contaminación de los espacios marinos provino y proviene de buques, sobre todo de los buques cargueros de hidrocarburos o substancias nocivas; por lo tanto, creo que no hay que

perder de vista que ese fue el marco en que la III Comisión desarrolló sus labores, y no en el marco en que algunos de los colegas han querido insistir.

Nunca, como dije, hubo la intención, por lo menos por parte de la enorme mayoría de los Estados participantes, de una codificación exhaustiva, que diera como resultado inmediato una sensible mejora a la situación ambiental de los mares.

Lo anterior contrasta (y esto lo han dicho muy claramente, creo, los oradores que me han precedido) con las normas, por ejemplo, sobre la zona económica exclusiva, que son suficientemente detalladas para permitirle a cualquier Estado ribereño, y así ocurrió en la práctica, adoptar la reglamentación pesquera que de la noche a la mañana cambió radicalmente la situación normativa y real exist nte en las 200 millas adyacentes a sus costas. El caso de la contaminación marina se dio siempre en un largo plazo. Es por eso que los resultados escasos, si se quiere, que se han obtenido (y en esto coincido con mi colega, la Doctora Schneider), no son tan escasos como parecen.

El logro más significativo de la Conferencia hasta ahora, es que más de 150 Estados hicieron lo que ni la OCMI ni la Conferencia de Estocolmo, ni ningún otro esfuerzo internacional previo había hecho. Es decir:

1º Establecieron la facultad de los Estados, no los Estados de pabellón, sino de los Estados de puerto y costeros, de fijar normas y reglas que coadyuven a la lucha contra la contaminación, siempre y cuando esas normas y reglas cayeran dentro de una cierta limitación que se dispone en el Texto.

2º Permite que los Estados de puerto, es decir, Estados en cuyos puertos se encuentran buques, y Estados costeros, apliquen normas en sus zonas de jurisdicción, normas que previamente

han sido (y aquí viene un problema sobre el cual hablaré al final de mis palabras) normas internacionalmente aceptadas.

3º Y creo que también esto es una cuestión que es importante reconocer. La Conferencia, o el Texto de la Convención, reconoce que existen ciertas áreas especiales en las que las consecuencias inmediatas de una contaminación serían particularmente nefastas, y por ello se establece un procedimiento especial para que los Estados, en cuyas zonas de jurisdicción existen esas áreas, puedan aplicar normas más estrictas que las generalmente aceptadas en la comunidad internacional.

El Texto Integrado también ha incorporado, y tiene como mérito, si se quiere, algunas reglas y normas que habían sido previamente adoptadas entre un número relativamente reducido de Estados, bajo otros auspicios, pero que al ser englobados en el tratado universal se convierten en normas generalmente aceptadas. La doctora Schneider se ha referido a esto y creo que quizá, si hay una crítica que se puede hacer al trabajo de los doctores Gold y Johnston, es el no reconocer suficientemente esta contribución, porque si bien los arreglos de separación de tráfico que ellos mencionan en su trabajo son arreglos quizá al margen de la Conferencia, el hecho es que tanto en el artículo 22 como en el artículo 41, como en el artículo 211 del Texto, se hace ya referencia específica y se atribuyen competencias a los Estados costeros en esta materia, cosa que no había existido anteriormente más que por arreglo administrativo dentro de la Organización Consultiva Marítima Intergubernamental, y creo que, por lo tanto, hay que reconocer como mérito de la Convención este factor adicional.

Para resumir rápidamente la situación, para situar mis previos comentarios en el contexto de la meta citada, es decir, la distribución ordenada de facultades, de legislación y aplicación en la materia de prevención de la contami-

nación, debe decirse que la universalización de ciertas normas aún no consideradas como internacionalmente aceptadas, y el otorgamiento a una organización internacional de la competencia para legislar normas universales sobre las que los Estados ribereños deberán basarse, en la adopción de medidas nacionales para prevenir a contaminación marina en sus zonas de jurisdicción, son, en muy pocas palabras, el logro fundamental.

Sobre esta materia hubiera querido tener la oportunidad de hablar brevemente sobre la OCMI, organización en la que yo representé a México durante dos años y medio. Ten o unos criterios quizá muy conflictivos en cuanto a los que han manifestado la doctora Schneider y los doctores Gold y Johnston, y que se asemejan un poco más a los pensamientos de mi ilustre colega de Venezuela; pero el tiempo no me lo permite, a menos de que en el curso de algunos comentarios posteriores pudiera yo hablar sobre esto.

Finalmente, quisiera muy rápidamente decir que en su presentación los doctores Gold y Johnston, han sustentado la tesis de que ciertas decisiones de carácter administrativo, dentro de una organización internacional como la OCMI, aunada a la puesta en práctica unilateral por ciertos países costeros, como el caso de Canadá, de medidas específicas destinadas a controlar el tráfico marítimo en sus zonas de jurisdicción, constituyen, según la tesis de ellos, una fuente normativa más eficaz que la labor de la Conferencia sobre el Derecho del Mar o de las conferencias diplomáticas convocadas bajo los auspicios de la OCMI, por ejemplo. Es una tesis que en lo personal puedo concordar con su conclusión, más no quizá con su metodología. Creo que la cuestión se enmarca específicamente en lo que va seguramente a representar un tema para análisis futuros de todos ustedes, distinguidos profesores, académicos, abogados y diplomáticos, sobre qué es lo que constituye una regla o norma internacional aceptable, frase que tenemos que recordar califica cada uno de los artículos

que atribuyen competencias a las distintas categorías de Estados, dentro de la parte que se refiere a la contaminación marina y también el conflicto, el posible conflicto de competencias, o el posible conflicto entre el ejercicio por un buque del derecho al paso inocente y las medidas que se pueden tomar dentro de zonas de jurisdicción nacional para prevenir o reducir la contaminación en dichas zonas.

Creo que en la discusión aún inconclusa en el seno de la Conferencia misma, sobre esta cuestión, porque se sigue suscitando, sobre la necesidad de que se defina el término de "norma generalmente o intencionalmente aceptada", etcétera, se han sustentado las tesis más variadas sobre la misma, tesis jurídicas, tesis políticas; creo que en esto Jane Schneider tiene mucha razón en decir que lo que para uno constituye una flagrante violación con la consiguiente necesidad de actuar en concierto y no tomar medidas unilaterales, para el vecino constituye el ejercicio más respetable de sus derechos soberanos o de sus competencias según se le atribuyen en el Texto.

Creo que el abordar estas cuestiones será materia de futuras discusiones, de comentarios por parte del público de esta mañana, y simplemente quería yo dejar planteadas las inquietudes que sobre estos temas surgieron en mi mente durante sus exposiciones. Muchas gracias."

EDGAR GOLD: I would, first of all, like to thank Professor Nweihed -- a friend for many years -- for the very kind remarks made. I would also like to thank Dr. Jan Schneider for the very gentle castigation, and Dr. Andres Rozental for the very eloquent and diplomatic way in which he dealt with some of the points raised in our paper. I am also extremely glad that we had to pinch-hit today, because if we had had to wait the extra twenty-four hours, we would probably be in much worse shape than we are now!

When we spoke of the tortuous language of Article 211 of the ICNT (Revision 1), there was no intention whatsoever to suggest that UNCLOS III approaches in this area had been inadequate. Far from it. Committee Three's achievements, in particular in this area, as eloquently described by Dr. Schneider and Ambassador Rozental, are very clear. The new draft Convention has not only given coastal states new -- if limited -- powers, but has also developed new international legal norms for the prevention of marine pollution. As we suggest in our paper, UNCLOS III has gone very much further than any previous attempt at reforming international law. That is a tremendous achievement.

However, a persistent weakness in this process is particularly apparent when Dr. Schneider suggests that at this stage, keeping in mind these new achievements, we must now leave actual implementation solely to "competent international organizations" such as IMCO. This starts the very circle we were describing before -- this difficult circle of achieving a convention by consensus -- admittedly, as Dr. Schneider says, this is better than no progress at all. But that is really what we are talking about. The problem is illustrated by the "shopping list" of IMCO conventions appended to our paper. This appendix shows all of the 21 IMCO conventions, those which are in force, when they came into force, when they were signed. This was also appended to the paper to emphasize the achievement of an organization which was not meant to be castigated by us. There is nothing wrong at all with IMCO. In the paper, -- the part which I did not read -- I made the analogy between IMCO and ICAO. We basically come to the conclusion that there is very little difference in administrative terms, between this very strong regulatory body, ICAO, and IMCO, the consultative organization. The difference between the two organizations is in the attitude of the state's members of the organization. Rather than criticizing an organization itself, we were criticizing those who speak and make decisions beneath the roofs of these organizations. That is the difference -- the willingness of states to cooperate, internationally, at

ICAO, and the unwillingness of maritime states -- a small minority of maritime states -- to do so at IMCO, which has caused most of these difficulties.

We have already stated our firm belief that we must go the international route. It is the only way. But, what we are questioning is whether we have the time. At a recent international symposium on marine salvage, where the distinguished Secretary-General of IMCO was the keynote speaker, the representative of the French Ministry of Transport commenced his speech by stating: "On the seventh of March, 1978, the tanker Amoco Cadiz grounded off the coast of Brittany, and spilled two hundered and thirty thousand tons of light crude oil on the shores of that country." He went on to say, and I quote: "that no country which has not had such an experience, can understand it." "Until such time," he said, "France had faith in the international shipping industry, as well as in the so-called competent international organizations." This is the real difficulty. I am just wondering what would happen if we now take what UNCLOS III has achieved at great cost, basically due to the ability of people such as Ambassador Rozental, Ambassador Vallarta, and the many other people who have been working hard these many years for these achievements, back to these competent international organizations. Do we really have the time to go through the same process all over again, or will events overtake us resulting in "knee-jerk" reaction by coastal states on particularly bad pollution incidents. The recent collision between the Atlantic Princess and the Aegean Captain in the Caribbean might have occurred off the coast of one of the very large, prominent and more powerful countries, rather than in the area where it did occur. If it had, it might have resulted in just such a "knee-jerk" reaction from a state which had traditionally taken a very different role in competent international organizations such as IMCO. That is what we are getting at. I am also wondering whether this clock -- this time clock -- which is ticking away on the increasingly difficult area of marine pollution, does not preclude the tortuously slow process that Dr. Schneider talks about. Thank you.

JOHN BARDACH: I have a question to Professor Gold. If, indeed, as can be expected, technology will march on, and will enable traffic directions far out to sea, would you care to speculate what effect this will have on some of the important traffic routes -- very, frequently and strongly used traffic routes of the world?

EDGAR GOLD: Well, I think that without question, there are many areas in the world where you don't need any type of traffic system at all. And I think any coastal state which looks at this, ought to, first of all, look at the density of traffic, the amount of vessels, the interest to be protected -- fisheries, and other coastal resources and so on. And they

might say, well, the traffic is negligible, or the traffic is so unimportant that we are willing to write off the coastal interest. Or, perhaps, the cost of such a scheme is so enormous that we cannot afford them unless we go on to some sort of user pay system. I think the effect on traffic routes, on the major traffic routes in the world, can be looked at from two ways. There is no question that in some areas it is going to add to the steaming time of ships, and thus, to cost. Those costs, obviously, like everything in the world today, will be passed on to the consumer of shipping services. However, if you look at the ameliorative effects -- the benefits of the system -- those costs may then be absorbed in a benefit type of way. The second approach, to the effect from major traffic routes, is that it will expedite traffic. Although, at present, the national regulations for preventing collisions at sea require vessels to move at relatively moderate speeds, particularly in restricted visibility caused by fog, snow, and falling rain, traffic systems, such as we have at present in air traffic control, might expedite traffic, and will have a direct cost benefit in relatively congested areas. Certainly vessel traffic management systems, such as are in effect in many of the European and North Atlantic ports, allow vessels to move in extremely restricted visibility. I personally have gone into the port of Hamburg in thick fog, where you were unable to see the bow of the ship, and the first thing you knew, you were at the pier, being talked into your berth all along by a traffic controller. Now, without that system, you would have stood outside and anchored. So, those are the two approaches.

BERNARD OXMAN: I have a question for Dr. Nweihed or Ambassador Rozental or both, which takes a little bit of an introduction. I would like to allude to Professor Gold's remarks regarding the prospects of his prediction that the Canadian Government will extend access restrictions regarding navigation to part of the two hundred mile zone off its coast, outside of the Arctic. First, I should say, particularly, in light of Ambassador Tello's welcoming remarks, that I congratulate Professor Gold for his courage in making the statement. I know there are other kinds of unilateral action that are equally urgent. Turning directly to the question at hand: in the past, developing country coastal states were fighting for control of natural resources off their coast. Because of this, they tended to applaud any increase in coastal state control off their coast because it would further the generalized battle for control of natural resources. Therefore, we know as a matter of historical record that a large number of developing countries applauded the moves which were taken by the Canadian Government with respect to the Arctic for reasons that really transcended the particular environmental questions that were involved and that, I would like to believe, for reasons that transcended the nature of the two principle dramatis personae. But now, the resource battle -- that is, the battle for control of off-shore resources -- is essentially

over, or almost over. However, the fact remains that many third world countries still rely on the income from the export of raw materials to further their development. They must use the sea, and their own or foreign flag ships, in order to reach the three principle markets in the world for their raw materials -- that is, Japan, the European Economic Community, and the United States of America. Of the world's principle exporters of minerals and raw materials, only Canada has maritime access to each of these three markets, without the practical need to pass through the exclusive economic zone of a third state along the way. In light of all these developments, I would like to ask, simply, a prediction of the two speakers involved from developing countries. And that is: Will third world countries be willing, as they were in the past, to applaud or accept as permissible, under international law, new Canadian unilateral moves to control shipping in the two mile zone?

KALDONE NWEIHED:

"Muchísimas gracias al doctor Oxman por una pregunta muy inteligente y que por cierto nos llevará a tener que dar una respuesta, o aparentemente falsa o aparentemente contradictoria. La verdad no es ni una cosa ni otra. Estamos en tiempos cambiantes por el desarrollo socioeconómico de la humanidad; estamos los países del tercer mundo, los países en desarrollo, muy concientes de la gran tarea que tenemos por delante: superar, cuando menos en poco tiempo, los 200 años que llevan por delante los países que han pasado por el proceso evolutivo de la revolución industrial. Estamos concientes de la necesidad que tenemos de comunicarnos con el mundo. Si de algo me siento orgulloso es que, como venezolano, puedo hacerme eco del principio proclamado en Chile en 1832, por don Andrés Bello, nuestro gran jurista, cuando hablaba de la necesidad de las naciones de comunicarse entre sí, de comerciar entre sí. Andrés Bello, que es uno de los tres fundadores de nuestra patria, y no podemos ser infieles a sus enseñanzas. Estamos concientes de que gracias al Atlántico abierto, fueron dos provincias secundarias de aquella España del siglo XIX, Argentina y Venezuela, quienes pudieron imponer la contienda antiimperialista, en mar y en tierra, precisamente por tener tal acceso a Londres y a los demás mercados de armas y de ideas. Todo ello forma parte de una filosofía que aceptamos perfectamente.

Es cierto que están surgiendo nuevos principios, como lo son la preservación del medio marino y de la contaminación, frente a una necesidad de nuestra subsistencia. Nunca seremos tan merolicos, diría yo, tan idealistas, tan quijotescos, y eso que el Quijote forma parte de nuestra colección literaria, como para prescindir de las necesidades elementales de comerciar. Estamos de acuerdo con que el proceso de la cooperación internacional siga su rumbo, pero estamos al mismo tiempo concientes de que si este

proceso llega a tropezar con escollos, provenientes de esta pugna a la que hice referencia en mi primera intervención, entre las naciones marítimas que siempre han detentado este poder y los países costeros, en última instancia la decisión ha de tomarse con base en criterios que pudieran ser más individuales que colectivos.

El llamado tercer mundo no tiene una política económica ya definida, que no sea de rasgos generales. Si pudiéramos nosotros imponer ya un criterio unificado sobre países industrializados, no estaríamos en esos diálogos como Norte-Sur, sino sencilla y llanamente ya estaríamos en posición de imponer nuestros mejores intereses de la forma más directa.

Para abreviar mi respuesta, nosotros estamos dispuestos, según los intereses de cada región, a un balance entre los intereses de Estados costeros, como posible víctima de la contaminación, y sus propios intereses como exportador. Ahora, cuándo, cómo y dónde llega el momento de tomar esta decisión fatal a la que me lleva a contestar el profesor Oxman. Pues todo depende de una serie de circunstancias sobre las que es difícil especular teóricamente, desde el punto de vista de la posición de los países que exportan petróleo, de los países de la OCMI, o de aquellos como México, aun cuando no forme parte de la organización, pero que sigue políticas parecidas, y de los demás países exportadores de petróleo o de otras materias primas. Ya nosotros no estamos como antes, pendientes de un hilo, en términos de aceptar todo lo que se nos imponga. Yo quiero decir, con toda sinceridad, que el problema se está planteando nuevamente en términos, ya términos lógicos, de una política económica para el siglo XXI.

Nuestro problema con los países industrializados, no sólo es que ellos acepten o no, y cómo van a recibir nuestras mercancías. Es un problema fundamental de igualdad y de los daños hechos a nuestra economía por un sistema tricentenario de explotación despiadado, a través del

mar, que ha sido un arma para fortacerse a espaldas de nuestro desarrollo. Mientras nuestro diálogo sigue siendo un diálogo amistoso, el problema que usted plantea será resuelto por las negociaciones, y cada caso sobre sus propios méritos.

ANDRES ROZENTHAL:

Yo quisiera ser muy breve porque creo que todavía hay algunas personas que quisieran hacer uso de la palabra. Quizá aquí yo estoy en un problema personal muy grave porque, como principal responsable de la Cancillería mexicana de la política bilateral México-Estados Unidos, y México-Canadá, no tengo la menor intención de meterme en una polémica Estados Unidos-Canadá, sobre el futuro acceso de buques norteamericanos a nuevos puertos importantes cerca de la frontera con Canadá y Estados Unidos.

Por eso, no voy a comentar sobre el tema que suscita el doctor Oxman. Lo que sí quisiera decir, y creo que sí merece reconocimiento, es la cuestión de la contribución que ha hecho la delegación canadiense y el Gobierno canadiense al trabajo dentro de la III Comisión de la Conferencia, precisamente por su constante insistencia dentro del seno de esa Comisión, y también por algunas medidas que tomó unilateralmente, o efectivamente, por conseguir una mayor protección y un reconocimiento internacional, a ciertos casos muy específicos canadienses, pero que tenían una simpatía y gozaban de una simpatía general en muchas delegaciones de países en desarrollo, no por la razón que menciona el doctor Oxman, de control sobre recursos, porque, por lo menos la delegación mexicana, nunca pensó que había duda alguna sobre la soberanía que ejercíamos sobre nuestros recursos no vivos, dentro de nuestra plataforma continental hasta las 200 millas, sino más bien por tener simpatía con lo que el Gobierno de Canadá buscaba para proteger su medio ambiente marino, que es un medio ambiente marino muy especial y uno que merecía una consideración especial. Es por eso que el Texto Revisado, el artículo 234, específicamente, y el párrafo 6 del artículo 201, en realidad se adoptaron gracias al Gobierno y a la Delegación de Canadá. Y quería yo hacer ese comentario sin meterme en la polémica política bilateral que suscita el doctor Oxman. Gracias."

FERNANDO LABASTIDA:

"Doctor Johnston, muchas gracias, soy Fernando Labastida, funcionario de la OCMI.

En primer lugar, deseo felicitar a todos los panelistas por las muy brillantes intervenciones que hemos escuchado el día de hoy, intervenciones no sólo brillantes, sino estimulantes.

Como funcionario de la OCMI pienso que debemos dar la bienvenida a este tipo de diálogos, tanto por su erudición como por la hondura de las cuestiones que suscitan, porque esto promueve el diálogo constructivo, y es el diálogo constructivo el que promueve el progreso y la eficiencia de las organizaciones internacionales como la OCMI.

Deseo hacer, en cuanto al fondo de la cuestión, dos observaciones: una relativa a la estructura de la OCMI, y otra con referencia a algunas decisiones que se han tomado en el seno de la Organización, que espero ayudarán al doctor Gold a cambiar del pesimismo precavido que él expresó hoy, a algún optimismo quizá también precavido.

Con respecto a la estructura de la Organización, quizá sea esto declararlo obvio, toda organización internacional es un instrumento de cooperación para los gobiernos; los gobiernos las usan y las pueden usar de una manera adecuada y apropiada, o de una manera inadecuada; por eso, agradezco al doctor Gold que haya rectificado en su intervención final, en respuesta a los comentarios de los panelistas, que algunas de sus críticas se dirigían a la manera como los Estados miembros de la OCMI asumen posiciones o actitudes, y no una crítica a la Organización misma.

En efecto, la eficacia de la OCMI, como toda organización internacional, depende del apoyo que le otorguen los miembros que la constituyen, y su ineficacia dependerá también de los obstácu-

los que los mismos miembros que la constituyen plantearán a su actividad. ¿Quiénes constituyen la OCMI? En la actualidad son 112 países miembros. Hemos venido muy lejos, desde las épocas en que se podía señalar a la OCMI y acusarla de que era un club de países ricos; estos 112 países son, dos terceras partes de ellos, países en desarrollo. Pero junto con los países del tercer mundo, tenemos a los países industrializados, que proporcionan los servicios marítimos, Estados marítimos interesados en proporcionar servicios de transporte. Tenemos usuarios de los servicios marítimos, y tenemos Estados que desean que tanto los usuarios mayoritarios como los proveedores del servicio marítimo, se entiendan de manera adecuada para que los servicios marítimos se presten eficazmente y a precios razonables. ¿Cómo actúan estos países en el seno de la OCMI? ¿Pueden todos actuar igual o un grupo domina al otro o a los otros? En mi opinión, actúan en igualdad de Estados, en virtud de ciertos cambios estructurales que la Organización ha adoptado en sus comités principales, inclusive, en su Consejo Administrativo.

En la actualidad, el Consejo de la OCMI ha sido aumentado de 18 miembros a 24, y las seis categorías adicionales se han formulado para permitir que Estados sean electos para asegurar un equilibrio geográfico representativo en el Consejo, Estados que no sean ni los que proporcionan servicios marítimos ni los que los usan en una forma mayoritaria, sino que tienen un interés general en la armonía y en la eficacia del trabajo de la Organización.

El Comité de Seguridad Marítima, el órgano más importante de la OCMI, está abierto ahora a la participación de todos los Estados. Ya no es un Comité como antes, en el que solamente los Estados de grandes intereses marítimos podían dictar el ritmo y el contenido de los reglamentos y de las recomendaciones o códigos o convenios que se proponían. Asimismo, tenemos que todos los sectores participan en el Comité de la Protección del Medio Marino, en el Comité Jurí-

dico, y una cosa muy importante ahora, en el Comité de Cooperación Técnica.

Tanto en la Conferencia del Mar como en otras conferencias diplomáticas, es obvio que la comunidad internacional tiene confianza y apoya a la OCMI. Veamos en algunos casos concretos: en el Convenio de Contaminación Marina por Buques de 1973, la estructura de los participantes en la OCMI, en esta Conferencia, no representó ningún obstáculo para que se adoptaran algunas normas que son caras, me imagino yo, a la postura del doctor Gold, puesto que en ese Convenio tenemos algunas normas que otorgan al Estado del puerto cierta capacidad bien definida para aplicar y hacer aplicar las normas que el Convenio incluye.

Así también, en el seno de la Conferencia del Mar, el apoyo a la OCMI se ha manifestado en el hecho, a pesar de la nota número 5 del estudio del doctor Gold, que hace una referencia en singular, no en plural, a la Organización Internacional Competente, de que la OCMI y los Estados que en ella participan se han dado cuenta que en el momento actual hay que subrayar la importancia de la aplicación, de mejorar la capacidad de la Organización para ayudar a sus Estados miembros a aplicar de manera eficaz y rápida los convenios que se acuerdan o se establecen en la OCMI. Este nuevo énfasis se facilita por el programa de asistencia técnica de la Organización, porque hacer aplicar una norma requiere que los Estados estén capacitados económica y técnicamente para ello. Las normas que regulan el tránsito marítimo, la seguridad de los buques, la prevención de la contaminación, son normas de alto carácter técnico que requieren de especialistas y, en ocasiones, de capital muy elevado, para poder llevarlas a cabo. Es, entonces, a través de un programa de cooperación técnica, que se ayuda y se habilita a los Estados, sobre todo a los del tercer mundo, a que adquieran la capacidad para poder cumplir con las normas que se elaboran y formulan en la Organización. Esto, para mí, es fundamental y esencial e indica la nueva ruta que la OCMI va a seguir en la próxima década. No hay

duda de ello, puesto que los países del tercer mundo desean incrementar sus marinas mercantes, en esa famosa Organización que es el templo del tercer mundo: la UNCTAD.

Hay tendencias y corrientes que animan a los Estados a adquirir control sobre sus exportaciones y a no descansar exclusivamente en los buques marinos de otros países; si los van a adquirir y van a desarrollar sus marinas nacionales, tendrán que hacerlo, de hoy en adelante, de acuerdo con las altas normas de seguridad marítima de prevención del medio marino, de protección del medio marino, que se establecen en la OCMI. Y para hacerlo necesitan la ayuda técnica que el sistema de las Naciones Unidas proporciona en el caso de los buques a través de la OCMI.

Yo creo que ésta es una tendencia positiva, y espero yo que ella sea tomada en cuenta en los próximos análisis y estudios que se hagan de la vitalidad de esta Organización. El Secretario General de la OCMI, siempre ha reconocido que, aunque mucho se haya hecho, mucho más queda por hacer, y estoy seguro de que éste es el espíritu que prevalece entre los miembros de la Organización. Muchas gracias."

LEONARD LEGAULT: Mr. Chairman, I am at somewhat of a disadvantage this morning. First of all, I did not hear the paper presented by yourself and Mr. Gold. Also, I arrived only at six A.M. this morning, and am feeling a little whoozy. In addition, I am not used to speaking from this position. It seems to me that speaking from a standing position is more appropriate for preaching than negotiating -- and I hear no different from my colleague and old friend, Bernard Oxman. I beg to reply very briefly to what Bernie said before commenting very briefly on what Jan Schneider had to say. I think I should point out, first of all, that we may have more confidence in the developing countries than Bernie has. It has never been necessary for Canada to point out the interests of the developing countries to the developing countries. They are perfect masters of those interests. Secondly, I am not sure that I can agree that all of the resource problems have necessarily been resolved. Six months ago I would have agreed until certain problems with pollution began to arise off the coasts of certain countries. It seems that where we thought we had a consensus, we may not necessarily have a consensus. I must say I am not quite as optimistic as Jan Schneider about the situation with regard to the pollution. And that is not because I am terribly disappointed with what we have accomplished in the last ten years or so, but rather because I am very uncertain and very doubtful about our prospects for doing what remains to be done, the enormous job that remains to be done. Let me explain. In the last ten years, we have had two phenomena in the development of the new environmental law for the sea. There has been the vanguard represented by unilateral action by a number of coastal states. There has been the rearguard, represented by the multi-lateral response to that unilateral action. And also, the multilateral response to certain disasters of the Torrey Canyon type. Now, what I am concerned about is that the multilateral response has addressed itself as much to limiting the possibilities for future unilateral creativity as it has addressed itself to the substantial problem of protecting the marine environment. And that is fair enough, to a very large extent, because it is, of course, an appropriate and proper objective of multilateral action precisely to limit the scope for unilateral action. That is, in fact, really the essence of the exercise. But I wonder if we have not gone in some instances too far in this process in the last few years, particularly in the Law of the Sea Conference in Committee III. I mean, for instance, such provisions as the new provision on the territorial sea which explicitly limits the coastal states' powers, in terms of prescribing standards for the design, equipment, construction and manning of vessels. I know other measurements for that position that have been put forward so eloquently by representatives of major shipping states, but I am very concerned that that was a kind of creative, constructive ambiguity that existed in the past, when we had the simple system of coastal state sovereignty, on the one hand -- within

the territorial sea, that is -- and on the other hand, the simple concept of innocent passage. The creative tension between these two concepts allowed room for further development of the law. I am afraid that that room for further development has been severely constrained by some of the measures that have been adopted, or are about to be adopted, multi-laterally -- especially at the Law of the Sea Conference, but in other fora as well. So, to sum up, yes, we have come a long way, but we have a great deal more ahead of us to insure the protection of the marine environment, while, once again, I repeat -- and Bernie has heard me say this many, many, times -- not putting undue constraints on freedom of communication, on freedom of transportation at sea. These freedoms are as vital to Canada as to any country in the world, perhaps more vital than to many.

JOSE LUIS VALLARTA:

"Muchas gracias, me temo que no seré el último orador puesto que voy a hacer una pregunta a los panelistas. Como ya he mencionado, mi nombre es José Luis Vallarta, de la Secretaría de Relaciones Exteriores de México y expresidente de las Consultas Informales sobre Protección y Preservación del Medio Marino, digo expresidente porque abrigo la esperanza de que ese capítulo se haya cerrado en la Conferencia sobre el Derecho del Mar, y que si hay cambios, estos se hagan bajo la hábil presidencia de Allan Beasley, Presidente del Comité de Redacción. Me voy entonces a referir más bien al futuro y no a lo que fue mi trabajo en el pasado.

El doctor Gold se refirió a una declaración de Francia relativa al desastre del Amoco Cadis; yo quisiera preguntar a los panelistas lo siguiente:

La parálisis que sufrió Francia para intervenir ¿a qué se debe? Francia dijo que el derecho internacional le había impedido intervenir: en concreto se refirió al requisito del peligro grave e inminente que menciona el Convenio de la OCMI sobre Intervención. Entonces, mi pregunta es: ¿Por qué no pudo intervenir Francia?, ¿debido al Convenio sobre Intervención?, ¿fue culpa de la OCMI?, ¿es una falla del Convenio de 1910 sobre Salvamento Marítimo?, ¿en dónde está la falla?, ¿qué fue lo que impidió realmente a Francia intervenir y qué se puede hacer en derecho internacional para resolver este problema?

El tema está vivo, el Consejo Jurídico de la OCMI está estudiando las consecuencias jurídicas del desastre del Amoco Cadis, y creo que sería de gran utilidad que expertos como los panelistas den su opinión al respecto, si hay tiempo; yo estoy dispuesto a sacrificar el almuerzo para escucharlos. Gracias."

EDGAR GOLD: I think, Ambassador Vallarta, your question really deserves a very extensive answer and perhaps even one which is quite beyond my capability, because I can't really speak on what France should or should not do, or what prevented it from doing whatever it did not do. It seems, though, that the Amoco Cadiz disaster overwhelmed a country which was simply not prepared for what happened to it -- that is, prepared in either factual technical terms, or even legal terms. They had simply relied upon such terms and norms of international law which were in existence at that particular time, and hoped that it would not happen to them. As Admiral Grave suggested at this particular meeting between the United Kingdom and France, "We always were under the impression that God must be English, because the wind would blow the oil onto the French coast." As happened in the Torrey Canyon disaster, and in the Amoco Cadiz disaster, God again seemed to be English, because the wind was blowing from the north, and would not blow the oil away from the French coast. The contingency planning in the country did not exist at all. They relied, basically, on the contingency planning within the private interest of the international shipping industry. The salvage capability was not there. They relied upon the capability of the international salvage industry. But, most of all -- and I think this is really where I can very peripherally get to what you are asking -- the coastal state itself was not aware of the threat until many hours had passed and until the ship was firmly entrenched on the rocks which would eventually finish it. So the maximum effort of prevention in that particular country had not been there at all, because France had been a major international maritime state, and had relied upon the rules and regulations which had existed in the international maritime industry. Now, coming back to what you actually asked: Could they have done other things? Absolutely, they could have done other things. They could have done the very things which they have attacked Canada many times for doing, and which they are now doing with a vengeance. So, I think that is probably a very unsatisfactory answer to a very difficult question, which I would be very interested to discuss with you further. But having enjoyed the lunch at this center yesterday, I am not, at this particular state, willing to forego it for any reason.

PART IV

MARINE SCIENTIFIC RESEARCH AND DEVELOPMENT AND TRANSFER OF TECHNOLOGY

INTRODUCCION DE JORGE VARGAS:

Antes de iniciar, me agradaría simplemente hacer algunos comentarios generales, para después cederle la palabra al licenciado Vallarta Marrón. Empezaré por decir que, como todos lo sabemos, el tema de la investigación científica marina es un tema de los más novedosos en el campo del derecho del mar. Si el derecho del espacio oceánico es una de las ramas nuevas, una de las ramas jóvenes del derecho internacional, como veremos, el tema de la investigación científica marina es un tema de los más novedosos en el campo del derecho del mar. No obstante que es un tema tan joven, debo destacar que se trata también de un tema altamente controvertido, es un tema que en el seno de la Tercera Comisión ha recibido un tratamiento destacado, un tratamiento especial y, asimismo, ha suscitado el interés de todos los países por igual, tanto desarrollados como países en vías de desarrollo.

Es la primera vez que la III Conferencia de las Naciones Unidas sobre el Derecho del Mar, es decir, una Conferencia Internacional, analiza de manera sistemática, en la historia del derecho internacional, el tema de la investigación científica marina; este tema, en el pasado, había sido tratado en una manera fragmentaria, de una manera periférica. Si nosotros recordamos las Conferencias previas, la Primera y Segunda sobre Derecho del Mar, celebradas en Ginebra en 1958 y 1960, o aún la Conferencia Especializada Técnica de la FAO, que tuvo lugar en 1956. El tema de la investigación científica marina es un tema de enorme interés para todos los países, pero en especial para los países del tercer mundo, para los países en vías de desarrollo. Sin conocimientos sobre lo que se encuentra en mares y océanos, no es posible establecer programas adecuados para su utilización óptima, para su utilización racional; de aquí la imperativa necesidad, inaplazable, de que particularmente los países en vías de desarrollo, redoblen sus esfuerzos para fomentar las actividades de investiga-

ción científica marina a efecto de que éstas actividades puedan servir de base al aprovechamiento de los recursos marinos que se encuentran frente a sus costas, y también para que la investigación científica marina y los recursos humanos conectados con ella, contribuyan al mejor desarrollo socioeconómico de los Estados ribereños.

Voy a finalizar diciendo que, en este campo, las contribuciones latinoamericanas han sido destacadas; desearía aprovecha esta ocasión para recordar simplemente que dentro de las reglamentaciones jurídicas que se emitieron en el mundo para normar, dentro de un marco jurídico, las actividades de investigación científica se encuentran varios países de América Latina que están representados en esta reunión, ellos son: Brasil, Argentina, Chile, Ecuador y Perú. La influencia estos países latinoamericanos se encuentra no solamente dentro del contexto regional de América Latina, sino dentro de otras áreas geográficas, particularmente de los países en vías de desarrollo.

PONENCIA DE LUIS VALLARTA MARRON:

Mi experiencia en la Tercera Comisión, trabajando en el tema de la investigación científica, me hizo adquirir cierto temor por los hombres de ciencia, así es que ya se imaginarán ustedes cuál es mi ánimo al hablar ante ustedes.

Desde que la Comisión de los Fondos Marinos y Oceánicos, que precedió a la III Conferencia de las Naciones Unidas sobre el Derecho del Mar, inició sus trabajos, el tema de la investigación científica marina se caracterizó por la acritud de los debates y por una fuerte división entre países desarrollados y en desarrollo; uno y otro bando enarbolaban como bandera dos verdades, o dos verdades a medias, que oponiéndose entre sí no eran excluyentes la una de la otra; los países desarrollados afirmaban, con razón, que era inegable la existencia de una investigación científica pura, cuya realización habría de beneficiar a la humanidad entera, así como la humanidad entera se había beneficiado con el descubrimiento y utilización de la rueda.

Los Estados en desarrollo afirmaban, también con razón, que era imposible trazar una línea que separara la investigación científica pura de la encaminada a la evaluación de los recursos naturales de terceros, con miras al lucro de empresas propiedad de minorías privilegiadas. Otros países en desarrollo, que reconocían la existencia de una investigación científica pura, afirmaban, no obstante, que la misma, sin estar orientada directamente a la explotación de los recursos, indudablemente proporcionaba información necesaria y útil para la explotación de los recursos naturales.

A pesar de esas diferencias de enfoque, todos los países en desarrollo llegaron a la misma conclusión, es decir, que no puede aceptarse a priori la existencia de una investigación científica marina inocente y que, por tanto, los nuevos derechos jurisdiccionales de los Fstados ribereños,

me refiero a la zona económica exclusiva, y los existentes con anterioridad, llevaban aparejadas las obligaciones correlativas de los investigadores, los cuales requerían de reglamentación internacional. Las dos verdades contradictorias a que me he referido, guiaron necesariamente a sus respectivos sostenedores a dos posiciones conflictivas: la de los países desarrollados, que deseaban la más completa libertad para los investigadores, y la de los países en desarrollo, que deseaban autorizar previamente, para dominar y vigilar toda investigación científica en las áreas dentro de su jurisdicción. Tal vez hubiera sido posible trazar con relativa facilidad una línea entre esas dos posiciones, pero, como todos sabemos, en la negociación multilateral se acumulan las dificultades en número proporcional al de los participantes, y los obstáculos a veces dejan de ser racionales y objetivos, para convertirse en absurdos y subjetivos. Entre esos obstáculos juegan un papel muy importante problemas de política interna, que repercuten directamente en el foro internacional y, muy a menudo, diría yo, a esas dificultades hay que añadir problemas de personalidad, pues, a no dudarlo, en una Conferencia de más de 150 Estados, se encuentra siempre un buen número de personas dispuestas a sacrificar todo en beneficio de su ego.

En la Tercera Comisión, en el tema de investigación científica, debo añadir un problema más, que fue el difícil entendimiento entre hombres de ciencia y abogados. No siempre hablamos el mismo idioma. Conocí hombres de ciencia que merecían ser abogados; pero no conocí ningún abogado que mereciera ser hombre de ciencia.

Dos problemas de carácter político merecen la pena destacar, para comprender los escollos que ha encontrado la Conferencia sobre el Derecho del Mar en este tema. Las reivindicaciones de soberanía de 200 millas de algunos de los Estados, cuyos representantes, por razones de política interna, se vieron forzados a buscar para la zona económica exclusiva y para la plataforma conti-

nental, un régimen idéntico al que se aplicaría a una investigación que tuviera lugar en aguas interiores, o en el mar territorial de 12 millas aceptado por la mayoría de los Estados. Esos países, cuyas reivindicaciones de soberanía dentro de las 200 millas han quedado en franca minoría, contaron como un último recurso con el intento de acumular en el concepto de zona económica exclusiva todos los ingredientes que hicieran de esa zona de jurisdicción especial, que no es mar territorial ni alta mar, una institución jurídica lo más parecida posible al mar territorial. Para ello, la reglamentación de la investigación científica ofreció una oportunidad tentadora; aprovecho para comentar que, en mi opinión, al profesor Oxman se le olvidó recordar que la zona económica exclusiva es sui generis y que no es mar territorial como él lo indica, pero tampoco es alta mar como nos dijo.

Otro problema que tuvimos en la Conferencia fue la influencia de los estrategas, verdadera plaga en los foros internacionales que deseaban guardar a la investigación científica marina, como última carta por jugar en el seno de la Conferencia. Nada estorba más a una negociación multilateral que la aplicación de la técnica favorita de los estrategas, y a veces útil en las negociaciones bilaterales, de pedir 10 para obtener 5.

A pesar de las dificultades que he resumido, puede decirse que el Texto Integrado Oficioso para Fines de Negociación, revisión 1, que en adelante llamaré "el Texto", ha logrado un excelente equilibrio que espero con los pocos retoques que desean algunas delegaciones, recibirá apoyo unánime.

Si el artículo 238 del Texto reconoce el derecho de Estados y organizaciones internacionales, de efectuar investigaciones científicas, de conformidad con el futuro tratado, toda interpretación deberá hacerse tomando en cuenta el deber de todos los Estados de respetar ese derecho, so pena de incurrir en violación de una obliga-

ción internacional con todas las consecuencias que ello implica.

Por otra parte, los derechos del investigador llevan aparejados una serie de deberes frente a los Estados ribereños y frente a la comunidad internacional, cuyo incumplimiento facultaría al Estado ribereño, cuando se actúa dentro de su jurisdicción, a terminar o a suspender los derechos del investigador.

La cuestión de si el Estado ribereño tiene facultad para suspender y terminar, como dos etapas, o si tendrá derecho para terminar definitivamente una investigación, es una cuestión que está aún por negociarse, y a ella me referiré más adelante. Ese juego de derechos y de deberes, ya ha alcanzado, como expresé anteriormente, un buen equilibrio, pero para algunas delegaciones se requiere aún delimitar con mayor precisión el alcance de esos derechos y deberes.

Según el Texto, los Estados ribereños tienen, tanto en su mar territorial como en su zona económica exclusiva y en su plataforma continental, derecho de reglamentar, autorizar y de realizar las actividades de investigación científica marina. Las diferencias son a veces sutiles. En el mar territorial ese derecho se califica de exclusivo, y se ejerce con base en la soberanía del Estado ribereño. En la zona económica exclusiva, ese derecho no se califica de exclusivo, y se ejerce con base en la jurisdicción que el artículo 56 del propio Texto reconoce al Estado ribereño, respecto a la investigacion científica marina.

Conviene destacar que el término "exclusivo" o "exclusiva" en el Texto tiene un significado que no coincide con el gramatical, pues ni la zona económica exclusiva excluye la explotación por terceros, ni el derecho calificado de exclusivo, que ejercería el Estado ribereño en su mar territorial sobre el investigador, excluye del todo la autoridad del Estado que patrocina la investigación. Nótese que el que el artículo 5(

no califica de exclusiva a la jurisdicción que el Estado ribereño ejercería en la zona económica exclusiva respecto a la investigación científica marina. Tanto en el mar territorial como en la zona económica exclusiva, y en la plataforma continental, se requeriría, según el Texto, del consentimiento del Estado ribereño, si bien en la zona económica exclusiva y en la plataforma continental existiría, al igual que en la Convención de Ginebra sobre la Plataforma Continental de 1958, obligación de otorgar el consentimiento en circunstancias normales.

El concepto que pudiera causar mayor preocupación es el derecho a reglamentar la investigación científica, reconocido en el Texto a los Estados ribereños, cuando la investigación tiene lugar dentro de la jurisdicción de ese Estado.

La reglamentación por el Estado ribereño de la investigación científica en el mar territorial, en la zona económica exclusiva o en la plataforma continental, puede preocupar a los investigadores, quienes pudieran temer el alcance que esa reglamentación llegue a tener según la interpretación de algunos Estados ribereños.

Pudiera temerse, por ejemplo, que un Estado ribereño pretenda, con base en ese derecho, dar directivas de imposible aplicación por el investigador. Pudiera temerse que esa frase se interprete en el sentido de que, después de concedida la autorización con base en la descripción del proyecto que el investigador estaría obligado a someter al Estado ribereño, según el artículo 248 del Texto, dicho Estado tenga derecho de modificar el objetivo del proyecto, para lo cual el investigador puede no estar técnica o financieramente preparado o no estar interesado.

En algún momento en la historia de la negociación, circuló informalmente un Texto preparado por varias delegaciones, que lisa y llanamente declaraba que la investigación científica marina se realizaría en la zona económica exclu-

siva y en la plataforma continental previo consentimiento del Estado ribereño. Nótese la diferencia. El Texto actual habla del derecho de autorizar, reglamentar y llevar al cabo la investigación. Aquel Texto simplemente decía que la investigación se llevaría al cabo con el consentimiento del Estado ribereño.

En mi opinión, ese enfoque fue superior, me refiero al que simplemente declaraba que la investigación simplemente requería el consentimiento del Estado ribereño. Por las siguientes razones: No creaba el problema que plantea el concepto del derecho del Estado ribereño de reglamentar la investigación. Reconocía, además, el derecho a autorizar de antemano la investigación, al reconocer que el consentimiento previo era necesario. Por otra parte, nada quitaba al Estado ribereño al no referirse expresamente a un derecho que para nadie había sido controvertido. Me refiero al derecho del Estado ribereño de llevar a cabo investigaciones en su zona económica exclusiva y en su plataforma continental, derecho que está innecesariamente reiterado en el párrafo 1 del artículo 246 del Texto.

La supresión de la referencia al derecho del Estado ribereño de reglamentar la investigación no privaba en modo alguno a ese Estado de las facultades necesarias de reglamentación implícitas, tanto en el derecho de negar o autorizar el consentimiento, operación que puede ser precedida de una negociación del proyecto, como en el derecho de cesar o suspender el proyecto por incumplimiento de obligaciones por parte del investigador. No obstante, ese enfoque no se aceptó, porque algunas delegaciones, en mi opinión, haciendo alarde de subjetividad, declararon que la supresión de una referencia expresa al derecho de autorizar y reglamentar, era un precio muy alto a pagar por el consenco, como si la existencia de un derecho dependiera de la utilización de la palabra derecha.

Para tranquilidad de los Estados investigadores, cabe destacar que el derecho del Estado ri-

bereño de reglamentar la investigación científica, dentro de su jurisdicción, no puede ir más allá de las facultades ejercidas al momento de conceder o negar su consentimiento. Funda esta afirmación en lo siguiente:

Se ha aceptado que las solicitudes de autorización se presenten a los Estados ribereños por conductos oficiales, léase por la vía diplomática, artículo 250. Luego entonces, la respuesta del Estado ribereño será el final de un proceso de intercambio de notas que formalice un acuerdo entre Estados, de contenido obligatorio. Un Estado que pretendiera imponer modalidades al investigador, contrarias o no previstas en el intercambio de notas, y obstaculizadoras del proyecto, estaría violando una obligación internacional e incurriría en responsabilidad. Por tanto, la referencia al derecho de reglamentar es inofensiva, y aquellos Estados que abriguen la esperanza de reglamentar la investigación más allá del ac uerdo con el que se concedió la autorización, se encontrarán limitados por dicho acuerdo.

Cuando se iniciaron los trabajos en la Comisión de los Fondos Marinos, los Estados investigadores pretendían no sólo una libertad irrestricta para la investigación científica en la zona económica exclusiva, zona que ya se vislumbraba como una realidad, sino que eran renuentes a conceder a los Estados ribereños los beneficios generosos que hoy se preveen en el Texto.

A manera de anécdota, mencionaré el caso de un científico que, para justificar la posición egoísta de su país, arguía que no era posible entregar o divulgar los datos brutos obtenidos mediante la investigación, porque los hombres de ciencia son celosos de su trabajo y no gustan divulgar datos brutos antes de procesarlos y de sacar sus conclusiones, como si los Estados ribereños carecieran del todo de científicos capaces de utilizar datos brutos, obtenidos por terceros, y como si el prestigio personal de los científicos estuviera antes que la imperiosa ne-

cesidad de una transferencia de tecnología más justa.

Me referiré ahora a los beneficios que obtendría el tercer mundo si el Texto llega a ser un tratado de aplicación universal. No me referiré al principio de los fines exclusivamente pacíficos de toda investigación, consagrado en el artículo 240 como un beneficio para el mundo en desarrollo o para la humanidad, debido a que ese principio ha sido vaciado del todo de contenido por los gobiernos y potencias militares que pretenden que su carrera armentatista tiene por objeto garantizar la seguridad, sobre todo la seguridad y la paz internacional.

De conformidad con el artículo 244 del Texto, todo investigador tendrá la obligación de difundir por conductos adecuados sus programas de investigación, al igual que los conocimientos obtenidos mediante la investigación científica marina.

De conformidad con el citado Texto, también existirá la obligación de promover la difusión de datos, así como la enseñanza y la capacitación del personal científico en los países en desarrollo. El Texto en sí es generoso y responde al principio de que la ciencia no debe ser monopolio de ningún Estado o persona, y que la transferencia de tecnología no debe ser objeto de un comercio cuyo único fin sea el lucro.

Las disposiciones que he descrito no se refieren a una zona particular del medio marino y, de entrar en vigor el futuro tratado, se aplicarían a la totalidad de la investigación científica marina.

Nos queda esperar que la ausencia de la palabra "todos" para calificar a los datos y conocimientos que deberán ser objeto de difusión, no constituya una avenida que sirva de escape a los Estados investigadores para reservar para sí datos y conocimientos que pertenecen a la humanidad entera.

Los derechos soberanos de los Estados ribereños en la plataforma continental sobre sus recursos, y los derechos de soberanía de dichos Estados a los fines de exploración, explotación, ordenación y conservación de los recursos naturales de la zona económica exclusiva, están protegidos por la discreción reconocida en el Texto al Estado ribereño, de denegar el consentimiento a proyectos de investigación que tengan importancia directa para la exploración y explotación de los recursos naturales vivos o no vivos que entrañen perforaciones en la plataforma continental, la utilización de explosivos o la introducción de sustancias nocivas en el medio marino, que entrañen la construcción, el funcionamiento o la utilización de islas artificiales y de ciertas instalaciones y estructuras.

Los Estados ribereños, según el Texto, tendrán también discreción para negar su consentimiento en caso de inexactitud y, por tanto, mala fe del investigador, por lo que se refiere a los datos contenidos en la solicitud de autorización respectiva; esa discreción también se contempla para el caso de obligaciones pendientes de un investigador respecto a un proyecto anterior.

Fue imposible para la Conferencia sobre el Derecho del Mar encontrar una expresión más objetiva que el concepto "importancia directa para la exploración o explotación de los recursos"; en la práctica será difícil determinar el alcance de esa disposición, y es muy probable que los Estados ribereños tengan que recurrir, para lograr un uso justo de esa discreción, no sólo a la caracterización del proyecto de investigación mismo, sino a otros elementos tales como la entidad que facilita los fondos al investigador, pues una investigación financiada por una empresa comercial interesada en la explotación de recursos objeto del proyecto, será necesariamente sospechosa.

A no dudarlo, el Estado ribereño deberá estar

facultado, aun cuando no se diga explícitamente en el Texto, a preguntar y a investigar por sus propios medios sobre las fuentes financieras del proyecto en cuestión; en mi opinión, la negativa de un investigador para revelar las fuentes financieras de un proyecto, debe considerarse como justificante de una negativa para dar autorización, de conformidad con el Texto.

Uno de los principales logros de los países ribereños en desarrollo, fue la negociación del acuerdo sobre el artículo 248 del Texto, relativo a la obligación de proporcionar información al Estado ribereño. Cabe destacar que expresamente se consagra la obligación de proporcionar una descripción completa del proyecto; nuevamente, la comprobación por el Estado ribereño del ocultamiento de datos relativos al proyecto, al momento de presentar la solicitud, facultaría al Estado ribereño a denegar su consentimiento de conformidad con el artículo 246, párrafo 4, inciso d, del Texto.

Al presentar la solicitud correspondiente, el Estado investigador estaría obligado, según el Texto, a proporcionar una descripción completa, insisto, completa de la índole y de los objetivos del proyecto de investigación.

Si los objetivos del proyecto fuesen, por ejemplo, un estudio del comportamiento de la fauna marina en determinada región, y el investigador tuviese conocimiento del interés comercial del patrocinador económico, en los datos científicos del proyecto, el Estado investigador estaría obligado a destacar entre los objetivos del proyecto los fines comerciales del patrocinador financiero.

Los fines comerciales del investigador no implican necesariamente la negativa del Estado ribereño, pues dicho Estado pudiera interesarse en dar su consentimiento a pesar de los fines comerciales que en última instancia tendría el proyecto. Lo que debe evitarse, a toda costa, es el encubrimiento de propósitos de lucro me-

diante un proyecto de investigación. El comercio y el lucro son actividades lícitas si se ejercen conforme a derecho y en estricto respeto de la justicia. No obstante, no se puede esperar respeto al derecho, ni justicia, de quienes ocultan una competencia comercial desleal bajo algo tan noble como la investigación científica.

Según el Texto, el Estado investigador estaría obligado a informar sobre el método y los medios que se van a emplear, incluyendo el nombre, tonelaje, tipo, clase de los buques, y una descripción del equipo científico. Cuando se negoció esta disposición hubo intentos para ampliar el alcance de esta regla, a fin de que incluyera toda la investigación científica marina, independientemente de que se llevara a cabo desde tierra, aire, mar o espacio ultraterrestre.

Un problema de interpretación que habrá que plantearse es si, por ejemplo, una evaluación de los recursos naturales de una determinada parte de una zona económica exclusiva o mar territorial, llevada a cabo mediante teleobservación desde aeronaves o satélites, caería dentro del ámbito de aplicación del futuro Convenio sobre el Derecho del Mar.

La referencia al nombre, tipo, tonelaje y clase de buque utilizado por el investigador, parece limitar el alcance del futuro Convenio a la investigación marina llevada a cabo por buques o medios flotantes o submarinos. No obstante, en mi opinión, sería válido interpretar que una vez que entre en vigor el futuro Convenio, un Estado investigador que fuese parte contratante, tendría la obligación de incluir en el régimen jurídico de la investigación científica marina establecido por el Texto, a toda investigación que se realizase dentro de la jurisdicción de otra parte contratante, incluyendo la teleobservación desde aeronaves y satélites, a menos de que existiese algún otro Convenio en vigor entre el Estado investigador y el Estado ribereño que

específicamente regule la investigación científica marina llevada a cabo desde aeronaves y satélites.

Confieso mi ignorancia, no sé si la reglamentación de la teleobservación desde aeronaves sea objeto de alguna reglamentación internacional. Si alguien puede llenar esa laguna mía, lo agradeceré.

Bien vale la pena dar una señal de alarma en este foro para atraer la atención del mundo en desarrollo a los trabajos de la Comisión del Espacio Ultraterrestre de las Naciones Unidas, relacionados con la investigación científica, pues el predominio de las opiniones de las potencias espaciales pudiera afectar adversamente los intereses de los países en vías de desarrollo.

Para dar un ejemplo, basta comparar el Texto objeto de negociación en la Conferencia sobre el Derecho del Mar, con la egoísta y absurda disposición del Proyecto de Tratado sobre la Luna, relativo a la obligación de compartir muestras extraídas por el investigador. En dicho Proyecto de Tratado, el relativo a la Luna, el investigador está obligado apenas a considerar la conveniencia de compartir esas muestras. En el Texto que analizamos, se consagra la obligación de compartir las muestras que puedan dividirse sin menoscabo de su valor científico. Dejo el espacio ultraterrestre y vuelvo al mar.

El Texto impone al Estado investigador la obligación de describir las zonas geográficas y las fechas del proyecto, así como el nombre de la institución patrocinadora. Esta última obligación de proporcionar el nombre de la institución patrocinadora está calificada por el concepto "descripción completa de", que aparece en el encabezado del artículo correspondiente, lo cual refuerza la tesis que expresé anteriormente sobre la obligación de dar datos completos, sobre todas y cada una de las instituciones que apoyan el proyecto.

No creo que pueda afirmarse que se ha cumplido con esa obligación si, por ejemplo, se diera como nombre únicamente el de la universidad que patrocina científicamente el proyecto, si no se informa sobre los intereses comerciales que apoyan financieramente al proyecto, si ese fuera el caso. Ocultar datos, sería actuar de mala fe y violar el espíritu del futuro Convenio.

Una conquista de los países en desarrollo fue la consagración, en el inciso f, del artículo 248 del Texto, de la obligación de informar sobre las posibilidades o de hacerse representar en el proyecto de investigación. Sin duda alguna es difícil de imaginar un medio más efectivo de transferencia de la tecnología que la participación de países en desarrollo en proyectos de investigación científica de países desarrollados. Aquí pido nuevamente disculpas a los intérpretes por salirme del Texto, pero recuerdo que cuando se negociaba esta cuestión en el seno del famoso grupo de Evensen, los varios Estados investigadores intentaron el negar al Estado ribereño el derecho de participar en los proyectos de investigación que se llevaran a cabo dentro de su jurisdicción. Y, al efecto, se utilizaron toda clase de argumentos. Recuerdo a alguno de los representantes, que explicó que a menudo los barcos, sobre todo los submarinos de investigación que eran pequeños, que las personas a bordo, eran grupos integrados que se conocían, cuya convivencia no planteaba problemas de carácter humano por esa integración que existía entre ellos, y que traer a bordo personas de otra cultura, de otro sexo tal vez, a bordo de ese barco o pequeño submarino, pudiera traer problemas humanos que motivaba esa cohabitación. Recuerdo que en aquel entonces, mi buen amigo Jorge Vargas, que representaba a mi país en esas negociaciones informales, insistió en las palabras que ahora existen en el Texto, que se dijera que cuando ello fuera posible, y añadió que ese problema de cohabitación no tendría, no sería un problema si se contemplaba el proyecto de investigación científica con criterios modernos y amplios. Tal vez hoy quiera expresar y am

pliar qué fue lo que quiso decir con esa intervención.

Además de la participación de científicos del Estado ribereño, el Texto prevee una serie de obligaciones del investigador que también pueden considerarse como un logro de los países en desarrollo. Así, según el Texto, el Estado investigador estaría obligado no sólo a proporcionar resultados y conclusiones finales, sino también los informes preliminares que solicite el Estado ribereño.

El Estado ribereño tendría, además, el derecho a recibir todos los datos y muestras obtenidas en el proyecto de investigación, con la única limitación que ya he mencionado en la parte relativa a las muestras que no pueden dividirse y los datos que no se pueden copiar. Cabe destacar que el Texto hace referencia a todos los datos y muestras y no a todos los resultados y conclusiones de la investigación. Desde ahora he de expresar mi opinión en el sentido de que sería de mala fe interpretar que la ausencia de la palabra "todos", antes de la expresión "los resultados y conclusiones finales", concede al Estado investigador el derecho de guardar para sí resultados y conclusiones finales de la investigación hechas dentro de la jurisdicción de terceros Estados.

De conformidad con el inciso d) del artículo 249 del Texto, los investigadores estarían obligados a prestar ayuda al Estado ribereño si así lo solicita en la evaluación de los datos y muestras, así como en la evaluación de los resultados correspondientes. Esa disposición es aun objeto de controversia. Se ha intentado negociarla a fin de que consagre la obligación de proporcionar, al Estado ribereño, si así lo solicita, una evaluación, la del investigador, de sus datos, muestras y resultados de la investigación o de prestarle ayuda para su interpretación.

Comprendo muy bien el temor de los Estados investigadores de que se les solicite una eva-

luación de los datos, con miras muy distintas al al objetivo del proyecto de investigación científica de que se trate. Si el proyecto de investigación tiene por objeto la obtención de datos y conocimientos metereológicos, difícilmente puede pedírsele al Estado investigador que ayude al Estado ribereño en una evaluación de esos datos para fines del mejoramiento del ambiente o de un recuento de recursos, para lo cual el proyecto de investigación pudiera carecer de recursos financieros y técnicos.

Por otra parte, será indispensable que se proporcione al Estado ribereño la evaluación hecha por el investigador de los datos y de los resultados.

A todos los Estados ribereños en desarrollo les pareció que debería consagrarse en el futuro Convenio su derecho de hacer cesar un proyecto de investigación científica marina en caso de discrepancia entre la información originalmente transmitida y las actividades de investigación. El mismo derecho fue reivindicado para el caso de incumplimiento de las obligaciones del investigador.

Esta cuestión se ha tornado controvertida, debido a que varios Estados investigadores desearían que la sanción, el castigo, tuviese dos etapas, es decir, la suspensión de las actividades de investigación científica y, en caso de no corregirse el incumplimiento de obligaciones o de no rectificarse la discrepancia, entre la información originalmente dada y las actividades mismas, el cese definitivo.

Alguna razón asiste a los Estados investigadores que quisieran evitar que un costoso y útil proyecto de investigación científica fuese terminado por un mal entendimiento, o por una violación menor, o quizá involuntaria de uno de los participantes en el proyecto. Es justo pedir que antes de dar por terminado el proyecto, el mismo se suspenda para continuar

posteriormente una vez corregida la acción u omisión ilegal.

Por otra parte, es difícil negar el derecho del Estado ribereño de cesar definitivamente algún proyecto sin suspensión previa, en casos de notoria mala fe por parte del investigador. La solución a este problema puede ser difícil y no parece deseable el recurrir a una enumeración de violaciones graves para determinar en qué caso debe proceder la suspensión, y en qué casos el cese directo de las actividades sin suspensión previa.

Puede abrigarse la esperanza de que, en la práctica, la suspensión de hecho constituya un cese definitivo, cuando la mala fe del investigador sea tal que, descubierta su falta, no le quede interés en volver a una investigación que se aparte de los fines ocultos que en realidad persigue.

No obstante, de alguna manera, deberá reservarse el derecho del Estado ribereño de tomar medidas drásticas contra investigadores de probada mala fe.

En conclusión, puedo afirmar, con base en mi mentalidad de nacionalidad de un país en desarrollo, que el Texto preparado por la III Conferencia de las Naciones Unidas sobre el Derecho del Mar, es un esfuerzo colectivo hecho por representantes de muy distintos intereses que precisamente por esa circunstancia, constituye un Texto equilibrado, cuyas disposiciones en mucho benefician a los países en desarrollo y cuya efectiva aplicación canalizará los beneficios de la investigación científica hacia el mundo más justo que todos deseamos. Finalmente, he terminado."

COMENTARIO DE JORGE VARGAS:

Quisiera simplemente como una nota al pie de lo que ha expuesto, señalar tal vez para claridad de algunos de nuestros elementos jóvenes, latinoamericanos, estudiantes universitarios que han venido al tratamiento de este tema, cuatro aspectos fundamentales que se desprenden de tu ponencia.

En primer término, me atrevería yo a presentarlos aquí, el triunfo de la tesis del consentimiento a favor del Estado ribereño en materia de la realización de investigaciones científicas marinas, dentro de las zonas de jurisdicción y con apoyo en el artículo 246, párrafo 2 del Texto, particularmente en la zona económica exclusiva. Otra característica muy importante del Texto consolidado, Revisión dos, sería que ahora se reconoce el derecho de los organismos internacionales a realizar actividades de investigación científica marina que antes no estaba reconocido, y esto lo recoge el artículo 238 del Texto. En tercer lugar, la imposibilidad de distinguir entre investigación científica marina básica o pura, por una parte, la investigación científica marina aplicada u orientada, por la otra. Por último, como cuarto punto, aclaración, estaría de que el Texto consolidado, incluyendo su revisión, reconoce en el artículo 87, inciso f, que la investigación científica marina constituye una de las libertades del Alta Mar, punto que había sido debatido incansablemente en la I CONFEMAR en el año de 1958, y que nunca quedó expuesto de manera explícita en la Convención respectiva sobre el Alta Mar.

COMENTARIO DE GLADYS PULENCIO DE GUARIN

Mi trabajo consiste en traer al conocimiento o a la memoria, lo que es la parte de cada uno de los Textos y de los articulados que se han ido conformando, a través de todos los estudios, de todos los trabajos que han hecho los pueblos de Latinoamérica y todos los pueblos de todas las naciones del mundo, para tratar de construir una norma en relación con la investigación científica, para tratar de ordenar, para tratar de buscar un cuadro armónico, para poder sobrellevar las distintas dificultades que tienen nuestros pueblos bajo esas normas.

Para llegar a esto consideré necesario pensar cómo había sido al inicio de 1970 que nuestros pueblos americanos empezaron a pensar cómo debería ser nuestra investigación científica en nuestros mares. Por eso, mi trabajo se refiere en su introducción a la Declaración de los Estados Latinoamericanos sobre el Derecho del Mar, adoptada en Lima en el año de 1970. Allí se hicieron consideraciones donde claramente se puede preveer que Latinoamérica considera ya, en esta oportunidad, que el asunto de la investigación científica marina debía verse desde un punto de vista de la equidad para los Estados en desarrollo.

La incidencia de un hecho geográfico, económico y social entre el mar, la tierra y el hombre que la habita, del que resulta una legítima prioridad para el aprovechamiento de los recursos naturales que les ofrece su ambiente marino, como consecuencia de esa relación permanente, se ha reconocido el derecho de los Estados ribereños a establecer los alcances de su soberanía o de su jurisdicción marítima, de acuerdo con criterios razonables atendiendo a sus realidades geográficas y biológicas, y a sus necesidades y responsabilidades socioeconómicas. Las prácticas indiscriminadas y abusivas en la extracción de los recursos marinos, entre otros motivos, han llevado a un grupo significativo

de Estados ribereños a extender su límite de soberanía y jurisdicción sobre el mar, dentro del respeto de la libertad de navegación y de sobrevuelo para las naves y aeronaves, sin distinción de pabellón. Además, ciertas formas de utilización del medio marino han venido originando, asimismo, graves peligros de perturbación del equilibrio ecológico, ante los cuales es necesario la adopción por los Estados ribereños de medidas destinadas a proteger la salud y los intereses de sus poblaciones. El desarrollo de la investigación científica en el medio marino requiere la más amplia colaboración de los Estados, de modo que todos presten sus recursos y compartan sus beneficios sin perjuicio de la autorización, vigilancia y participación del Estado ribereño, cuando esa investigación se efectúe dentro de los límites de su soberanía y jurisdicción.

Estas declaraciones fueron las que confirmaron el principio común del derecho del Estado ribereño al consentir, vigilar y participar en todas las actividades de investigación científica que se efectúen en las zonas marítimas sometidas a su soberanía o jurisdicción, así como a definir los datos obtenidos y los resultados de tales investigaciones.

Un segundo punto que quise traer aquí son los aspectos preparatorios que se realizaron antes de la III Conferencia de las Naciones Unidas sobre el Derecho del Mar. Se iniciaron en la Comisión de Fondos Marinos en Nueva York, en 1973; desde esta época la expresión "investigación científica" dio lugar a serias discusiones y se conformaban dos bloques: la mayoría de las delegaciones, entre ellas las de Colombia, sostuvieron que el concepto "investigación científica", para que quedara claro, se debería hacer bajo el concepto de beneficio de toda la humanidad, y allí las delegaciones de los Estados desarrollados estrecharon sus reservas y dijeron que muy pocos científicos iniciaban sus tareas con vistas al beneficio de la humanidad. Se inició la dificultad, agregando

que si se hacía referencia a ésta como principio, podría coartar la libertad de la investigación científica.

En su Comité III, por medio del grupo de trabajo número 3, en su sesión de marzo-abril, en las declaraciones de las delegaciones acreditadas sobre el tema de investigación científica, 18 Estados fijaron sus puntos de vista sobre el tema. El Jefe de la Delegación colombiana, en vista de la ausencia del material y documentos presentados por países de América Latina, propuso la creación en esta oportunidad de un grupo de redacción, para que se lograra un buen documento y que éste fuera una base de discusión. El grupo latinoamericano acordó la siguiente nómina, que fueron: Argentina, Perú, Ecuador, México y Colombia.

En su primera reunión, fue designado el doctor Alfonso López Reyna, para presidir las sesiones y presentar los informes y actividades latinoamericanos. Como conclusión de estas sesiones de trabajo, se vio con preocupación que los documentos presentados fueron de los Estados desarrollados; los Estados latinoamericanos demostraron desconocimiento del tema. En esta oportunidad, Colombia presentó su declaración, la cual sirvió de material de trabajo dentro del grupo latinoamericano, lo mismo que para algunos países de Africa y Asia. Esta declaración de Colombia, se puede considerar, fue la base, en 1973. La declaración de Colombia decía:

1º Que el grupo de trabajo que será creado en ese momento por ese subcomité, estudiara conjuntamente los temas de investigación científica sobre el medio marino y desarrollo y transmisión de tecnología, por cuanto los temas son complementarios y tienen una interrelación que los hace comunes al estudio de las personas que se dediquen a él.

2º Que las investigaciones científicas de cualquier calificación que se realicen en las aguas territoriales, conlleven la obligación por parte del Estado que ha ideado la investi-

gación, de hacer partícipe al Estado ribereño en la totalidad del trabajo, desde la fase del planeamiento, escogencia de áreas, estudios logísticos, realización de las operaciones científicas, procesamiento de los datos, interpretación de los mismos y publicación final de los resultados. En pocas palabras, que el Estado ribereño sea copartícipe integral del proceso investigativo.

3º Que las investigaciones científicas que se organicen en el mar patrimonial (en ese tiempo era mar patrimonial, ha cambiado a zona económica), esto es, desde el mar territorial hasta las 200 millas de la costa contadas a partir de la línea de base, tengan las mismas condiciones y obligaciones que fueron expuestas para la zona del mar territorial, ya que en esta zona, el Estado ribereño tiene el deber de promover y el derecho de reglamentar las investigaciones científicas, según se dijo en la Declaración de Santo Domingo, por cuanto dicho Estado debe ejercer derecho de soberanía sobre los recursos naturales, renovables y no renovables, que se encuentran en el agua, en el lecho y en el subsuelo de dicho mar patrimonial y porque la investigación científica es la base de la exploración y la explotación de los recursos naturales y los usos militares de la zona en cuestión, además de generar el conocimiento que debe enriquecer la mente del hombre y ha de estar a disposición de todos los habitantes de la zona.

4º Las investigaciones científicas que se realicen en la zona más allá de la jurisdicción nacional, o mar patrimonial, deberán cumplir las normas que establezca la Asamblea y el Consejo de la Autoridad Internacional, teniendo en cuenta que se realizan a nombre de la humanidad en patrimonio común y que, por lo tanto, el hombre tiene derecho a conocer científicamente la zona, así como a participar en el usufructo de sus recursos.

En todos los puntos anteriores deberá tenerse presente que no se restringirá la investigación científica, sino que, por el contrario, se promoverá su intensificación, dada la necesidad de los países en desarrollo de adquirir los conocimientos necesarios y fundamentales.

Las recomendaciones que dieron aquí en este grupo de trabajo fueron:

1º Conseguir facilidades para organizar el sistema de intercambio con los Estados latinoamericanos que conforman el grupo de redacción.

2º En cuanto a la investigación científica, debía hacerse un documento de artículo de Tratado.

3º Igualmente lograr avanzar en la armonización de las opiniones latinoamericanas, con miras a reducir las distancias y a convenir una organización sistemática con contactos y delegaciones de otras áreas geográficas.

En la III Conferencia de las Naciones Unidas sobre el Derecho del Mar, en su segundo período de sesiones, en Caracas, del 20 de junio al 29 de agosto de 1974, se consolidó a la llegada de las delegaciones el grupo de redacción que había sido conformado en Santo Domingo, y preparatorio de esa reunión, Colombia, México y Venezuela, para presentar un Texto al grupo latinoamericano. Este grupo que había sido conformado en Nueva York, se reunió en la Delegación de Perú. Este grupo latinoamericano hizo circular su Texto entre las delegaciones del Grupo de los 77 y fue acogido como base de estudio para consultas oficiosas. Después de múltiples reuniones diurnas y nocturnas del Grupo de los 77, se logró un Texto común, que fue presentado por Colombia en su calidad de presidente del grupo en la sesión dieciseisava de agosto 23 de 1974, de la Comisión III y cuyo documento transcribo a continuación. Como es bastante pesado y largo, yo creo que ustedes, todos, ya lo conocen, el documento A/CONF.62/

C.3/C.3. Allá lo que se trató fue ante todo de dar como principio del Estado ribereño el derecho a realizar y reglamentar la investigación científica en sus aguas jurisdiccionales y en su plataforma, lo cual era consecuente con las aspiraciones de los Estados latinoamericanos.

En relación con el consentimiento, la participación y la obligación del Estado ribereño, el documento L-13 establece las condiciones bajo las cuales se deben realizar las investigaciones científicas, que son en todo aplicables al criterio del derecho exclusivo de realizar y reglamentar tales investigaciones científicas, lo mismo que el derecho a supervisar dicha investigación.

4º La III Conferencia de las Naciones Unidas sobre el Derecho del Mar, en su quinto periodo de sesiones, adoptó el Texto Unico Oficioso para Fines de Negociación. En su 55ava. sesión plenaria, celebrada el viernes 18 de abril de 1975, la Conferencia decidió pedir, a cambio de los precedentes textos, tres grupos principales que preparasen un Texto Unico para Fines de Negociación, que abarcara los temas que tenía ante sí cada Comisión.

Es de destacar que en esta oportunidad aparece el primer articulado para estudio de la Conferencia. En el tiempo transcurrido del 5 de mayo al 26 de agosto de 1975, se reunió el Grupo Evensen en Ginebra. A esta reunión asistieron 56 Estados y organizaciones internacionales a título personal, y se trataron dos temas de la III Comisión: Investigación Científica de los Mares y Protección y Preservación del Medio Marino.

Quiero hacer referencia a lo tratado en esta oportunidad sobre investigación científica, porque allí se nos muestra la posición de países en desarrollo, a los cuales pertenecen los latinoamericanos, así como la de los países desarrollados. En ese entonces se pudieron apreciar varios criterios, de los cuales quiero destacar lo siguiente:

a) En disposiciones generales, primero que todo se vio la necesidad de definir qué era la investigación científica.

b) La conveniencia de comenzar el artículo 1º, explicando cuáles eran los fines de la investigación.

c) Los representantes de Estados desarrollados se mostraron partidarios de una definición restrictiva, en el sentido de ampliar la fórmula de investigación científica, llevada a cabo en el medio marino; a este concepto se opusieron los Estados en desarrollo, en base al argumento de que la investigación científica se puede conducir desde otros espacios, aéreo, atmosférico, ultraterrestre, por ejemplo. En el artículo 6º se hace referencia a la investigación científica conducida desde tierra. Quedó claro, entonces, que el concepto debe comprender toda la investigación científica referente al medio marino, independientemente de dónde se conduzca.

d) El artículo 2º fue cuestionado por el representante del Perú, porque a su juicio se pretendió definir quiénes tenían derecho a la investigación, y en ese sentido se hablaba de todos los Estados y organismos internacionales, y si bien más tarde se hacía una distinción, podría haber margen a un conflicto de interpretación. En consecuencia, se solicitó se definieran los derechos en relación con las áreas donde se ejercite, pues las cuestiones del derecho de investigación son asunto fundamental para los países en desarrollo.

Otro de los puntos fue el derecho a la investigación, tema bastante conflictivo. En principio, podría considerarse que el artículo del Texto corresponde a las necesidades de las grandes potencias para poder realizar con mayor libertad la investigación. De ahí que los Estados en desarrollo insistieran en la conve-

niencia de volver sobre este punto, una vez que se determinaran claramente los derechos y deberes de los Estados, desde un punto de vista metodológico y político, parece conveniente resolver, en primer término, cuáles son los derechos y deberes de los Estados; desde un punto de vista metodológico y político, parece conveniente resolver, en primer término, cuáles son los derechos y deberes y, posteriormente, quiénes son sus titulares y bajo qué condiciones.

Al tratarse el punto relacionado con los medios científicos adecuados para la realización de la investigación, se sugirió la inclusión de los satélites, controles remotos y otros, pues en este campo la Convención debe ser reguladora.

En cooperación internacional y regional, se discutió lo siguiente:

a) No se presentaron mayores divergencias de fondo en esta materia que aparece regulada en el capítulo II, artículos 8 al 12; sin embargo, los Estados en desarrollo insistieron en que la difusión de conocimientos científicos era una necesidad correlativa del derecho.

b) Por otra parte, se destacó la importancia de incluir una referencia a la transferencia de tecnología, concepto que en opinión de los países desarrollados debería trasladarse a la parte de la Convención que trata este punto, posición objetada por los países en desarrollo.

COMENTARIO DE VICTORIA DOS SANTOS COSTA:

El nuevo derecho del mar, que se encuentra en vías de formación, debe de preocuparse de las desigualdades de facto de la vida internacional, sobre todo económica.

El derecho al desarrollo de los países considerados subdesarrollados, formando una grande mayoría dentro de los 150 miembros de las Naciones Unidas, debe ser así el derecho nacido de la constatación y de la corrección de las desigualdades, porque el derecho internacional debe realmente transformarse en sus estructuras fundamentales en derecho de desarrollo.

Este derecho al desarrollo se anuncia actualmente como la grande vía de cooperación entre los Estados. El mar ocupa el 70% de la superficie del globo. Desde la antiguedad se representa sobre todo como una fuente de riquezas inagotables, y sirve como la gran vía de comunicación y de comercio internacional.

En la Carta de Derechos y Deberes Económicos de los Estados, en su artículo 7, se dispone que: Todo Estado tiene la responsabilidad primordial de promover el desarrollo económico, social y cultural de su pueblo y, a este efecto, el derecho y la responsabilidad de elegir sus objetivos y medios de desarrollo, de movilizar y utilizar cabalmente sus recursos y de llevar a cabo reformas económicas y sociales progresivas, de asegurar la plena participación de su pueblo en el proceso y los beneficios de desarrollo.

El artículo 13, completa lo anterior al afirmar que todos los Estados deben promover la cooperación internacional en materia de ciencia y tecnología, así como la transmisión de tecnología, y que, en particular, todos los Estados deben facilitar el acceso de los países en desarrollo a los avances de la ciencia y la tecnología modernas, la transmisión de tecnología y la creación de tecnologías autóctonas.

La Carta también dispone que: Todos los Estados deben cooperar en la investigación con miras a desarrollar directrices o reglamentaciones afectadas internacionalmente para la transferencia de tecnología, teniendo plenamente en cuenta los intereses de los países en desarrollo. Además, establece que los fondos marinos y oceánicos y su subsuelo, fuera de los límites de la jurisdicción nacional, así como los recursos de la zona, son patrimonio común de la humanidad, sobre la base de los principios aprobados en la Asamblea General, es una solución 2749/XXV de diciembre de 1970.

Lo anterior significa que los Estados deberán asegurar que la exploración de la zona y la explotación de sus recursos se realice exclusivamente para fines pacíficos y que los beneficios que de ellos se deriven se reparta equitativamente entre todos los Estados, teniendo en cuenta los intereses y necesidades especiales de los países en desarrollo, previendo que, mediante la concertación de un Tratado Internacional, de carácter universal, que cuente con el Acuerdo General, se establecerá un régimen internacional que sea aplicable a la zona y sus recursos y que incluya un mecanismo internacional apropiado para hacer efectivas sus disposiciones.

También el Pacto de las Naciones Unidas, de 1966, sobre los derechos económicos, sociales y culturales, y en el Pacto sobre los Derechos Civiles y Políticos, en el artículo 1º de ambos, se dice que: todos los pueblos tienen derecho a la libre determinación, a establecer libremente su condición política y proveer, asimismo, a su desarrollo económico, social y cultural. Para el logro de sus fines, todos los pueblos pueden disponer libremente de sus riquezas y recursos naturales, sin perjuicio de las obligaciones que derivan de la cooperación económica internacional, basada en el principio de beneficio recíproco, así como en el derecho internacional.

En ningún caso podría privarse a su pueblo de sus propios medios de subsistencia. Este es un paralelo entre los Pactos y la Carta.

La América Latina, dentro del derecho del mar, tiene a través de declaraciones individuales, relativas a los límites de mar territorial, mar adyacente, plataforma continental o mar epicontinental, y colectivamente, proclamó la necesidad de alcanzar el desarrollo de sus pueblos por la utilización de los recursos marinos.

El 18 de agosto de 1952, en Santiago se afirmó: "Los gobiernos de Chile, Ecuador y Perú tienen la obligación de asegurar a sus pueblos las necesarias condiciones de subsistencia y de procurarles los medios para su desarrollo económico". En 1955, los llamados Principios de México sobre el Régimen Jurídico del Mar, exponían: "Cada Estado tiene competencia para fijar su mar territorial hasta límites razonables, atendiendo a factores geográficos, ideológicos y geológicos, así como a las necesidades económicas de su población y a su seguridad y defensa". En 1970, en Montevideo y en Lima, se reconoce la existencia de un nexo geográfico, económico y social entre el mar, la tierra y el hombre que la habita, del que resulta una legítima prioridad en favor de las poblaciones ribereñas para el aprovechamiento de los recursos naturales que les ofrece su ambiente marítimo. De ahí que los artículos primeros de las declaraciones respectivas establecen el derecho del Estado ribereño de disponer los recursos naturales del mar adyacente a sus costas, y del suelo y subsuelo del mismo mar, para promover el máximo desarrollo de su economía y elevar los niveles de vida de sus pueblos.

En Lima se afirma el derecho inherente del Estado ribereño a explorar, conservar y explotar los recursos naturales del mismo mar adyacente a sus costas, y del suelo y subsuelo del mismo mar, así como de la plataforma continental, y su subsuelo, para promover el máximo

desarrollo de sus economías y elevar los niveles de vida de sus pueblos.

La doctora Gladys habló ya algo sobre la Declaración de Lima. En Santo Domingo, el 7 de junio de 1972, en la Conferencia Especial de los Países de la Región del Caribe, complementando lo que había sido expuesto en las declaraciones anteriores, los mismos Estados se preocuparon especialmente del problema de tomar en cuenta situaciones particulares de este mar, del Mar Caribe, declarando que se deben procurar soluciones regionales y subregionales en el derecho del mar, con base en la noción de mar patrimonial. Aquí, los latinoamericanos traen repetidos con ligeras diferencias, la preocupación del continente por el desarrollo, por el aprovechamiento de los recursos de los océanos y mares que los circundan. Muchas veces los latinoamericanos proponen soluciones regionales y subregionales.

Era necesario que el derecho del mar se tornase en un derecho al desarrollo. Vino entonces la resolución 27-49 de diciembre de 1970, que aprobó la declaración de principios reguladora de los fondos marinos y oceánicos y su subsuelo fuera de los límites de la jurisdicción nacional, en que el fondo del mar pasaría a constituir patrimonio común de la humanidad, por lo que sus recursos naturales deben explotarse en beneficio de los pueblos más necesitados.

Se elabora por fin el Texto Integrado Oficioso para Fines de Negociación, en el cual los más diversos aspectos del derecho del mar son localizados, y en cuya parte 14 se dedican trece artículos, distribuidos en cuatro secciones, al desarrollo y transmisión de la tecnología marina, de la cual es interesante e indispensable mencionar algunos puntos.

Analizando y citando los artículos del Texto, podría afirmar que la preocupación de los autores fue de elaborar un Texto en que todos los aspectos fuesen enfocados partiendo de las

siguientes preguntas: ¿Qué es desarrollo y transferencia de tecnología marina? ¿Cómo cesará la transferencia de tecnología? ¿De qué manera se protegerán los intereses legítimos de los Estados marinos? ¿Cuáles son los objetivos básicos de los Estados? ¿Cuáles son las medidas para así alcanzar los objetivos básicos? ¿Cuáles son los medios y modos de cooperación internacional? ¿Cuáles son los objetivos de la utilidad de la transmisión de tecnología?

Por fin se plantea la necesidad del establecimiento de centros nacionales y regionales de pesquisa científica. La cooperación entre las organizaciones internacionales fue el objeto del último artículo.

El aspecto 1 de la disposición general del artículo 266, estipula la promoción del desarrollo y la transmisión de la tecnología marina. Los Estados directamente cooperarán para promover activamente el desarrollo y la transmisión de la ciencia y la tecnología marina en condiciones y términos equitativos y razonables. Los Estados que pueden necesitar y soliciten asistencia técnica de esta materia, particularmente los Estados en desarrollo, incluyendo los Estados sin litoral y los Estados geográficos en situación desventajosa, en cuanto se refiere a la preservación del medio marino, la investigación científica marina y otros usos del medio marino compatibles con la presente Convención. Los Estados tratarán de promover condiciones económicas y jurídicas para la transmisión de tecnología marina, en beneficio de todas las partes interesadas sobre una base equitativa. Es interesante acentuar aquí que en el artículo 144 del Texto, esto obedece a algunas normas sobre la transferencia de tecnología con relación a la zona de los fondos océnicos y sus subsuelos. El artículo 267 se ocupa de la protección de los intereses legítimos de los Estados. Los objetivos básicos se encuentran en los artículos 200 y 608. El artículo 269 se ocupa de las medidas para lograr los objetivos básicos, entre los cuales

se encuentran las condiciones favorables para la contratación de acuerdos, celebración de conferencias y seminarios y el intercambio de científicos. La sección dos, sobre cooperación internacional, comprende cinco artículos, entre los cuales el 270 establece medios y modos de cooperación internacional, el 271 da orientaciones, criterios y normas, el 272 se refiere a la coordinación de programas internacionales y el 273 a la cooperación con las organizaciones internacionales y con la Autoridad en la transmisión de la tecnología a los Estados en desarrollo.

Dada su importancia, sería interesante que leyéramos el artículo 274, que se ocupa de los tres objetivos de la utilidad respecto a la transmisión de tecnología. Sin prejuicio de los intereses legítimos, incluidos entre otras cosas los derechos y deberes de los poseedores y los proveedores, la Autoridad, con respecto a la exploración de la zona y la explotación de sus recursos, garantizará que se emplee con fines de formación de miembros del personal administrativo, científico y técnico establecido para esas tareas, así como de nacionales de los Estados en desarrollo, sean ribereños, sin litoral o en situación geográfica desventajosa, sobre la base de distribución geográfica equitativa, que puedan necesitar y solicitar asistencia técnica en esta esfera, incluyendo la documentación técnica relativa al equipo, maquinaria, mecanismo y procedimiento correspondiente.

COMMENTARY

Dr. Paul Fye
Woods Hole Oceanographic Institution

I must point out, at the onset, that my presence at the round table is one of an obligation, and not a right. The obligation was that I did not want my institution to let our very gracious host and distinguished chairman down. I must further confess to being an imposter. I am not a lawyer. I am not an expert in matters of the law of the sea. I am not even a scientist who can be disguised, on occasion, as a lawyer. I am simply a practitioner and user of the oceans through thirty years of trying to learn more about this wonderful and weird world we know as the oceans. I must confess further that I had hoped the chairman would have enough courage, when the time ran out, not to intrude on your drinking time, and to adjourn the meeting. Further, I have been greatly impressed not only by these beautiful surroundings and atmosphere -- and I am keenly aware of the honor of being here at CEESTEM, and sharing this round table with these distinguished speakers. The performance this morning, enhanced further by the panelists this afternoon with their excellent presentations, has me thoroughly intimidated.

But I am not such a great impostor as to pretend that I am happy with the state of affairs of the Law of the Sea Conference, as it relates to marine scientific research. Nor are my colleagues happy with the state of affairs. We feel that we have been had. We feel that the result of the long and tedious negotiations has resulted in the worst combination of the obligations regime and the consent regime, at opposite ends of the negotiations spectrum.

I don't understand the subtleties of customary law and how it arises. And I don't know whether we have already established the principles of Chapter 13 as customary law. But I would contend that our unhappiness is based on the fact that, essentially, all of the articles of Chapter 13 have been put into practice. And we do not need to wait for the ratification of the treaty, or further negotiation, to see some of the impacts of the law of the sea on marine scientific research.

Changes have been taking place: changes in urgently needed research, which is not being done; changes due to refusals on the part of coastal states to give consent or due to such extensive limitations on research that can be done that the researching state finds these conditions unacceptable and cancels the proposed research. Perhaps even more serious is the fact that I find scientists are sufficiently discouraged by delays in obtaining consent, or failure to obtain consent,

or the fear of having consent refused at the last minute, that they are are not planning research that needs to be done. This type of self-control by the scientists is more unfortunate, in my opinion, because much of the important and necessary research lies within the exclusive economic zone, or the continental shelf extended for as yet undetermined distances. Much of the research needed to be done to understand the proper control of pollution, fisheries management, mineral resources -- except for manganese nodules -- lies within the economic zone, or on the shelf and its extensions.

An examination of research done at my institution some years ago indicated that something between a third and half of the research we were doing was in the economic zones of other states. This was always done with their cooperation and their blessing if not consent. And it was done because the scientists concerned felt that this was the most important work that needed to be done and involved the most important questions that needed to be answered. Now this is changing, I must confess, not only due to regulatory limitations or effects and impacts of the law of the sea negotiations but also due, at the moment, to economic limitations. The laboratories in my country find that the funds for operating of ships are inadequate in large part due to the increase of fuel costs. And they are, for this reason, planning cruises much shorter than in previous years.

I should at this point note, as you have already observed, that the greatest evidence of my being an impostor is that I am not specifically commenting on the papers presented this afternoon. I did not have an opportunity to study them, and feel quite inadequate to comment specifically about them. We do look forward in the future, I hope, to greater cooperation from our colleagues from other states. And I think that we will find that there are advantages to working under the new regime, which we must do, and will do.

I would like to comment, if I may, Mr. Chairman, on two aspects of scientific findings and new technologies which have an interesting interaction with the law of the sea. The first is an update of a story you have read about in the public press, partly because it has a Mexican version now. It is the discovery of life in the deep rift valleys which run through the center of the great mountain chains that range throughout the mid-ocean regions. This work has been done by the cooperative effort of a number of laboratories, including those of Mexican scientists, using the small Woods Hole submersible Alvin. The geologists and geochemists planning this work did not anticipate finding life to any extent in the deep sea where they were doing research. In fact, they did not invite any biologists to accompany them. Much to their surprise they found five small areas -- oases, if you will -- in what is normally a marine desert where life was most prolific. This splendid example of serendipity occurred between Ecuador and the

Galapagos. Clams, mussels, sea worms, octopus, many other species were found in enormous quantities in these small areas. And most surprising was that the species were giant forms of clams which were twelve inches long, mussels almost as large, tube worms which were an inch and a half in diameter and eight feet long. More recently, at twenty-one degrees north, about a hundred miles west of Baja, California, several dozen such oases were discussed along the the rift valley, and the life there was even more prolific and the species even larger, having tube worms as long as twenty feet. We were privileged and pleased to have Mexican scientists with us in these endeavors. And I would like to note that there was no cultural shock in our beneficial experiences together. Only three people can descend in our little submarine to depths greater than two miles, and that does require a very cordial relationship among the three. And I should note that not only have we been privileged to have scientists from neighboring coastal states with us, but we have even been privileged to have women aboard.

The point is that these discoveries, which may have great impact on the understanding of marine life, were first found about two hundred miles from Ecuador and the Galapagos, and, more recently, in the proposed exclusive economic zone of Mexico. It would be a great shame if scientific research had been prevented in these areas and thus scientists had missed such findings.

A second illustration concerns new technology. As many of you know, there is a proposal to utilize the energy available in the difference of temperature between the cold waters, deep in the ocean, and warm surface waters. Yesterday, I wanted to ask Professor Oxman about installations that might be necessary to extract this energy from the sea, but time did not permit asking the question. Those of you familiar with OTEC, as it is known, the Ocean Thermal Energy Conversion project, appreciate that an installation comparable to, or even larger than, the largest drilling platforms will be required to perform this extraction of energy. At present a modest installation is operating near Hawaii from a barge. And a larger one will be in operation next year, from a T-2 tanker. The system requires pumping very large quantities of water from deep in the ocean, where the temperature is only a few degrees above freezing, to the surface, and into a boiler where electricity can be generated in the fashion of a steam-generating plant. In the Hawaiian examples, the depth of water is only about seven hundred meters, but in a full case it would be anticipated that the pipes might go down to twenty-five hundred meters. In the Hawaiian case, a closed cycle ammonia plant is used, and other versions are being considered for deep water. In concept, the installation would be anchored in deep water, or perhaps in the deepest portions of the economic zone or beyond, in the high seas. In some instances it could be drifting so as to take advantage of the

maximum change in temperature. Such an experiment which may make significant changes in the ocean does raise questions concerning marine pollution and obstacles to navigation, to fishing or to submerged submarines.

I don't consider this an example of marine scientific research, subject to the regulations of Chapter 13, but rather an example of a new technology, which may have important law-of-the-sea implications. And let me close, Mr. Chairman, by saying this is not the end. There will be other examples, which we cannot even imagine today.

PART V

DELIMITATION OF THE EEZ AND THE CONTINENTAL SHELF BETWEEN OPPOSITE AND ADJACENT STATES

INTRODUCTION

Dr. Lewis Alexander
University of Rhode Island

Let me say just a general word about maritime boundary problems. Up until a few years ago there were a very small number of people who knew about the problems of maritime boundary delimitation. And in the United States the principal office handling this is the Office of the Geographer under Bob Hodgson. One of the reasons I'm sorry Bob isn't here is that I think within the United States he is probably the leading expert on the problems and thus would be able to contribute answers as well as his very good paper.

The field has expanded somewhat, and I think for two reasons in particular. One is the need for a precise boundary delimitation on the seabed because of oil and gas leases and exploitation. And the second is of the extension seaward of coastal state jurisdiction calling into question a number of boundary delimitations necessary between countries. When they were more than 24 miles apart, these questions did not arise. Now, if they're within 400 miles of each other, or if their continental shelves adjoin to one another, this problem comes up.

And of course, as you're going to see in Bob Hodgson's paper, the ICNT says almost nothing about this except to leave it for the States to take care of.

THE DELIMITATION OF MARITIME BOUNDARIES BETWEEN OPPOSITE AND ADJACENT STATES THROUGH THE ECONOMIC ZONE AND THE CONTINENTAL SHELF: SELECTED STATE PRACTICE

Robert D. Hodgson*
The Geographer
Department of State
(Delivered in his absence by Professor H. Gary Knight)

The task I have been assigned is difficult under any interpretation. However, the question of state practice in the delimitation of maritime boundaries between opposite and adjacent states may be addressed in several ways. One, a type of statistical approach, could enumerate the number of potential maritime boundaries with the existing pattern of states; the number of agreed boundaries which could, in turn, be categorized as adjacent and/or opposite as well as by functional type of boundaries -- territorial sea, contiguous zone, continental shelf, zones of extended resource jurisdiction; the methodology[s] utilized in the delimitation; the number and character of disputed boundaries, where known; and, perhaps, finally a overview of the vast number of maritime limits which have yet to be negotiated or even to be considered by the states concerned. They encyclopedic approach, I believe, lends itself better to a written paper which may be consulted as a "source document" as needed. In an oral presentation, it struck me that the approach could be a potential source of greater confusion than edification.

As a consequence, I will examine the subject from a different tack. I would like to review, in some detail, several third-party settlements and roughly a half dozen bilateral agreements. These have been selected to have displayed imaginative and rational solutions to specific maritime delimitation problems. The selection does not intend to indicate that all future delimitations will, or should follow these particular methodologies; I am certain that many boundaries will be developed on other methodologies which have proven, under proper circumstances, to have been of value.

However, to put these selected agreements and third-party settlements in their proper perspective, I will note a few figures. If all existing coastal states and territories declared 200-mile economic competence zones, there would result approximately 331 maritime boundaries [1]. At present, fewer than 25 percent of these have been negotiated, many of which

*The views herein are those of the author and not necessarily of the United States Government.

have been "negotiated" only in part. The Anglo-Norwegian and the Canada-Denmark continental shelf boundaries, for example, require extensions to reach the outer limits of the continental shelf or the fishery zones which the states presently claim.

As a consequence of the limited number of established maritime boundaries, it would be difficult to speak, at this time, of state practice in an absolute or definitive manner. Therefore, I would like to address "state practice" in a way not necessarily consonant with the usual meaning. "Practice of states" might better describe the basic intent of the selection for examination of particular agreements and decisions.

One point seems to be quite universal: coastal states are evolving politically and economically in a manner by which ocean waters and seabed are coming increasingly, in the geographic sense, under national dominion. Claims for the breadth of the territorial sea have expanded in my lifetime from a near universal acceptance of three miles [2] to great distance from the shore [3]. The Third United Nations Conference on the Law of the Sea (UNCLOS III) is attempting to standardize this breadth at not more than 12 miles from the national baseline [4]. While it is too soon to state categorically that the Conference will succeed, or even that it will fail in this and other attempts to codify the law of the sea, it does seem fair to state -- without prejudice to claims of other breadths -- that the majority of the world's coastal states and territories have virtually settled on a general claim of 12 miles, including free transit of international straits.

Other zones, moreover, are -- in the same forum -- increasing in breadth. The contiguous zone, limited to 12 miles by the Geneva Convention in the Territorial Sea and the Contiguous Zone [5], has an ICNT-sanctioned breadth of twenty-four miles from the baseline.

In addition, coastal states, based in whole or in part on the same ICNT, have increasingly claimed 200-mile zones for certain economic competences, in particular fishing [6]. In the quartet of 1958 Geneva Conventions on the international law of the sea, fishing was deemed to be a high seas' freedom in the zone beyond the territorial sea. Later, state control over fisheries was extended to the seaward limit of the contiguous zone. One must consider, therefore, that fishery management and conservation zones or exclusive fishery zones have expanded from at least the breadth of a territorial sea to that of an economic zone.

Lengths of maritime boundaries between both opposite and adjacent states have, as a consequence, been increased by a similar magnitude. It need not be dwelt upon, except in

passing, however, that certain states are in a restricted geographical situation and their "waters" cannot be expanded but to a limited degree. These situations, however, are very few in number.

The delimitation of land boundaries between states has matured principles evolved over a long period of historic time. In the early stages, limits took on the aspect of frontiers, marches or zones rather than finite lines of demarcation [7]. Territories passed back and forth between states with considerable frequency and reflecting the strength, power or interest of the central core of a particular state. However, the creation of a modern centralized state in the recent past has led to the evolution of a science of boundary delimitation based upon international law and mirroring, in the main, state practice. The principles often were related to physical aspect of the land -- rivers, mountain ranges, drainage divides -- or to human factors -- the distribution of language, religion, ethnic groups, etc. This is not to say, or even imply, that all international land boundaries are "scientific" or even "natural". Many result from capricious actions of states or even of individuals who knew little or nothing about the physical or human geography of the areas being divided between competing states. In some situations, compelling reasons were often advanced to ignore geographic factors for better or more reasonable results.

Boundaries in water bodies, however, have generally developed in differing manners based upon very diverse reasonings. As Boggs has noted, in discussing primarily limits in rivers and lakes although the points are also applicable to seas and oceans, "[P]olitical boundaries that pass through bodies of water within the territory of two or more nations or states present several interesting problems. No matter how complicated any land boundary may be, it can be marked throughout its entire course, and it is so marked whenever it becomes necessary. But water boundaries are characterized by peculiar problems, of both definition and demarcation. Definition of water boundaries is usually in relation to their landward margins, and shorelines shift both vertically and horizontally, with melting snows, spring freshets, drought, or tides; furthermore, they migrate with erosion and accretion. Likewise, demarcation questions are peculiar, generally speaking, in part because it is seldom practicable to mark the turning points of boundaries in the water, and it is frequently not feasible to mark them on land by means of reference monuments and lights."

"Modern political administration, however, demands a definiteness in all boundaries greater than was formerly required in rivers, lakes, and seas. If a question of national or state jurisdiction arises, it should be practicable to plot required in rivers, lakes, and seas. If a question of national

or state jurisdiction arises, it should be practicable to plot the position ... on a chart on which the boundary is shown or on which it is feasible to determine the boundary in accordance with a clear and precise definition."[8]

The problems of demarcation have always been recognized in the sense of physical marking on the surface of the water the precise location of turning points. Buoys are unsatisfactory and generally expensive, particularly in deeper water. While technological advances in the future may make the question of location by transponders feasible and practical, the most logical solution is, as noted by Boggs, to have a precise and clear definition of turning points. A complete definition would, therefore, include the nature of the connective lines, their reference spheroid and/or necessary datums. Unfortunately, many existing agreements either fail to provide these essential data or the limits are plotted on inaccurate maps or charts which inhibit the ability to recover the boundary with precision necessary to avoid future dispute and/or error. As will be noted, one third-party arbitration court failed to comprehend the importance of "demarcation" through precise delimitation of the maritime boundary. The decision presented particular problems of such a serious nature as to require a second adjudication.

Boggs' definition of "water boundaries" in relation to their "landward margins" has proven prophetic, although insufficiently appreciated in the present world of delimitation. It is hoped that the analyses which follow will reveal certain of these inter-relationships associating the elements of definition to the landward margins for the maritime boundary. Most may recall that Professor Francois convened a group of experts during the early sessions of the International Law Commission [9]. Various delimitation methodologies which they considered all tied the maritime boundary to the terminal point or section of the land boundary: the latter's prolongation; a line normal to the general direction of the coast; and the equidistant [median] line. These relationships, being the first to be considered, were philosophically relatively simple. Subsequent refinements have become more sophisticated and ever more closely attuned in their inter-relationships to the landward margins and/or to their natural prolongations through marine space or areas. With more time, we may anticipate, as with the development of land boundary practices, that these relationships may evolve into an even more rational and/or natural symmetry.

I. The Third-Party Settlements

Three major third-party settlements involving delimitation of maritime boundaries are considered here: (1) the International Court of Justice Decision on the North Sea Continental Shelf Cases [10] involving the binding principles

of international law for the delimitation of continental shelf boundaries between the Federal Republic of Germany (FRG) and Denmark, on one hand, and the FRG and the Netherlands, on the other; (2) the Delimitation of the Continental Shelf between the United Kingdom and France as determined by the Court of Arbitration [11]; and (3) the technical appeal to this latter Decision. To this observer, the Anglo-French case may have even greater and more unfortunate effects on the techniques of delimitation than the original decision may seem to have on relevant international law [12].

A. The North Sea Cases

I need not expound to a great detail on the ICJ Judgment relating to the North Sea Cases, for many scholars have examined it from various viewpoints of the law [13]. I would, however, attempt to analyze briefly the outcome of the decision in terms of the geography of the cases and the ultimate boundaries negotiated between the parties [14]. Denmark, the FRG, and the Netherlands lie adjacent to each other on the eastern and southeastern shores of the North Sea. The Danish coastline is aligned nearly due north-south as is the adjacent portion of the German shore. In the vicinity of the mouth of the Elbe River and close to both land boundary termini, the German coastline changes direction abruptly and markedly to extend nearly east-west, in the same direction as the Dutch Frisian shoreline. According to the German claims, in part, this radical change in the coastline, among other things, made for an inequitable delimitation of the continental shelf if the equidistance method were to be utilized for both continental shelf boundaries of the FRG [15].

Due to the similarities of the Dutch and Danish legal positions and arguments, the Court and the Parties agreed to join the two cases into one. There can be no doubt that a "double" equidistance delimitation, as a consequence of the change in coastal direction, would have severely limited the seaward extension or prolongation of the German continental shelf. The seaward trisection point lies only 93.99 miles from the three shore lines. This point, in turn, is situated 85.50 miles east of the North Sea midline between the U.K. and the Dutch and Danish coastlines. Thus, on the basis of two equidistant boundaries, the German prolongation would have extended only about 52.5 percent of the distance from the shore to the midlines of the North Sea.

The Danes and the Dutch argued that the use of equidistance as the method of delimitation would be required under international law in the absence of special circumstances. The Governments obviously did not perceive the existence of these conditions.

The Court majority, in effect, disregarded the direct arguments of both sides and, calling on the Truman Proclamation as its basis, stated that a delimitation of the continental shelf was not an apportionment of area [16] but the appropriate determination of the natural prolongations of the shelf off each country's coasts; the Court declared these limits existed; it was therefore a matter of determining where they were [17]. The geographical view of the Court was clearly one of an extension of the land territory -- in a horizontal plane -- into and under the sea. That this extension related to the landward margins of the continental shelf boundaries cannot be disregarded. In the final development of its argument, the Court defined this prolongation in these terms: "[t]he institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal states into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists ... . The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong."[18]

The Court, in speaking of "certain configurational features," raises the question if it was referring to elevated or to submerged features, or to both. The use of "geology," rather than "geography" or "topography" would imply that the Court majority was speaking of the surface or subsurface of the submerged shelf or seafloor. However, there was no discussion of such features in the opinion. Later references indicate strongly that coastal features and even the configuration of the entire coastline played an important part in the formation of the concept of appurtenance or prolongation. Thus, it would appear reasonable to believe that the Court did not mean to draw a clear distinction between emerged and submerged features. The continuum of land and shelf builds the framework of the relationship of boundary to "landward margins."

As a consequence, in the final decision, the award states:

> "(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking into account all of the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental

shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;

(2) if, in the application of the preceding subparagraph, the delimitation leaves to Parties areas that overlap, these are to be divided between them in agreed proportions ...;
(D) in the course of the negotiations, the factors to be taken into account are to include:

1. the general configuration of the Parties, as well as the presence of any special or unusual features;

2. so far as is known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;

3. the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal States and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region."[19]

These relationships to the landward margins and their natural continuum could not be more explicit.

The principles having been established by the Court, the Parties quickly negotiated the continuations of the existing boundaries. From an analysis of the final delimitation, it is obvious that the parties relied heavily on the Court's injunction that a reasonable degree of proportionality must exist [20]. Within limits of the North Sea, the final shelf areas produce a ratio within a mere 100 square miles of the coastal proportionality claimed by the Federal Republic. However, in spite of the Court's proclamation that resource fields could be divided -- for many means exist to develop these cooperatively in common or by allocation -- the boundaries in both instances were delimited in such a manner which excluded known Danish and Dutch hydrocarbon fields from the German continental shelf. We do not know if these were proven (or claimed) to relate to geological or geographical features on shore or if the two states wished to protect known resources.

The unusual feature of the delimitation, however, is the extension of the FRG continental shelf to the mid-line of the sea. While the advocates of the Federal Republic made the point in argument and in graphic form that this situation should occur, no clear explanation appears to have been advanced. While the Court did not pronounce on the subject, the final delimitation raises an intriguing question. In similar instances, i.e. lateral states facing on an enclosed or semi-enclosed sea, do all coastal states have the "right" or the "option" to extend, or to claim to extend, their natural prolongations to the midline of the semi-enclosed sea? The creation of a "panhandle" west-northwestward to terminate along the already negotiated limit of the U.K. shelf cannot have been required merely to meet the areal coast proportionality. It is obvious that the Federal Republic strongly desired a prolongation which would attain a common maritime limit with the U.K. If the results of the delimitation will affect future delimitations, the issue of what comprises the midline may well become a factor to be negotiated or litigated. The maritime limit of the U.K., as noted, clearly defines the line in the North Sea.

Geographic factors of greater complexity may well affect such efforts, if made, in other seas. It is entirely possible, however, that the concept may assist in particularly difficult situations. In the southern South China Sea, for example, where the sovereignty (and the nature) of the many small rocks and islets are disputed, an equitable solution may involve prolongation of China, Vietnam, Indonesia, Malaysia and the Philippines to the midline of the southern part of the sea ignoring the question of ownership and relevance of the reefs and rocks of the sea. The effects on this delimitation may only be seen with time and future negotiations.

B. The Anglo-French Arbitration

We are at a disadvantage in the analysis of the Anglo-French shelf case for the two states agreed that the memorials and counter-memorials presented to the Court of Arbitration would remain confidential. As a result, it is not possible to determine with any precision lines of argument taken by the parties and the evidence used to substantiate them. Certain points appear obvious from the quotations in the court's judgment; but context is often determinative and this may not be always obvious in the quotation.

As a general summary, the two states disagreed upon the location of the continental shelf boundary in the English Channel and the Celtic Sea, i.e., the western approaches to the Atlantic Ocean [21]. The British case appears to have been premised upon the lack of special circumstances and hence the equitable results which an equidistant boundary would produce. France, in contrast, claimed at least three situations where

special circumstances were relevant and which would have to be taken into account in any delimitation that was in accord with equitable principles [22]. These three, in summary, related to (1) the location of the Crown fiefdom of the Channel Islands immediately opposite the French shore; (2) the issue of Eddystone Rock; and (3) the effect of the Cornish Scilly Islands on a Celtic Sea shelf boundary.

The Court has fortunately settled an extraneous issue raised by the ICJ in the North Sea Cases by noting that the delimitation articles of the Convention on the Continental Shelf were meant to include all geographic situations [23]. The ICJ, in an aside, had noted that the Netherlands and Denmark were geographically neither "adjacent" nor "opposite". The Court of Arbitration wisely stated that geography and not legal principles determines these two relationships. As a consequence, states in the same region which may have maritime boundaries are to be classified according to the relationships of the coasts to the adjacent body of water or continental shelf to be deemed the natural prolongation. As a consequence, the Court of Arbitration perceived the U.K. and France to be geographically opposite in the area of the English Channel and to be adjacent as they faced upon the shelf of the Celtic Sea. This decision is both rational and reasonable and, as a test, it may be applied to all geographic relationships. Maritime boundaries, as a consequence, may now be deemed to change their "character" within their area of prolongation. The effect of position, however, may dominate or be subordinate to other geographic, physical or historical factors which may override the relevance of physical or spatial relationships.

In the main area of the English Channel, the two states were found to be opposite. The coastal baselines of the two states in the Channel were determined to be generally parallel and nearly identical in geography; as a consequence, the justices perceived no special circumstances -- except in the Channel Islands area discussed below -- and determined that the application of equidistance would produce a continental shelf boundary according to equitable principles. In actual fact, both states agreed on this methodology with the noted exceptions, in one of which the Court favored the French argument and in the other, the British.

The resulting delimitation did no violence to the shelf area allocated to the states, to the development of international law or to the relationship of the maritime boundary to the issue of the landward margins of the Channel. The resulting boundary relates to the landward margins in accordance with reasonable geographic similarity.

In the case of the Channel Islands, the Court of Arbitration found that "... such an interpretation [of the Channel Islands as a projection of the United Kingdom] ... would

be as extravagant legally as it is manifest geographically; nor does the United Kingdom, in fact, ask the Court to view the situation in that way. As recalled in paragraph 169, it specifically puts its case on the basis that 'there is a portion of continental shelf appertaining to the south coast of England and a portion of continental shelf appertaining to the Channel Islands'. These two separate portions, it claims, 'merge together in mid-channel' ... ."[24]

"The true position, in the opinion of the Court, is that the principle of natural prolongation of territory is neither to be set aside nor treated as absolute in a case where islands belonging to one State are situated on continental shelf which would otherwise constitute a natural prolongation of the territory of another State. The application of that principle in such as case, as in other cases concerning the delimitation of the continental shelf, has to be appreciated in the light of all the relevant geographical and other circumstances ... ."[25]

Consequently, the Court found in favor of France and created for the Channel Islands an "enclave" of continental shelf to be measured twelve miles seaward from the natural baseline [26].

The Issue of Eddystone Rock was not determined by the court on the basis of geographic factors but rather that France had already accepted it as a basepoint from which the United Kingdom measured its territorial sea and contiguous fishery zone [27].

If the decision of the Court of Arbitration contained a surprise, it would have to relate to the boundary in the western approaches, the Celtic Sea. The Court of Arbitration referred to the relative westward extensions of both the peninsulas of Cornwall (U.K.) and of Brittany (France) as well as to their insular prolongations -- the Scilly Islands (U.K.) and the Ushant (Ouessant) group (France) [28].

There appear to have been differences in opinions between the parties on the precise western limit of the Channel and the "beginning" of the Atlantic. The Court of Arbitration, however, stated categorically that "... the precise system of toponomy adopted for these various areas is without any legal relevance ...; it is the physical facts of geography, not nomenclature, with which this Court is concerned."[29]

Both parties appear to have based their claims on the utilization of the equidistance methodology [30]. The United Kingdom perceived no "special circumstances" and claimed the boundary should follow the true equidistant line. In contrast, the French proposed continuing the "general direction" of the coastlines of the Channel westward and bisecting this area. As in the North Sea Cases, the Court of Arbitration, in

effect, rejected the proposals of the two states and concentrated on its perception of the geography of the Celtic Sea shoreline. The language of the Court is of interest to the concept of "landward margins"; "[i]n the view of the Court, the further projection westward of the Scilly Isles, when superadded to the greater projection of the Cornish mainland westwards beyond Finistere, is of much the same nature for present purposes, and has much the same tendency to distortion of the equidistance line, as the projection of an exceptionally long promontory, which is generally recognized to be one of the potential forms of 'special circumstance'."[31]

Since the Court did not wish to try "refashioning geography", an admonition of the International Court, the justices, having recognized that a "special circumstance" did indeed exist in the "superaddition", chose not to develop a boundary ex aequo et bono. As a consequence, they chose to modify the equidistant line by reducing the Scilly Isles to "half-effect" basepoints [32], although denying any paramount reason for the particular fraction. They referred to the decision as an "abatement" of the perceived deflection of the true equidistant line by the combination of the westward positions of Cornwall and the Scilly Islands.

I will postpone comment on the development of the line to the next section which relates to the U.K. request for clarification of "technical" problems inherent in the final decision. The Court, however, developed one "equidistant line" using Ushant and the Scilly Isles and another which ignored the existence of the latter. The "triangle" enclosed by the two lines was then divided in "half" to create the "half-effect line".

Before leaving the boundary, several points relating to it and the landward margins of the water body to be divided may be made. There appears to be no question that the English Channel equidistant boundary reflects a division of the continental shelf on the basis of equitable principles. No "special circumstance" occurred -- with the exception of the Channel Islands. While one may argue the case -- and indeed the parties did disagree and did argue it -- the Court perceived the Channel Islands -- as a U.K. dependency -- as a special circumstance. The issue of being a "sovereign state" was raised and the Court implied that it might have seen the issue differently had the political situation of the Islands differed. From a geographical perspective, it is difficult to see, however, what the relevance in geographic circumstances would be if the Channel Islands were (a) an integral part of a U.K. "county"; (b) as they are -- a crown dependency; (c) a "colony" of the U.K.; or (d) indeed independent rather than suzerain states. The Court of Arbitration otherwise related the boundary to its perception of the landward margins of the

two states. Considering the coasts to be "equal" in length and virtually identical in geography, the Court deemed the equidistant line to mirror the two coasts.

It must be noted, however, that the Court appears to have modified the ICJ notion of "coastal proportionality" in an adjacency situation while utilizing the concept in the area where the condition of geographical "oppositeness" existed. At the same time, it agreed that the opposing condition, i.e., disproportionality, was a strong indication that a boundary would have been developed on a basis other than equitable principles [33]. The effect of the negative emphasis, however, has likely had little effect on the continental shelf boundary award. It certainly did not result in an unacceptable non-conformity of relationship to the landward margins of the Celtic Sea.

C. Technical Interpretation of the Decision

The publication of the award of the Court of Arbitration raised several very important technical issues. Certain of these were questions of interpretation but others clearly reflected what I believe were errors in the vital technical work [34]. The importance of these should not be underestimated and the effect they have had on the final delimitation proves the need for understanding the importance of precision in the technical work. There must, as well, be a clear, mutual understanding between jurists and experts. Each in his way should be familiar with the craft of the other to assure that the legal decision (a) is based upon accurate data, and (b) that it is transferred to turning points and delimited lines which -- due to the lack of demarcation -- will be precisely and continuously recoverable. Errors of understanding may result in the "loss" or "gain" of resources of immense present or future value [35].

The "technical questions", however, dealt with the following issues: (a) "the manner in which the 12-mile enclave boundary was drawn" seaward of the Channel Islands; (b) the "techniques used in the drawing of the boundary" in the Celtic Sea [36], and to these I would add (c) the manner in which the two equidistant boundaries were drawn westward from point 'M' to determine the final "half-effect line" of the award.

The Court answered the U.K. questions without seemingly taking into account technological advances made in the past several years [37]. The United Kingdom Government delicately referred to these questions as "certain technical problems involving contradictions between segments of the boundary line thus traced and defined and the intention of the Court set out in the body of the Decision."[38]

In the first instance, the United Kingdom claimed that the expert had ignored five low-tide elevations, all situated within one mile of the shore line, and two dryland points which had traditionally been used by the British for the development of the three-, six- and twelve- mile limits seaward of the Channel Islands. These points were not utilized on the official award chart nor noted in the report of the technical experts [39]. The Court wisely stated that "(a) request for interpretation must, therefore, genuinely relate to the determination of the meaning and scope of the decision, and cannot be used as a means for its 'revision' or 'annulment', processes of a different kind to which different considerations apply."[40]

In the area of the Channel Islands, the Court asked the French Government if it disputed the British contention that certain basepoints had been "ignored". "The French Government has not contested and does not contest that the identification of the basepoints relevant ... has been carried out correctly by the British Government ... ."[41] The Court, without asserting error by the expert, did note a "discrepancy" between its intent and the chart affixed to the decision [42]. A "harmonization" was thus allowed to be adopted as the true intent of the Court's original decision.

The second technical questions raised by the U.K. request involved the nature of the line from M - N (and as noted above in (c) other questions on methodology may be raised). The technical expert had constructed all lines on Mercator charts as the "straight lines" of the decision. A straight line on a Mercator chart is, in fact, a loxodrome, a line which cuts all meridians at the same angle. On the earth, of course, a loxodrome is a continuous spiral which, when extended poleward will continuously create arcs of smaller and smaller radii. A "straight line" on the earth -- i.e., the shortest line connecting two points on the surface -- is a geodetic line which, on a Mercator chart, is reflected by a curved line. I need not go into greater technical detail at this point but Point N on the geodesic would have been located approximately four miles south of its position on the loxodrome [43]. The adoption of the loxodrome, of course, deprived the United Kingdom of a portion of continental shelf which a different technical interpretation would have deemed to be British. Furthermore, it must be kept in mind that the distance from M - N measures 168.67 miles (on the geodesic) and the area "lost" is not inconsiderable.

From a purely technical perspective, the Court's reasoning for accepting the French argument or, at least, in rejecting the British version that an error has been made, is not compelling.

The French Government stated "[t]he expressions 'half-effect' and 'mid-way' cannot, according to the French Government, be understood as meaning that the Court had in mind division formulated in terms of absolute mathematical equality. The question simply being one of correcting the effect of the inequitable distortion due to the position of the Scilly Isles ... . Consequently, a boundary which corresponds to a factor sufficiently close to a half is ... in perfect accord with the Court's reasoning in paragraphs 249-251 of the Decision."[44]

Any technical expert would agree with the French position that absolute perfection in the equal division of area is not possible at this stage of technological development. However, it is most difficult to accept that a "sufficiently close" result is reasonable in the same context. The British clearly pointed out that in the negotiations prior to the arbitration, both parties clearly understood that the equidistant line could be drawn for illustrative purposes on any chart or map as well as on any projection; however, corrections for distortions caused by these projections should always be taken into consideration [45].

Furthermore, it is difficult to consider that unforeseen technical errors would be employed in abating the inequitable results of a special circumstance (the Scilly Isles) and to so state would appear to detract from the legal concepts on which the decision is based. The technical implementation of a legal decision should not be a factor to alter the decision itself. What this situation demonstrates is the importance of in-depth understanding of technical aspects of delimitation by all concerned, and particularly by the justices and the technical expert or experts who are associated with the case and upon whom the responsibility for carrying out the intent of the Court is placed.

It is impossible to assess the responsibility; however, the Court decreed that "[t]he question ... is ... whether the two loxodromes employed in the Expert's calculations may be considered as a simplified form of strict or true equidistance lines. It is whether they can and ought to be considered as 'equidistance lines' within the meaning, and for the purposes, of the half-effect or method of delimitation adopted and defined in paragraphs 251, 253, and 254 of the Decision. In answering this question, the Court has necessarily to take as its starting point the fact, which is undisputed, that the calculation by the Expert, on the standard navigation charts employed by him, of the two loxodromes as lines equidistance from the specified base-points as meticulously exact. It has also necessarily to take as another starting point the facts that the half-effect solution was adopted by the Court as an equitable variant of the equidistance principle expressing a necessarily approximate appreciation of diverse considerations; and that the method for implementing it was devised as a modified rather than as

a strict application of the equidistance method. The ad hoc character of the devise and the fact that it is a special application of the equidistance method is, indeed, evidenced by the Court's selection of two particular pairs of base-points for the calculation of the lines determining the half-effect boundary rather than all the potentially relevant points on the respective coastlines.

"111. The information available to the Court, as already indicated, does not appear to it to establish that the delimitation of maritime boundaries by a loxodrome line on a standard navigational chart based on Mercator projection without correction for scale (sic) error is either inadmissable in law or as yet so outmoded in practice as to make its use open, in general, to challenge. The Court, therefore, finds itself bound to conclude that the techniques used in the calculation of the half-effect boundary may not be considered as incompatible with the method for its delimitation laid down in paragraphs 251, 253, and 254 of its Decision of 30 June 1977.

"113. The method of calculating the course of the line M - N employed by the Expert and adopted by the Court in the proceedings in 1977 has not therefore been found by the Court to be incompatible with its findings in paragraphs 251, 253, and 254 as to the principles and method to govern the delimitation of that segment of the boundary. Thus no such contradiction has been established ... ."[46]

The Court, of course, was well conversant with the law and its reasoning for so interpreting. From a technical point, early equidistant lines were developed upon Mercator charts and the resulting lines were generally not corrected for the errors induced by the chart's projection. Mariners use Mercator charts due to their unique ability to depict courses to be steered. Because they constitute good navigational (water) charts, low-tide elevations and other elements of the baseline, such as the low-water line, are generally plotted only on these Mercator (navigation) charts. As a consequence, equidistant lines determined on the basis of plane geometry are logically developed upon these navigational charts. However, the mariner corrects errors induced by the projection as he sails his route. With more sophisticated technology, more advanced corrections are made.

The same consideration should apply to the boundary delimitation. The term "equidistant boundary" should not be utilized indiscriminately. In cases where equidistance is the methodology employed, the boundary must be one on which every point is equidistant from the nearest point on the respective baselines of the two states involved. Moreover, it is unfortunately true that many states have claimed in treaties to delimit "equidistant boundaries" which, in every fact, have little or no relationship to the definition. It is also true

that an equidistant boundary may be developed from all relevant basepoints and then simplified by exchanges of territory of equal or near equal area. However, the parameter boundaries described by the Court of Arbitration were not equidistant lines and should not have been so described. In the same manner the final boundary should not have been labeled as a "half-effect" equidistant line when a more precise line could have been developed easier, cheaper and more accurately by computation. Thus, it is not a question of plane geometry being "nearly as accurate". Most modern mapping services could have developed more accurate lines which truly met the criteria which the Court claimed it outlined in paragraphs 251, 253, and 254 of its Decision.

In this modern period of rapid technical developments, it appears to me that such imprecision detracts from the intended precision of the judicial opinion. If the Court had decided simply to develop a compromise line somewhere between the claims of the states then the resulting impression would be more understandable. However, the description of the boundary as giving "half-effect" -- the definition of the Court -- would require that the resulting line should be as close to a 50/50 division of the delimited area as technically possible.

I shall not spend too much time on the final point of "objection" to the "technical" aspects of the Court's Decision. However, I would like to note that the equidistance methodology was not used in the Celtic Sea region. Only three basepoints were selected and the lines were developed from one of these points on each baseline. The basepoints were, moreover, not the final determinant points, the ones which had the greatest or ultimate influence upon the "equidistant" line; nor do they appear, from examination, to be particularly comparable in terms of geographical influence.

Since it would have been easy to compute the geodetic lines specified by the Court and the geodetic midline required by the Decision, so could a true equidistant boundary have been developed using all relevant basepoints on both the French and British Islands west of the peninsulas of Brittany and Cornwall. In a similar manner, an equidistant line could have been developed between these same French basepoints and U.K. basepoints restricted to the mainland. From these, one of many boundaries could have been created which would have divided equally the area contained within these two true equidistant lines and the agreed-upon location of the 1,000 meter isobath. Again, by computation, the processes would have been reasonably quick, inexpensive and more precise. The line would also have conformed to what the court professed to have ordered the technical Expert to accomplish.

However, if the intent was not to divide equally the area contained within equidistant lines, the Court-selected lines should have been designated what they were -- artificial limits of a disputed area as defined by the court. This is not to insist that technical terms be used only within the limits of their technical definition. Certainly the legal definition of the continental shelf takes precedence over any geologist's or geographer's definition. However, the equidistant line is legally defined in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone [47] and it would be reasonable to assume that the Court would abide by this definition or at least not to undermine it by the loose usage of language in its Decision.

II. Selected State Practice

As I originally noted, there is no intent to deliver a litany of maritime boundary delimitations categorized in one or two words according to my conceptions. Rather, it appears more reasonable to examine a limited number of agreements which appear to reflect the close and essential geographic relationships of the ultimate boundary to the landward margins forming the perimeters of the maritime area. Some have been reasonably simple and yet reflect a relatively sophisticated view of the geographic facts. Others, of course, have been very complicated and they often mirror the political realities combining a chance for reasonable development, the maintenance of good neighborly relations and the absence of a desire to litigate the issues due to potentially damaging effects on other interests.

A limited number of maritime boundary agreements have been selected for the purpose of this review. Several are illustrative of methodologies which delimit coastal facades and which relate to the general direction of the coasts. Another has been chosen to reflect respective lengths of the coastal margins from which the boundary has been delimited. The Japan-Korea agreement, in contrast, illustrates the development of a seabed area without the delimitation of a single boundary between jurisdictions. Finally, an agreement has been negotiated to allocate functional competences without restriction by the limits of other rights.

A. Chile-Peru-Ecuador-Colombia Maritime Limits

These three maritime boundaries have been delimited by a series of declarations and a bilateral international agreement. The west coast of the continent of South America is constituted by a pair of relatively direct north-south lines. Several variations do occur in the general continuous trend; they, however, do not detract from the longitudinal expression of the coast and hence the lateral expression of the coastal fronts which the parallels of latitude create.

They form the landward margins of the maritime boundaries. The primary proclamation in 1952 of Chile, Peru and Ecuador comprised an assertion of jurisdiction (and in certain instances sovereignty) "over the area of the sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast."[48] Article IV declared the boundaries of the zones to be formed "... by the parallel of latitude drawn from the point of which the land frontier between the two countries reaches the sea."[49]

The use of the parallels of latitude was continued in the Ecuador-Colombia agreement of August 23, 1975 [50] and by the boundary between Colombia and Panama [51]. The latter utilizes, in part, equidistance methodology and a negotiated boundary, for a distance of approximately 177.42 miles from the land terminus of the mutual boundary. The parallel of 5° North then forms the limits between the maritime jurisdiction of the two states seaward. Thus, from 5° North latitude to 18° 23' 03" South latitude, the maritime frontiers between all west coast Latin American states follow parallels of latitude, a north-south distance slightly in excess of 1,400 miles. The coastal facades reflect the geography of the west coast area. The facade methodology is thus relatively consistent although not so unique that a reflection of coastal front may be utilized only in the region.

It may also be added that both the Argentina-Uruguay and the Brazil-Uruguay maritime boundaries, which are generally perpendicular to its coasts [52], roughly parallel each other. These boundaries delimit again coastal fronts even though these limits do not coincide with lines of latitude. (The azimuths of the boundaries vary by less than 10° of the arc.)

B. Franco-Spanish Territorial Sea and Continental Shelf Boundary

In the North Sea Cases, the ICJ stated that a maritime boundary should reflect to a reasonable degree the proportionality between the respective coastline of the adjacent states. The Governments of France and Spain have negotiated a territorial sea and continental shelf boundary in the Bay of Biscay which carries out this edict in a sophisticated manner [53]. The Spanish coastline extends nearly west-east from the land boundary terminus while the French coastline projects first northward and then northwestward. The French shore on the Bay is considerably longer than the Spanish. In their negotiations, the states developed the first sector, i.e., to point Q 13, on the basis of equidistance. This point is approximately 68.4 miles from the baselines of both states. Furthermore, the delimitation process utilized nearly equal lengths of coastal baselines in the development of the equidistant portion of the boundary.

Next the parties agreed to create an arc from the hinge point, i.e., where the French coast changed directions (Pointe de la Negade) and to swing this arc onto the Spanish baseline to create point "X". A difference in view developed at this point; Spain desired to continue the equidistance line to the point where the line would intersect this arc; France, in contrast, wanted to terminate the equidistant portion at the straight line connecting the Pointe de la Negade and "X". The compromise "split" the difference. From this point to the terminal point of the boundary, the line was constructed to allocate to the states shelf area proportional to the ratio of the unused segments of the national baselines, i.e., those lengths northwestward from the hinge for France and west of "X" for Spain.

This delimitation clearly reflected both the relationship to the landward margin and to the edict of the ICJ in the North Sea Cases decision. The boundary delimitation was inventive and a skillful coupling of the law as seen at the time and the factors of the baseline geography. Both states have, of course, legislated 200 mile resource zones and it will be of great interest to observe the processes of extending the shelf boundary to the limits of their 200-mile zones.

C. Netherlands Antilles-Venezuela

The Netherlands Antilles is composed of two groups of islands separated by the breadth of the Caribbean Sea. In the south, the main, i.e., larger, islands of Aruba, Bonaire and Curacao lie offshore of the mainland of Venezuela; Saba, St. Maarten and St. Eustatius are situated on the northeastern rim of the Lesser Antilles. The latter three extend southeast of the Virgin Islands of the U.S. and are situated to the north of the Venezuelan island of Aves.

As a consequence, two distinct maritime boundaries had to be negotiated to separate the zones of the parties. In the northeast, an equidistant boundary was delimited [54]. The major political-legal problem, however, had always been in the south. Aruba, the western-most of the three major islands, lies on the same 200 meter platform as the mainland Venezuela. Curacao, in the middle, and Bonaire, to the east, are separated from the mainland by deeper water -- approximately 730 fathoms (c. 1500 meters). According to press reports, Venezuela originally perceived the three islands to be situated upon the Venezuelan continental margin. Since Aruba was enclosed within the mainland 200 meter isobath, an equidistant boundary was acceptable to the parties; elsewhere, however, the noncontiguous islands would receive only a limited allocation of shelf, perhaps as little as 12 miles measures from the normal baselines of Bonaire and Curacao.

The final negotiated boundary, however, reflects more accurately the realities of the physical and political geography of the area. The Antilles received a reduced allocation of territory in the sense that the final boundaries allocate less area, i.e., 56 per cent, than would true equidistant lines. In fact, only two of the thirteen points utilized to delimit the boundary extend to a median line. The remainder are negotiated to effect a reduction in area for the Antilles in view of its lesser area and shorter coastline. The boundary is "U-shaped"; the two northernmost points are equidistant but not from Venezuelan territory. Point No. 1, in the west, is equidistant between Curacao (Netherlands Antilles) and Cabo Beata and Isla Saona (Dominican Republic). Point No. 13, in the east, is equidistant between Isla Saona and Aruba and Curacao (N.A.) [55]. The effect of these point selections is to reduce the Antillean area as the boundary proceeds seaward and to totally ignore any effect that Bonaire as well as the Venezuelan baseline would have on an equidistant line. To the east of Bonaire, the boundary follows a meridian of longitude, that of Puerto Cabello situated on the mainland of Venezuela. To the west of Aruba, a meridian of longitude (70° 25' W.) is also utilized.

D. Italy-Tunisia Continental Shelf Boundary

Italy and Tunisia face each other across the Strait of Sicily in the waist of the Mediterranean. Italy, however, is sovereign over a group of four small islands -- Lampedusa, Lampione, Linosa and Pantelleria. These islands are situated nearly in the middle of the channel between Sicily and the mainland of Tunisia. By treaty [56], Italy and Tunisia developed their maritime boundary in a unique manner which takes into account the special circumstances of these islands. An equidistant line comprises the basic boundary between the Tunisian baseline and the Italian baseline ignoring the four mid-channel islands. About Pantelleria, the Italian shelf extends to a distance of 13 miles. The limit about Lampione, in contrast, is formed by the envelope of 12-mile arcs measured from the island baseline to intersections with the envelope developed about Lampedusa. Lampedusa, as was the case with Pantelleria, again receives 13-mile envelope of arcs to describe the outer limit of the continental shelf. The arcs extends from an intersection with the Lampione arcs to the intersection with the envelope of arcs, again 13 miles in radius, measured from the normal baseline. These arcs terminate as the boundary again when they intersect the original median line.

At the time of the treaty, Italy only claimed a 6-mile territorial sea and a 12-mile fishery/contiguous zone. The granting of an additional mile for continental shelf purposes constituted a relatively marked departure from the treatment of other "mid-channel" islands by states. The figure, however, maintains the Italian shelf as a cohesive whole and furthermore

extends the Italian shelf between the nearest Italian island (Pantelleria) and the Tunisian baseline, i.e., a rough "half-effect" has been achieved. The Lampione relationship, in contrast, is approximately 1:4 with Tunisia gaining the larger share.

E. Japan-Korea Continental Shelf and Joint Development Zone

Japan and Korea long suffered with a simmering dispute over the limit between their respective continental shelf areas. The basic difference in position appears to have related to the different perceptions and hence to conflicting delimitation philosophies, i.e., equidistance (Japan) and natural prolongation of the land mass (Korea). The primary dispute involved the southern area at the mouth of the East China Sea. In the Sea of Japan and the Korea Strait, the only dispute centered on the sovereignty of Dak-do/Takeshima/Liancourt Rock. As a result, an equidistant boundary -- in the main -- was delimited in these relatively narrow waters. The disputed islands served to limit the northward extension of the maritime boundary at this time.

The disputed area in the south, however, was designated as a "joint development zone" to be exploited in "common". The zone was divided into eight subzones which have the following areas:[57]

I.	630 sq. n. mi.	VI.	35 sq. n. mi.
II.	76 sq. n. mi.	VII.	11,770 sq. n. mi.
III.	33 sq. n. mi.	VIII.	4,770 sq. n. mi.
IV.	6 sq. n. mi.	IX.	3,130 sq. n. mi.
V.	3,651 sq. n. mi.	Total	24,101 sq. n. mi.

The second agreement [58], which created the joint development zone, provides for the contractual and operating parameters, as well as the delimitation of the 20 external points which outline the zone.

A Joint Commission was established to oversee operations in the joint development zone. Most of its functions, however, remain recommendatory with principal powers remaining with the states. This agreement constituted the first negotiated agreement creating a joint development zone for the exploration and exploitation of the minerals of the continental shelf including the seabed and subsoil. The implementation, h wever, was delayed for a considerable period by the ratification process and the passage of necessary, enabling legislation. The zonal solution, however, was a bold move by the parties to hasten development of the region's potential hydrocarbon reserves. Since this agreement was negotiated, several other treaties have included joint zones or are contemplating them.

As a delimitation mechanism, the two agreements established a mid-channel boundary where the parties are situated in an opposite geographic condition. However, in the area where they assume the character of being geographically adjacent, the joint development zone replaces the delimited boundary for zone shelf exploitation. It should be noted that the agreement specifically states that it does not establish a boundary for the superjacent waters.

F. Australia-Papua New Guinea Maritime Boundary

We have discussed agreements which delimit territorial sea, continental shelf and maritime zones with one line, generally for all purposes. Two of the agreements, France-Spain and Japan-Korea provide for joint development zones [59]. For the shelf, at least, they have created two boundaries which, in a sense, overlap.

The Australia-Papua New Guinea boundary, however, appears to me to be the most imaginative, or at least the most original, agreement which has been negotiated to date [60]. The agreement faces four vexing questions and solves them in differing manners: sovereignty over islands, the division of the continental shelf, allocation of fishing areas and the protection of a developing indigenous way of life in the area.

The first problem concerned the delimitation of an area for the protection of the aboriginal way of life which, with intensive commercial development, could be seriously harmed [61]. A "Protected Zone", delimited to cover the entire Torres Strait area, overlaps or coincides with the other limits of sovereignty and jurisdiction. Within this Zone, the parties acknowledge the need to protect the traditional way of life of the aborigines situated on Australian and Papua New Guinea territory. Traditional fisheries are guaranteed as is the freedom of migration which characterizes the way of life. Furthermore, the parties, in general, agree to the free movement of vessels and aircraft of third parties with certain exceptions. Both parties are also obliged to protect and preserve the environment and, as a result, mining and commercial fishing will be controlled so as not to harm the native's traditional fisheries. Commercial fishery rights are to be allocated, percentagewise, with PNG dominance in the north, i.e., 75/25, equally in the central portion and with Australian dominance in the south.

The question of sovereignty was particularly critical since nearly all islands in the Torres Strait, virtually to the shore line of PNG, had been annexed by Australia and were administered by the State of Queensland. Neither the state nor the local inhabitants desired to change this situation. The islands, as a result, remain under Australian sovereignty for the most part; a few close on-shore islands were acknowledged to be under

the PNG sovereignty. The Australian islands, north of the line described below, receive a territorial sea of three miles which may not be extended should Australia opt at a future date for a 12-mile territorial sea.

On the question of the continental shelf limits, a boundary was delimited from the Australia-Indonesia-PNG tripoint east and northeastward through the widest channel of the Torres Strait region. The boundary then extends southeastward into the Coral Sea. The seabed line lies considerably closer to the PNG mainland than to the Australian. It does not reflect the use of equidistance as a methodology in the Strait area [62]. In the main, however, the boundary is closer to the mainland of Papua New Guinea than to that of Australia. In the Torres Strait, the ratio (between mainlands) is nearly 1:3 in favor of Australia. Nevertheless, the continental shelf boundary passes to the south of several dozen sovereign Australian islands. These, as noted, possess three-mile territorial seas unless a delimitation problem would grant them less.

Where the territorial seas of the two states overlap, a boundary has been delimited; it is again not an equidistant line; the relationships to the baselines of the two states vary with location. In places, it is closer to Australian territory and elsewhere, to PNG territory.

East and west of the narrows of the Torres Strait, the continental shelf boundary also serves as the fisheries jurisdiction limit for the parties. Within the narrows, however, a special zone is developed which extends northward, almost to the PNG coast, and thence eastward and then southward to rejoin the continental shelf boundary. Within this area, Australia has jurisdiction over fishing -- defined as excluding the living resources of the continental shelf -- while PNG has jurisdiction over the resources of the shelf. It should be noted that to the east and to the west of this special zone, Australian islands are situated to the north of the common seabed/fishery boundary.

Thus, in an area measuring roughly 80 miles by 175 miles, the two parties have resolved four fundamental questions by means of delimitation without being restricted by the relationship of any two of them: (1) sovereignty, (2) continental shelf, (3) fishery jurisdiction, and (4) residual rights including the protection of the native way of life. Of course, in certain areas, two or more of these limits may coincide. In spite of the complexity of the agreement, it appears to constitute a dynamic and novel method to solve the myriad of political, economic and social problems within the framework of the political and physical geography of the unique area.

III. Summary

How does one relate these three third-party settlements and the nine selected maritime boundary agreements to the question of state practice in the delimitation of maritime boundaries between adjacent and opposite states for the continental shelf and for the 200-mile zone? I noted in the beginning that a pure and, perhaps, simplistic statistical summary might not prove to be revealing or perhaps even useful. Instead, the major third-party settlements and a limited number of boundary agreements were selected for a more particular analyses. Most of these agreements have taken place since the 1958 Geneva Conventions and a large number since the North Sea Continental Shelf Cases decision. Most, moreover, pre-date the Anglo-French Arbitration decision.

They all have in common a direct relationship to the particular political and/or physical geography of their respective landward margins. The Court decisions reflect the international law on the subject of marine boundary delimitation between the parties. While France and the U.K. are both parties to the Convention on the Continental Shelf, the Court of Arbitration stated that the rules of the delimitation would be the same under customary law as well as under the Convention [63]. The bilateral and multilateral agreements certainly conform to the requirements of the Convention as well as to the edict of the ICJ that meaningful negotiations take place between the parties. Each, morever, reflects the direct influence of the unique local geographical situation; the boundaries harmonize with the landward margins from which they spring.

Where the geography of the coastal area is constant over distance, bounderies between successive pairs of states reflect the same delimitation procedure. Where unique geographical factors -- special or relevant circumstances -- occur in a particular area even of small dimension, a system of delimitation has been devised to meet the particular needs of the particular physical environment. The boundaries and the coastal zones are in balance and the areas allocated reflect natural prolongations or coastal facades whereby each state is granted the area naturally appertaining thereto. As has been noted, many of these agreements reflect highly imaginative solutions to particular problems.

Although we are dealing at this time with the delimitation between states of both the continental shelf and 200-mile zone boundaries between opposite and adjacent states, the practice of states appears to view the guiding principles to be identical or very nearly so. The delimitation articles in the ICNT (Rev.1) are identical for both the zone and the shelf [64]. While objections have been raised by certain states to the existing ICNT delimitation language, I cannot recall that any

formal or informal suggestion has been made that different criteria be established for the delimitation of boundaries for the zone and for the shelf. It would, therefore, appear that the already-quoted commentary of the International Court in the North Sea Cases, or a paraphrase of it, underlies, or should underlie modern delimitation agreements -- "[t]he institution of the continental shelf [or the 200-mile zone] has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which the institution would never have existed, remains an important element for the application of its legal regime."[65] The relationship between a maritime boundary and its landward margin must be harmonious to effect a delimitation according to equitable principles, no matter the methodology to be adopted.

NOTES

1. Hodgson, Robert D. and Smith, Robert W., "Boundary Issues Created by Extended National Marine Jurisdiction," Geographical Review, Vol. 69, No. 4, October 1979, p. 426.

2. All references to miles in this paper refer to nautical miles. One nautical mile equals 1,852 meters. In certain instances a minute of latitude has been substituted for the standard international nautical mile. The so-called "geographical mile" will vary with specific latitudes. The differences, however, for this purpose are very small.

3. In September, 1979, twenty-two states claimed territorial sea breadths of three miles while seven claimed from 4 to 6 miles. The twelve-mile claimants totaled seventy-six. Eleven claimed breadths varying between fifteen and one hundred and fifty miles. Fourteen claimed 200-mile territorial seas, while three delimited their outer limits by straight lines; one state, Lebanon, has no territorial sea legislation. The United States has expressed its willingness to accept a maximum breadth for the territorial sea of twelve miles within the framework of a comprehensive and widely acceptable law of the sea treaty.

4. See Informal Composite Negotiating Text/Revision 1, A/CONF.62/WP.10/Rev.1, April 28, 1979. Hereinafter, referred to as ICNT or ICNT (Rev. 1).

5. See Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 24, Done at Geneva, April 29, 1958; entered into force for the United States September 10, 1964. 15 UST 1606; TIAS 5639; 516 UNTS 205.

6. In September, 1979, seventy-nine states claimed 200-mile competence over fisheries. Certain of these claimed broader jurisdictions including sovereignty.

7. Jones, Stephen B., Boundary-Making, A Handbook for Statesmen ..., Carnegie Endowment for International Peace, Washington, 1945, pp. 3-18.

8. Boggs, S. Whittemore, International Boundaries, Columbia U.P., 1940, pp. 176-7. Underlining added.

9. "Report of the Committee of Experts on technical questions concerning the territorial sea", Annex to Addendum to the Second Report on the Regime of the Territorial Sea by J.P.A. Francois, A/CN.4/61/Add.1, May 18, 1953, pp. 6-7.

10. International Court of Justice, North Sea Continental Shelf Cases (1969), ICJ Rep. 3. Hereinafter referred to as the North Sea Cases.

11. Arbitration between the United Kingdom ... and the French Republic on the delimitation of the Continental Shelf, Cmnd. 7438, HMSO, London, March 1979. Hereinafter referred to as the Anglo-French Arbitration.

12. Ibid. Court of Arbitration, Decision of 14 March 1978 on the Delimitation of the Continental Shelf. Hereinafter referred to as the Decision of 14 March 1978.

13. For three such studies see: E.D. Brown, "The North Sea Continental Shelf Cases," Current Legal Problems, 1970, pp. 187-215; R.Y. Jennings, "The Limits of the Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment," Int. and Comp. Law Q., Vol. 18 (1969), pp. 819-832; L.F.E. Goldie, "The North Sea Continental Shelf Cases - A Ray of Hope for the International Court?", New York Law Forum Vol. XVI, No. 2 (1970), pp. 327-377. There are many more equally relevant articles including several in the American Journal of International Law.

14. See Limits in the Sea, No. 10 and No. 10 - Revised, "Continental Shelf Boundary: North Sea," Office of the Geographer, Department of State, Washington, D.C.

15. The shoreward portions of both the Danish - German and the Dutch - German territorial sea and continental shelf boundaries are developed using the equidistance methodology in whole or in part. The continuation of the methodology, however, would have led to the inequitable results according to the Federal Republic.

16. North Sea Cases, paras. 18 and 20.
17. Ibid. para. 19.

18. Ibid. para. 95. Underlining added.

19. Ibid. para. 101. Underlining added.

20. Ibid. para. 101.

21. In this analysis, I am ignoring the legal questions raised by the French reservations and the British counter-declarations. See Colson, D. "The United Kingdom - France Continental Shelf Arbitration," AJIL (1978) Vol. 72, No. 1, pp. 95-111 for a fuller examination.

22. Anglo-French Arbitration, pp. 10-18.

23. Ibid. para 206 and paras. 91-92.

24. Ibid. para. 190.

25. Ibid. para. 194. Underlining added.

26. Ibid. paras. 201-3.

27. Ibid. para. 144.

28. Ibid. para. 244.

29. Ibid. para. 204.

30. While the equidistant line developed as the maritime boundary in the English Channel did not utilize the French straight baselines (see Limits in the Seas No. 37, "Straight Baselines: France") as the baselines from which the equidistant boundary was delimited, the presence of the system appears to have impressed the justices of the Court indirectly if not directly. The United Kingdom also has a system of straight baselines (see Limits in the Seas No. 23, "Straight Baselines: United Kingdom") but the lines are not extensive in the Channel area. While the French system enclosed Ushant within the straight baselines, the British excluded the Scilly Isles. One wonders if they had been within a system of internal waters if the Court's perception might have been altered. See ibid. para. 248.

31. Ibid. para. 244. Underlining added.

32. Ibid. para. 251.

33. Ibid. paras. 99-101 and 205.

34. Decision of 14 March 1978; cited in Note 12 supra.

35. I again chose to ignore certain vital legal issues raised by the interpretation request of the U.K. France objected on several bases to the U.K. call for "clarification". The Court dealt with these questions according to its "charter" and to the law. Unfortunately, the question of "meaning" of the decision was as much technical as legal and this particular issue will be dealt with in greater detail later.

36. Decision of 14 March 1978, p. 134-136.

37. Hodgson, R.D. and Cooper. E.J., "The Technical Delimitation of a Modern Equidistant Boundary," Ocean Development and International Law Journal, Vol. 3, No. 4, 1976, pp. 361-388.

38. Decision of 14 March 1978, p. 139 para. 4.

39. Ibid. pp. 140-141, paras. 8-11.

40. Ibid. para. 29.

41. Ibid. para. 33.

42. Ibid. paras. 34-36.

43. Ibid. para. 15.

44. Ibid. para. 42.

45. Ibid. para. 57.

46. Ibid. paras. 110-113.

47. Article 12 of the Convention defines an equidistant line in terms of a median line "... every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured ... ." The baselines from which the territorial sea are measured may be the "natural" baseline of the low water line depicted on official charts or the "straight baselines" permitted under Article 4. Other Articles permit "closing lines" or "straight baselines" to close rivers, bays, etc.

48. First Conference on the Exploitation and Conservation of the Maritime Resource of the South Pacific "Declaration on the Maritime Zones," August 28, 1952. See Ecuador Executive Decree No. 275, February 7, 1955 (Registro oficial No. 1.029) and Peru's legislative resolution No. 12.305 (El Peruano, May 12, 1955).

49. See Limits in the Seas No. 86, "Maritime Boundary: Chile-Peru" and No. 88, "Maritime Boundary: Ecuador-Peru."

50. See Limits in the Seas No. 69, "Maritime Boundary: Colombia - Ecuador."

51. See Limits in the Seas No. 79, "Maritime Boundaries: Colombia - Panama."

52. See Limits in the Seas No. 64, "Continental Shelf Boundary: Argentina - Uruguay" and No. 73, "Maritime Boundary: Brazil - Uruguay."

53. See Limits in the Seas No. 83, "Territorial Sea and Continental Shelf Boundaries: France and Spain (Bay of Biscay)."

54. Treaty of Delimitation between the Republic of Venezuela and the Kingdom of the Netherlands, signed at Willemstad, March 31, 1978, in force January 1979?

55. The effect of the reduced area delimitation -- in contrast to an equidistant boundary -- served to eliminate one boundary between the United States and Aruba, Bonaire and Curaco. There will still be a short U.S. - Netherlands Antilles boundary between the islands of Saba and St. Croix, Virgin Islands of U.S.

56. Accord entre le Gouvernement de la Republique Italienne et le Gouvernement de la Republique Tunisienne relatif a la Delimitation du Plateau continental entre les deux Pays, signed at Tunis, August 20, 1971, in force December 6, 1978. See Gazzetta Ufficiale (Italy) No. 191, July 10, 1978. See also Limits in the Seas No. 89, "Continental Shelf Boundary: Italy - Tunisia."

57. An example of the division of a subzone is as follows:

Subzone 5

Texaco (Korea)	20%
Texaco (Japan)	12.5%
Chevron (Korea)	20%
Chevron (Japan)	12.5%
NOEC (Japan)	25%
Lucky (Korea)	10%

58. See Limits in the Seas No. 75, "Continental Shelf Boundary and Joint Development Zone: Japan - Republic of Korea." Article III governs.

59. The Franco-Spanish joint development zone is divided by the continental shelf boundary. The Japanese-Korean zone, however, does not contain within it a shelf or maritime zone boundary.

60. Treaty between the Independent State of Papua New Guinea and Australia concerning Sovereignty and Maritime Boundaries in the area between the two countries, including the area known as Torres Strait, and Related Matters, signed at Sydney, December 18, 1978. Department of Foreign Affairs and Trade, Port Moresby, 1978.

61. Ibid. Annex 9.

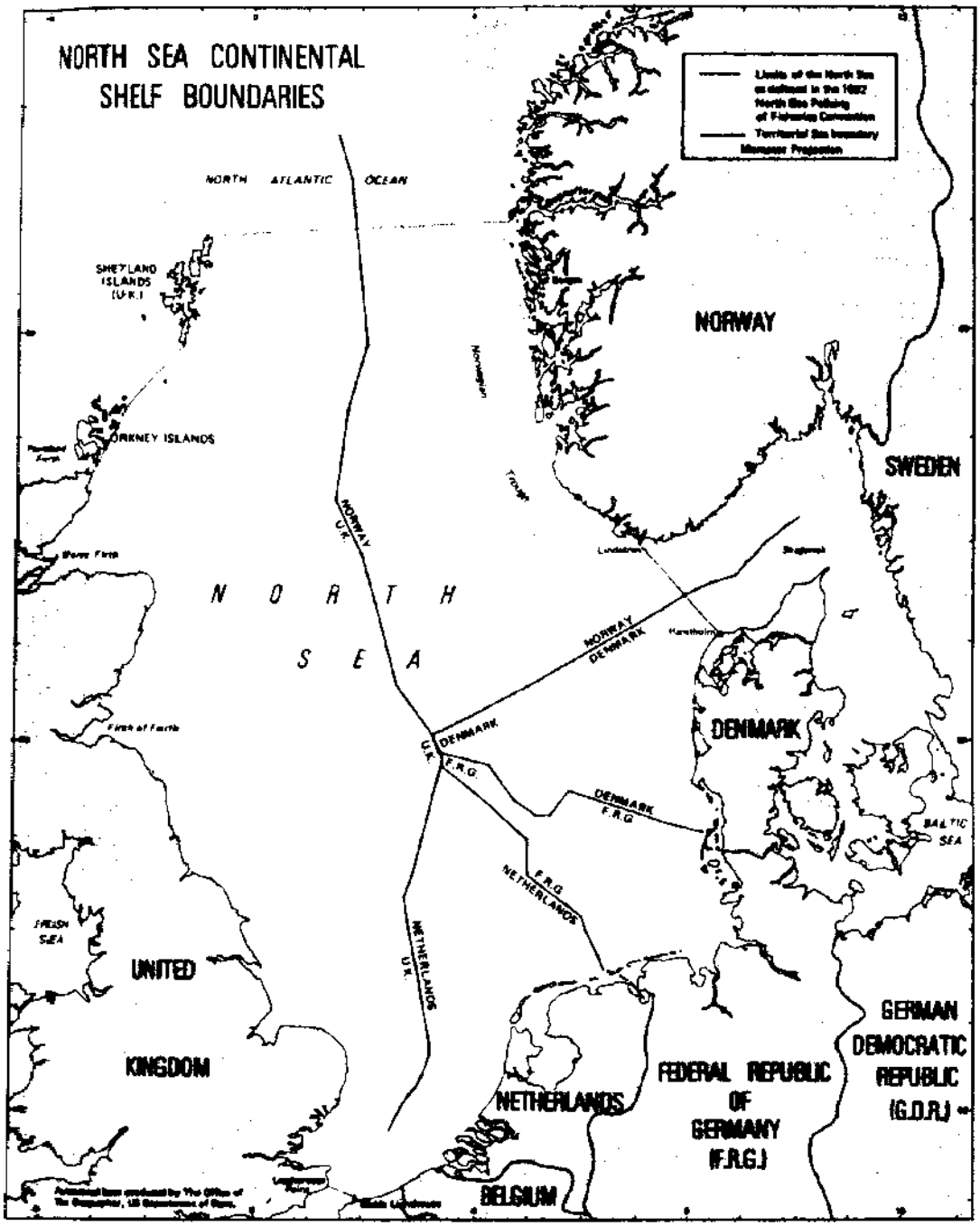
62. The tripoint is equidistant from the baselines of the three parties and several points to the east appear to be equidistant as well. However, due to the constant

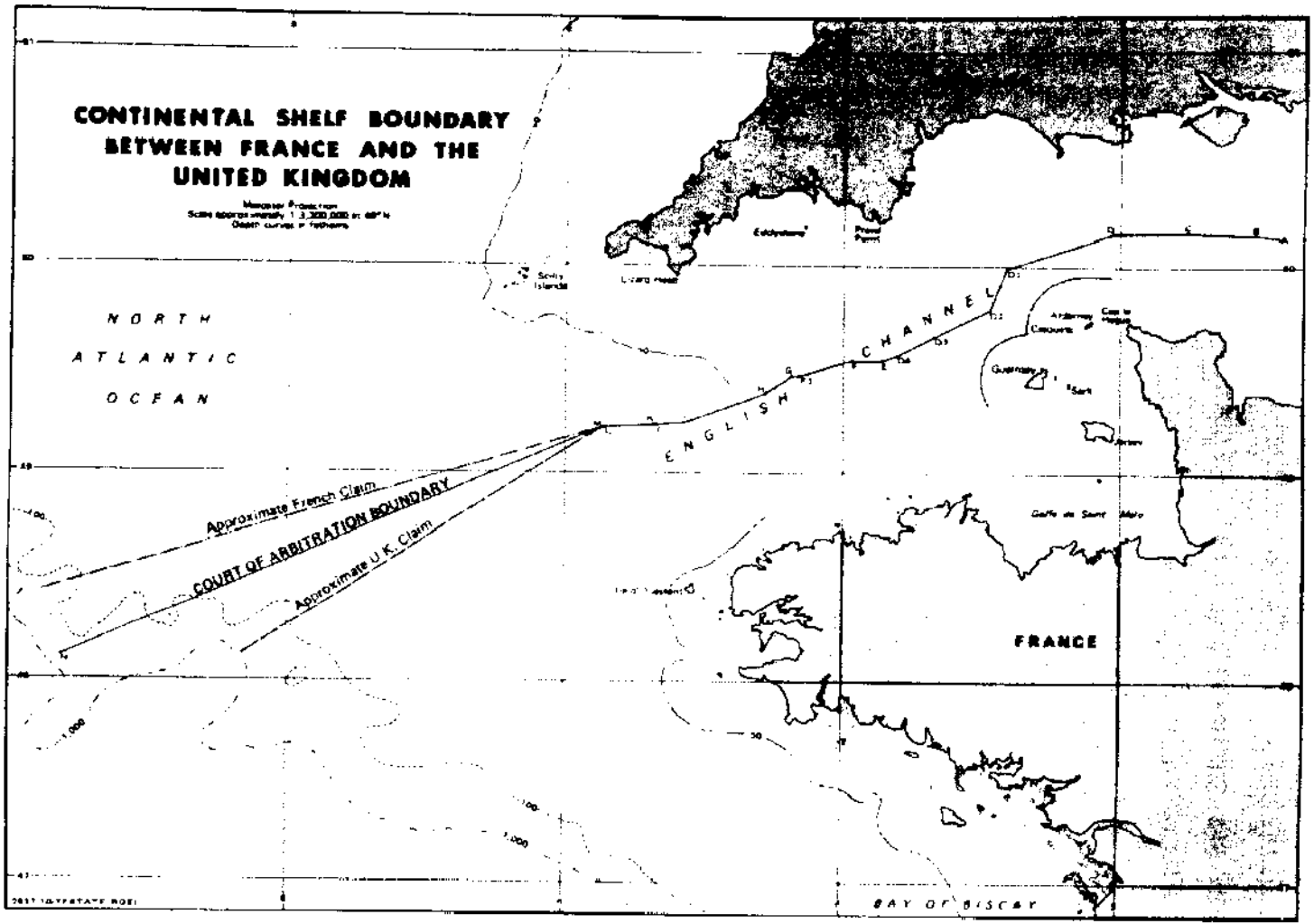
shifting shore line and the poor quality of the charts of the area, it cannot be said precisely where the use of the equidistance system terminates.

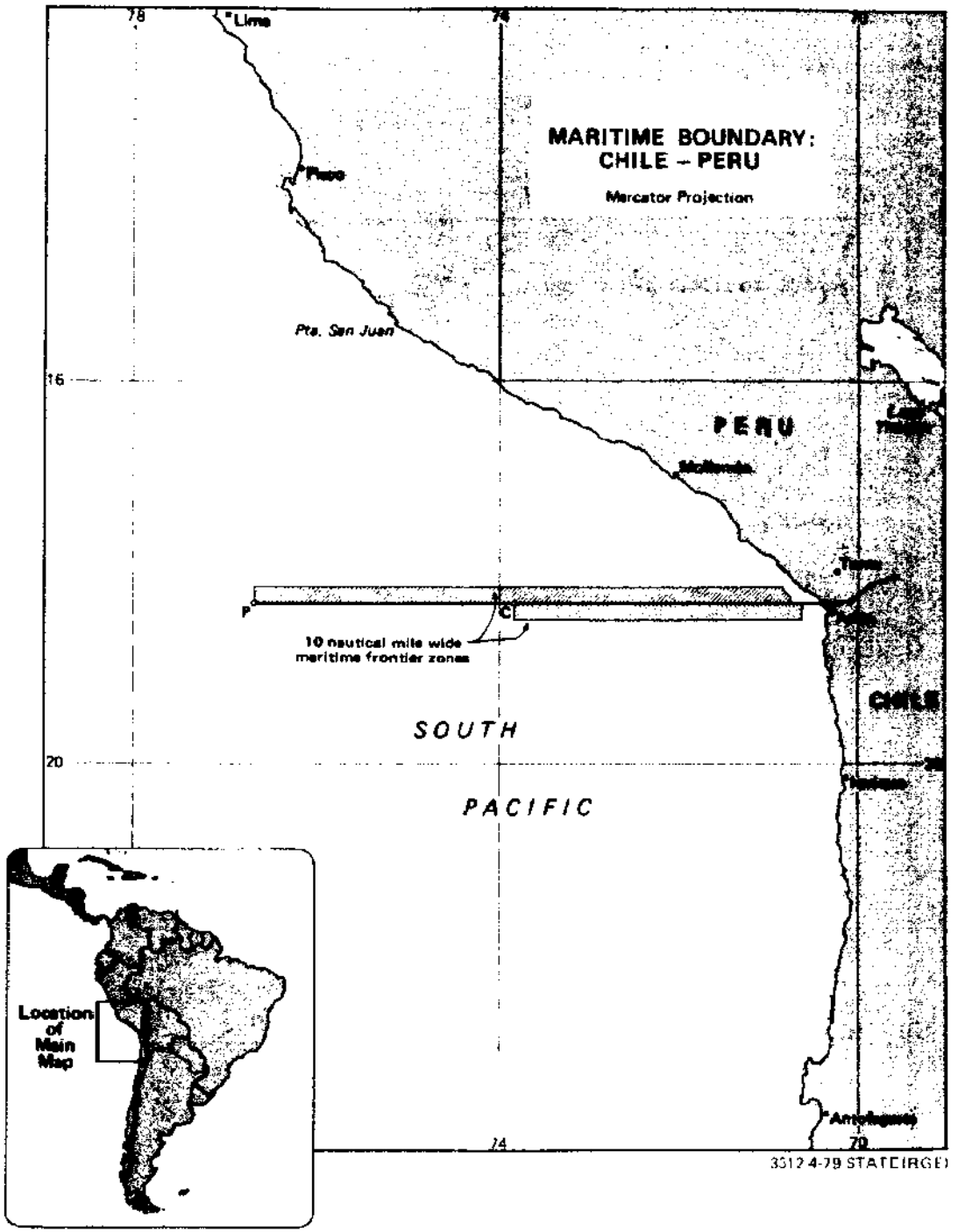
63. Anglo-French Arbitration, para. 47.

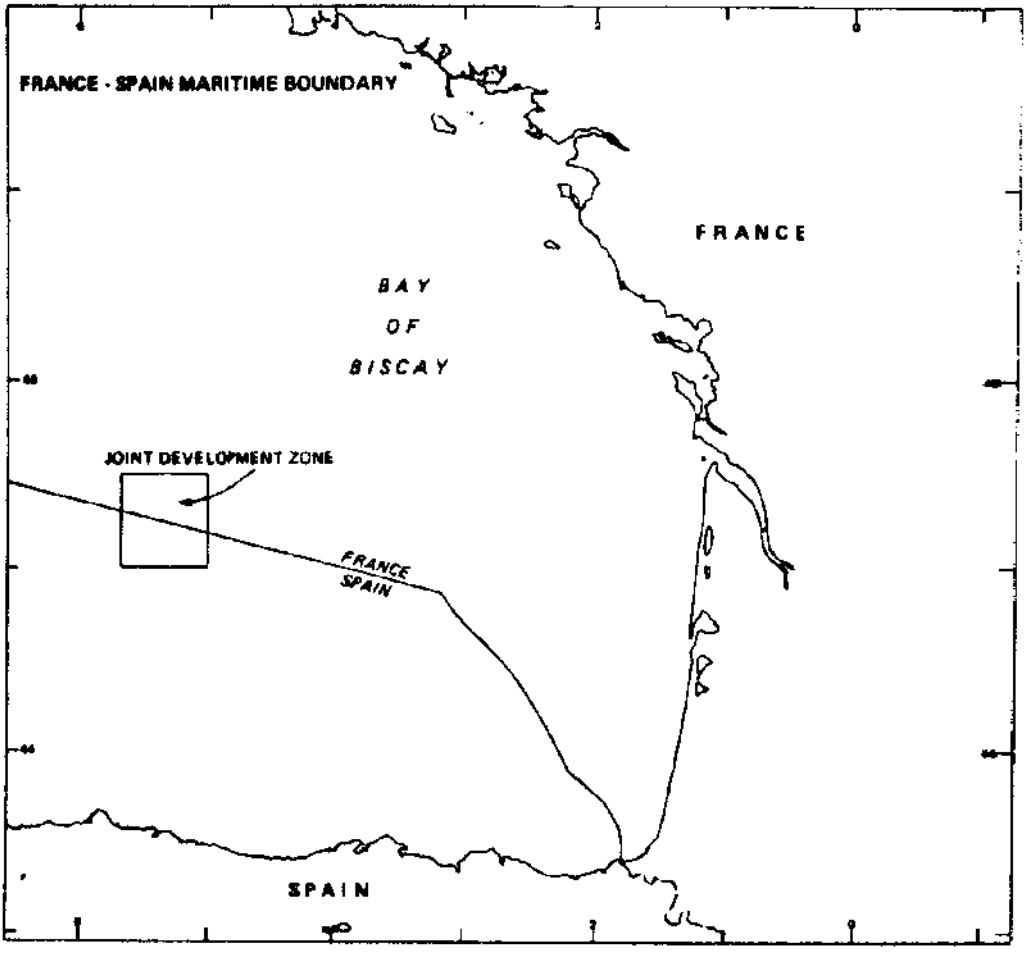
64. Informal Composite Negotiating Text, Rev. 1, March 19 - April 27, 1979, A/CONF.62/WP.10/Rev.1. April 28, 1979. Articles 74 and 83 use identical language except for the generic identification of the zone.

65. North Sea Cases, para. 95.


NORTH SEA CONTINENTAL SHELF BOUNDARIES
NORTH ATLANTIC OCEAN
SHETLAND ISLANDS (U.K.)
ORKNEY ISLANDS
NORWAY
SWEDEN
DENMARK
NORTH SEA
U.K.
NORWAY
DENMARK
F.R.G.
NETHERLANDS
BELGIUM
FEDERAL REPUBLIC OF GERMANY (F.R.G.)
GERMAN DEMOCRATIC REPUBLIC (G.D.R.)
BALTIC SEA
IRISH SEA
UNITED KINGDOM


CONTINENTAL SHELF BOUNDARY
BETWEEN FRANCE AND THE
UNITED KINGDOM
NORTH
ATLANTIC
OCEAN
ENGLISH
CHANNEL
Approximate French Claim
COURT OF ARBITRATION BOUNDARY
Approximate U.K. Claim
FRANCE
BAY OF BISCAY


MARITIME BOUNDARY:
CHILE – PERU
Mercator Projection
Lima
Pisco
Pta. San Juan
PERU
Tacna
CHILE
10 nautical mile wide
maritime frontier zones
P
C
SOUTH
PACIFIC
Location of Main Map
78
76
74
16
20
3512 4-79 STATE(IRGE)


FRANCE - SPAIN MARITIME BOUNDARY
FRANCE
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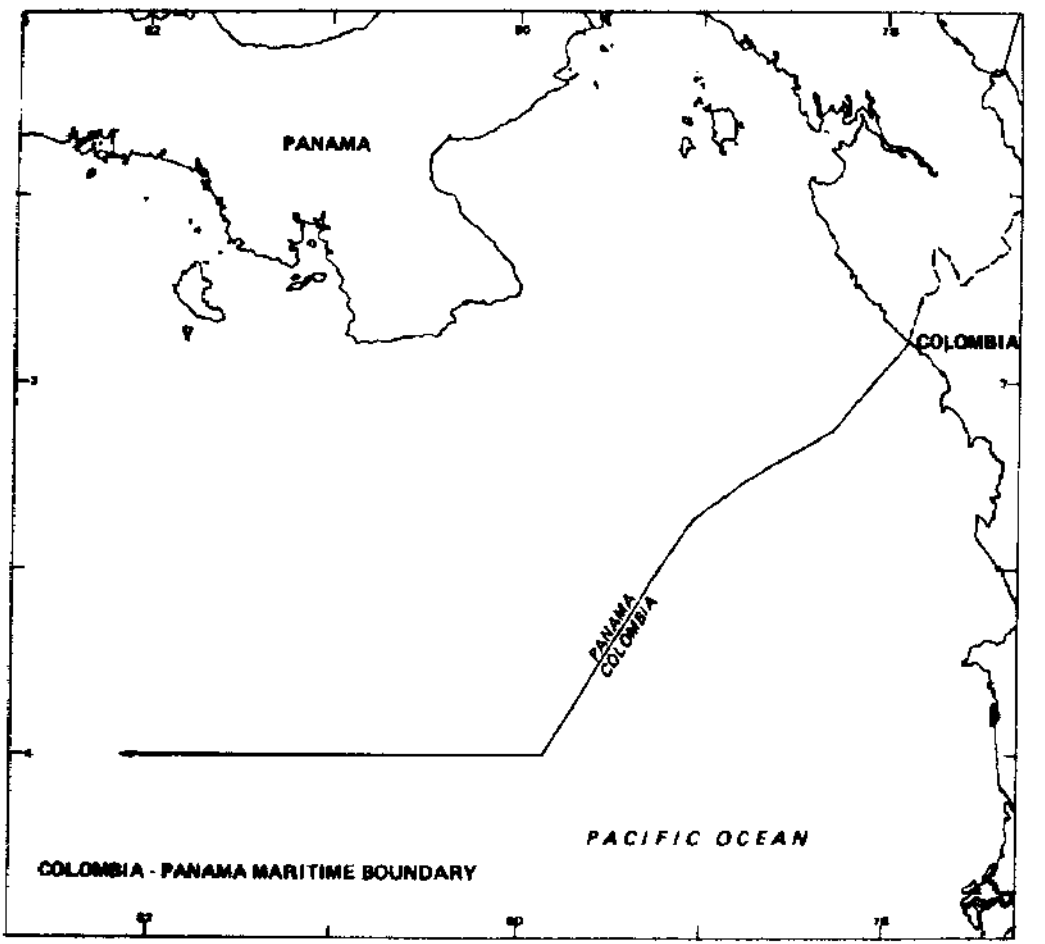
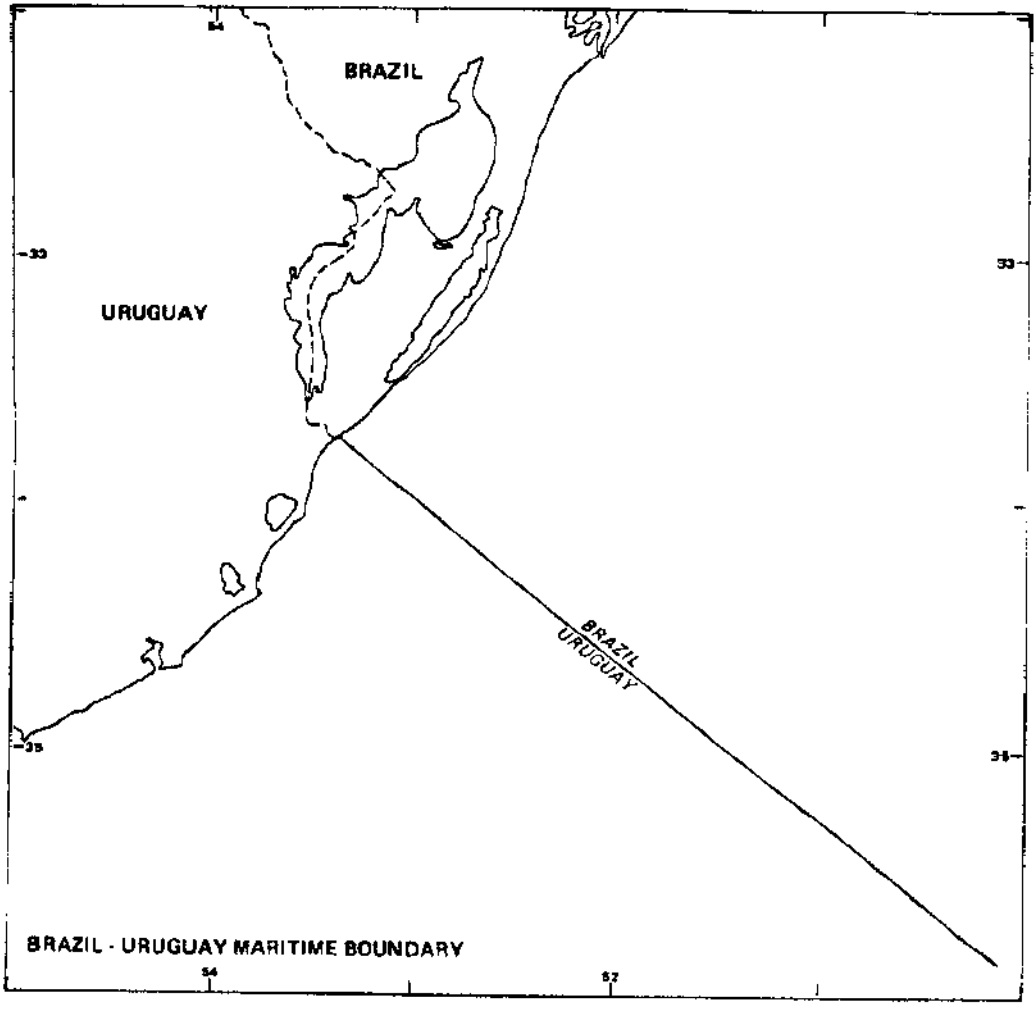
OF
BISCAY
JOINT DEVELOPMENT ZONE
FRANCE
SPAIN
SPAIN


PANAMA
COLOMBIA
PANAMA
COLOMBIA
PACIFIC OCEAN
COLOMBIA - PANAMA MARITIME BOUNDARY


BRAZIL
URUGUAY
BRAZIL
URUGUAY
BRAZIL - URUGUAY MARITIME BOUNDARY

COMMENTARY

Commander Peter B. Beazley
Hydrographic Department
United Kingdom

First of all, of course, as a good government servant, I must make the usual disclaimer: that the views I express here are my own and not in any way necessarily those of my government.

The second thing I think is I must say how very gratified I am to have been invited to sit on this panel with a principal paper produced by Dr. Hodgson. At least as far as the English speaking world is concerned, no one who has had anything to do with the technical aspects of boundary or baseline determinations can fail to have been very greatly influenced by the immense written contribution that Bob Hodgson has made as well as his fellow countrymen, particularly Dr. Boggs and Aaron Shalowitz.

An ever technical advisor myself, I think it is clearly my role to make technical comments. I hope you'll notice I use the expression "technical advisor". I'm sure we all know the definition of an expert -- a man who knows more and more about less and less until he knows everything about nothing. I'd rather not be listed in that category.

I intend to consider two particular points -- accuracy in both boundary determinations and definitions, and very briefly half or partial affect of topographic features.

So far as concerns the accuracy in the determination and definition of boundaries, new techniques have had to be adopted in the last 20 years, as Dr. Hodgson makes clear. Until the 1960's, most if not all boundaries were determined on quite large-scale charts and were precisely defined by reference to those charts. This produced acceptable standards of accuracy both for determination and for definition, at least in the short term. Notable problems arose with the 1839 Anglo-French fisheries agreement where a line on the west coast of the Cotentin Peninsula had to be redefined in 1928 because it was no longer possible to locate it properly under the definition given in the 1839 agreement. And I think it is now fairly difficult to reconstruct the 1928 line. And that sort of changeability I think would be quite unacceptable in a modern continental shelf boundary with all the issues that are at stake.

It was the advent of oil and gas discoveries in the North Sea that really made it necessary to consider boundaries lying

far from land where it would be impossible to determine positions by reference to a bearing in a distance from a conspicuous topographical feature. Something better was needed than simple reference to a chart.

The 1965 series of North Sea agreements broke new ground in two particular ways. First, they defined a common geodetic datum which had become necessary because all positions had to be defined by latitude and longitude; but the various national datums did not agree with one another. And secondly, these agreements for the first time defined the nature of the lines joining the various turning points which were listed in the agreement.

Hitherto, it had been customary and sufficient simply to draw straight lines on navigational charts. Such lines are, in almost all cases, rhumb lines or loxodromes, which I won't attempt to define. But an equidistance line can most nearly be defined as a geodesic, which is a different sort of line and would appear differently on a chart or on a map from a loxodrome.

Now these particular points, particularly as they relate to the question of geodetic datum reflected in the ICNT, make clear the need to define the geodetic datum in boundaries and the need for a very markedly more sophisticated approach than the 1958 text which simply requires references to be fixed, permanent, identifiable points on the land. And it's very difficult to do that in the sense that I think was clearly meant by the drafters of the '58 convention.

Nevertheless, although the agreed boundary lines were defined with precision, the computer facilities were not readily available to calculate the equidistance lines which formed their basis. So the actual determination of the basic line was achieved by relatively crude methods. Since then, there have been two further developments in technique.

Firstly, it is now easier and far more accurate to compute a line developed far from shore by using geodetic principles than it is to try to determine it with any reasonable accuracy on a chart. And secondly, the use of Doppler satellite observations now enables oil operators to determine the position of an oil rig to within a meter or so in relation to an established geodetic datum, thus making it more important than ever that boundaries be defined with precision.

But absolute accuracy in determining a geometrically based line, such as an equidistance line, is even now seldom possible, not because of the mathematics but for purely practical surveying reasons. Rarely, for example, are the base points known to an accuracy of only a meter or so. And it would not be a profitable occupation to try and achieve that degree of

accuracy in most cases, especially if the base line (normal base line) is the low water line, which is a movable feature in any case. Furthermore, in many parts of the world, such as notably the Pacific Ocean, large numbers of individual islands have been positioned each on its own local geodetic datum; and there is insufficient data to put them on a common datum.

But these considerations need not necessarily delay boundary determination, especially, as in many cases, when the boundary may be needed for fishery jurisdiction rather than for jurisdiction over hydrocarbon resources. And in that case, minor derogations from absolute accuracy of determination are likely to be less of potential concern. And it is still possible to define the resulting boundary with precision.

Now these developments have necessitated much more rigorous technical requirements than were ever foreseen in 1958. I'll come back to that point shortly, but first I would like to comment on half or partial effect.

This question arises when, as for example in the United Kingdom and France arbitration, it is decided to give only partial effect to a particular topographical feature. But, of course, it need not arise solely in such an arbitrable decision. It may be used by agreement between parties, as was the case in the Iran/Saudi Arabia continental shelf agreement in 1965.

I've written on this matter elsewhere. But the particular point I should like to make is that one may ask oneself exactly what is being given partial effect, and this is a problem very often for the technical advisor. And I must emphasize at this point that I am not referring specifically in this matter to either of these cases but this is a generalization that I'm making. One must decide, is it a topographical feature that is being given the partial effect? And if that is so, where should God ideally have put it to avoid producing the distortions it's intended to correct? Or, is it an exercise in splitting the difference between lines derived from using that feature and lines derived by ignoring it? And they are by no means the same. And if the latter is the case, one must examine quite closely what are the relevant base points to be used if the feature is ignored.

If the technical aspects of boundary delimitation have become more complex than formerly, so too, have the issues. The technical advisor cannot fulfill his role properly if he does not know the issues or if he is not aware of state practice. Pragmatic decisions which must balance strict technical accuracy against the political expediency of cutting delay mean that the technical advisor cannot provide useful

advice if he does not know the context in which that advice is required. But I do venture to say that this is a point that may too often be overlooked.

Bob quotes a number of cases where special circumstances have been acknowledged and accommodated without recourse to third party settlement. One can think of a number of others, and no one surely would argue with the proposition that this is by far the most desirable way of determining boundaries. But equally, nobody would dispute that even with good will such accommodation and agreement is not alaways possible.

While all these examples are an encouragement to those who prefer accord to discord, none of them provides -- or at least not easily to my eyes -- a model from which objective criteria may be deduced for application in other cases and other circumstances. And indeed, I think you could say that a notable example of the difficulties of transferring a concept from one geographical situation to another can be seen in three cases -- the North Sea Case of 1969, the U.K./French arbitration, and the French/Spanish agreement. Neither do these cases give us a means of measuring equity, and until someone discovers how to do that, we shall all have to struggle along with negotiation, and, alas, where necessary, resort to arbitration or other third party settlement. And in that case, a proper weight will have to be given to technical as well as to legal aspects. And in all efforts to achieve agreement, it will be absolutely essential for the political and legal and other advisors to work very closely together.

Perhaps, Lew, I could have just a quick minute to take up a point that you mentioned -- the problem of baselines that move around. There is a problem in boundary delimitation which has not yet been resolved, although Dr. Hodgson points out that nobody has suggested that interstate fishery or EEZ boundaries and limits as opposed to the outer limits should be differently defined from those of continental shelf boundaries. But there are a number of cases, notably in northwest Europe, where although continental shelf boundaries have been agreed, they were specifically continental shelf boundaries and are not in fact fishery boundaries. And since the continental shelf boundaries were defined, the baselines on which they were determined have moved. And in the interim where the median line is the fisheries boundary, there is quite frequently a discrepancy between the two boundaries -- between the fishery boundary and the continental shelf boundary. Not, I am happy to say, a point of dispute or difficulty, but I mention it to show that there can be situations, if only temporary, where in fact there is a distinction between the two boundaries.

COMENTARIO DE ALBERTO SZÉKELY:

Quisiera en primer lugar agradecer la invitación que se me ha hecho para participar en este debate, en el que se trata de uno de los temas controvertidos más importantes que quedan pendientes en las negociaciones de la III Conferencia de las Naciones Unidas sobre el Derecho del Mar. Quisiera decir que siento muchísimo que el profesor Hodgson no esté con nosotros en esta ocasión, no solamente porque se le considera como uno de los principales especialistas en esta materia, sino porque, como lo diré más adelante, él y yo fuímos contrapartes en una negociación específica de delimitación de zonas de jurisdicción hasta las 200 millas entre dos Estados, los nuestros, adyacentes, y, desde luego, hago los mejores votos por su pronto reestablecimiento.

La historia del desarrollo del derecho internacional del mar en esta materia es bastante triste; en realidad, la manera como se han venido desenvolviendo los debates y la no negociación, porque no podría aventurarme a llamarla negociación, en la Conferencia del Mar, ha llegado inclusive a un límite un poco ridículo, podría decir, pues es uno de los temas en que he podido observar que las partes contendientes se han encasillado en forma más radical, de todos los temas que he podido seguir en la Conferencia del Mar.

En 1958, cuando la I Conferencia de Naciones Unidas sobre el Derecho del Mar adoptó la Convención sobre Plataforma Continental, se llegó ahí, en su artículo 6, a una fórmula que contenía una serie de criterios que habían sugerido la Comisión de Derecho Internacional, después de varios años de trabajo preparatorio, y que se basaba principalmente en la práctica de los Estados. Desgraciadamente, la fórmula de 1958 fue destruída por la Corte Internacional de Justicia, en los casos de la Plataforma Continental del Mar del Norte. Y más desafortuna-

damente todavía, la III Conferencia del Mar heredó los defectos de la decisión de la Corte, y no ha sido posible para la Conferencia escapar de esos defectos; más al contrario, la Conferencia ha estado en prisión, respecto a la decisión de la Corte Internacional de Justicia. Y para resumir la conclusión de mis comentarios diré que estos defectos consisten principalmente en la muy errónea estrategia de imponer una "camisa de fuerza" a los Estados opuestos o adyacentes, negándoles así la necesaria libertad para encontrar una solución a sus superpuestas zonas de 200 millas o plataformas continentales.

Tanto la Corte Internacional de Justicia como la Conferencia del Mar, han adoptado subsecuentes fórmulas, que están plagadas de elementos de incertidumbre y de elementos de conflicto. Una pequeña revisión de las fórmulas nos permitirá dar apoyo a la aseveración que acabo de formular.

En 1958, el artículo 6 de la Convención sobre Plataforma Continental ofrecía lo que, desde mi punto de vista, debe ser la piedra angular de cualquier intento de solución en la delimitación de plataformas o zonas adyacentes u opuestas, y me perdonarán que algunos de los documentos a los que me voy a referir están en español y otros en inglés, pero no pude encontrar una uniformidad en el lenguaje.

En 1958, el arítulo 6 de la Convención decía que: "Cuando una misma Plataforma Continental sea adyacente al territorio de dos o más Estados cuyas costas estén situadas una frente a otra, su delimitación se efectuará por acuerdo entre ellos." Terminaba esa frase y continuaba: "A falta de acuerdo, y salvo que circunstancias especiales justifiquen otra delimitación, ésta se determinará por la línea media cuyos puntos sean todos equidistantes de los puntos más próximos de las líneas de base, desde donde se mide la extensión del mar territo-

rial de cada Estado." La Convención estaba estableciendo una guía de conducta específica fundamental: la delimitación debe establecerse por acuerdo entre las partes. Ahora, si no hubiera acuerdo, entonces ya establece ciertos criterios, al primero de los cuales le damos prioridad: las circunstancias especiales, y después venía la línea media equidistante, en el caso de las plataformas adyacentes; este artículo ya no se refiere a la línea media equidistante, sino nada más a la equidistancia. Pero lo fundamental de este artículo es que dejaba en la mano de los Estados la solución de la delimitación, ¿cómo?, por acuerdo y, por lo tanto, les daba un cierto ámbito de libertad para negociar.

La Corte Internacional de Justicia, en 1969, empezó a derogar esa libertad; en efecto, establece que la delimitación debe ser adoptada por acuerdo, pero dice que éste debe hacerse de conformidad con principios equitativos y tomando en cuenta todas las circunstancias pertinentes: entonces, ya está calificando la naturaleza del acuerdo al que se debe llegar, y esto constituye ya una primera limitación a la libertad de los Estados, de la que ya he hablado.

Los documentos que han venido progresivamente desarrollando las delegaciones ante la Conferencia del Mar, han adoptado fórmulas que heredan la tendencia de la Corte Internacional de Justicia.

En el Texto Unico Revisado establece que las partes deben llegar a un acuerdo, pero, de conformidad, otra vez calificándole y limitándole con principios equitativos, que aquí pasa a ser, como en el caso de la Corte, el primer criterio mandatario: se dispone además el empleo, cuando sea apropiado, de la línea media o de equidistancia, además del deber de tomar en cuenta todas las circunstancias pertinentes. Aquí el orden está revertido en cuanto a la línea media o equidistante y, finalmente, llega-

mos a la fórmula que existe actualmente en los artículos 74 y 83 del Texto Integrado para Fines de Negociación; en estos artículos se adopta otra vez la fórmula de que la delimitación debe efectuarse por acuerdo, pero de conformidad con principios equitativos, empleando cuando sea apropiado la línea media o de equidistancia y teniendo en cuenta todas las circunstancias pertinentes.

En los casos de ambos Textos, se hace una variación respecto a la fórmula de 1958, porque en ambos se dice que, cuando no se llegue a un acuerdo, los Estados interesados recurrirán a los procedimientos previstos en la Parte XV del Proyecto de Convención, que es la que se refiere a la solución de controversias; pero, desde luego, la obligación de recurrir a ellos no implica un sistema mandatorio específico de solución de controversias, puesto que, si revisamos la Parte XV, encontraremos que ésta ofrece una serie de posibilidades a los Estados. Ninguna de las nuevas fórmulas está apoyada con un sistema mandatorio verdadero de solución pacífica de controversias.

Todos estos criterios que hemos mencionado, los principios equitativos, las circunstancias relevantes o especiales que se deben tomar en cuenta y que se imponen obligatoriamente a los Estados, al tratar de llegar a un acuerdo, son criterios subjetivos que a nadie satisfacen, sino criterios vagos que no llevan más que a la incertidumbre.

El que éste fuera el caso, ha llevado a una situación bastante difícil de la Conferencia; como ustedes saben, existen dos grupos radicalmente opuestos que no pueden aceptar la fórmula del Texto Integrado y, por lo tanto, esa fórmula puede convertirse en un obstáculo para la ratificación de esta Convención por parte de esos Estados, convirtiéndose eso en uno de los asuntos graves de atención, de pendiente resolución. Ya en las muchas etapas de la Conferencia era necesario que algunas delegaciones con

influencia en la misma, ejercieran sus mayores esfuerzos para lograr un acercamiento entre las distintas partes.

A petición de varias delegaciones, la Delegación de México, que por diversas razones estaba en posición de influir de alguna manera positiva, fue requerida para ejercer esos esfuerzos, con el objeto de lograr un equilibrio en la fórmula nueva que se incluirá en el Texto.

Desde el principio, la Delegación mexicana consideró esto como un reto formidable, porque reconocía, y sigue reconociendo, que si bien puede entenderse que la solución del Texto puede encontrarse en la redacción de una fórmula balanceada, también se ha dado cuenta que este balance también tenía que ser neutral. México, eventualmente, de una sesión a otra, decidió redactar una primera propuesta informal de compromiso, y al presentarla nuestra Delegación dijo que los dos grupos antagonistas no estaban dispuestos a ceder un ápice en la posición en que se habían encasillado desde el principio. Por lo tanto, nosotros habíamos llegado a lo que parecía ya no solamente una querella de palabras, sino una querella por su orden o colocación en la frase, es decir, un ejercicio meramente de redacción, no un ejercicio de sustancia, de negociación y regateo sobre la sustancia de la norma que se iba a establecer, sino meramente un ejercicio de redacción. Hicimos notar que nadie está en contra de que los acuerdos de delimitación deban ser equitativos, ni tampoco de que se deban tomar en consideración las circunstancias especiales, ni siquiera que las partes, si así lo desean, puedan convenir en el método de equidistancia, y por lo tanto, concluíamos que todo, al parecer, depende de la prioridad o posterioridad que estos términos tengan en la cláusula en que todos ellos se incorporen.

Tuvimos en la Delegación que ejercer nuestra mayor imaginación para encontrar ese balance neutral que creíamos podría lograr un compro-

promiso. La primera fórmula les dará una idea de cómo se pretendía encontrar ese balance. La fórmula que presentó la Delegación de México decía: "The delimitation of the exclusive economic zone and of the continental shelf between adjacent and opposite States shall be effected by agreement between the parties concerned and taking into account (aquí estuvimos siguiendo la tendencia de la Corte Internacional de Justicia, de calificar el acuerdo, pero lo tratamos de corregir)...on an equal footing", es decir, "en un pie de igualdad" los siguientes criterios: los de equidistancia y los de circunstancias especiales, "with a view to their application, as appropriate, in each specific case. Aquí, como veremos, estamos buscando un equilibrio en cada uno de los criterios y, en vez de poner los principios equitativos al principio, como lo hace la Corte, o el Texto, nosotros proponemos que cualquier cosa que se haga, cualquier criterio que se adopte, deba derivar en una solución equitativa, es decir, basada en los principios de equidad. Esta fórmula no fue aceptada porque, como lo pasaremos a describir un poco después, era neutral y era demasiado equilibrada. En realidad, ninguna de las partes contendientes estaba dispuesta a aceptar una fórmula neutral y equilibrada; ellas querían asegurar una fórmula que satisfaciera sus propios intereses y que se inclinara por su propia posición.

Presentamos después otras fórmulas, fórmulas revisadas, en las que cada vez tratábamos de acercarnos lo más posible a un compromiso. Quitamos lo del "pie de igualdad", y pusimos que lo que se debería tomar en cuenta en el acuerdo debería hacerse concurrentemente. Inventamos el término "concurrently" para ver si éste era más atractivo. Después se nos unió en este esfuerzo la Delegación de Perú, e inventamos otros términos que igualmente pretendían lograr ese equilibrio.

Yo he sido delegado de mi país ante la Primera Comisión, y durante las negociaciones de

esa Comisión siempre pensaba que era bastante frustante ver la poca flexibilidad de las partes en la negociación, y que era desesperante la manera en que se critalizaban las posiciones, y cómo las diferentes partes ejercían el mayor grado de intolerancia.

Cuando tuve la oportunidad de participar en las negociaciones de delimitación a las que me refiero, me dí cuenta que había casos peores en la Conferencia del Mar, y definitivamente este caso es uno de los de peor intolerancia, que se ha venido registrando en el Grupo 7 de Negociación.

Para México era bastante cómodo poder ejercer su influencia, porque estábamos, como dijo nuestro delegado en este Grupo en alguna ocasión, en una posición nosotros mismos de equidistancia respecto a las dos partes en pugna, porque nosotros habíamos ya resuelto nuestros problemas principales de delimitación; como dijo el profesor Alexander anteriormente, México ya estableció una delimitación con los Estados Unidos y con Cuba, un acuerdo en que por cierto los dos países lograron un acuerdo significativamente histórico, simplemente porque las relaciones de nuestros países están plagadas de instancias de conflictos territoriales y limítrofes, que han tenido capítulos bastante tristes y, sin embargo, éste es el único acuerdo de delimitación fronteriza en el que, después de dos breves sesiones, llegamos a un acuerdo, y siempre hemos pensado que esto debería de convertirse en un ejemplo para los ejercicios similares que llevan a cabo otros países al delimitar sus zonas marinas.

Después de haber dicho esto, quisiera hacer un par de reflexiones más. En primer lugar, el trabajo del profesor Hodgson tiene un mérito específico. Prueba con los casos específicos que da al final de su presentación, que es mejor no imponer una "camisa de fuerza" a los Estados adyacentes u opuestos. Que los Estados, cuando se encuentran en el momento necesario,

en el momento adecuado, podrán diseñar métodos originales, inteligentes e imaginativos para negociar un acuerdo. Creo que los ejemplos que él nos ha dado son suficientes para apoyar esta aseveración. Lo que nos lleva a concluir el otro punto. Desde mi punto de vista, ninguna fórmula, por más imaginativa que sea, que se incorpore en la Convención General de Derecho del Mar, no importa cuán inteligente sea, va a dar una solución general a todos los casos de delimitación entre los Estados adyacentes u opuestos. Esto es absolutamente imposible.

La experiencia que traté, en forma un poco rápida y atropellada, de describir, cuando México intervino tratando de lograr un compromiso, me lleva a esta conclusión: No hay una fórmula definitiva general que sea aplicable para todas las partes y que sea una fórmula mágica. No se puede regresar tampoco a la fórmula de 1958, pero sí se puede devolver a los Estados la libertad necesaria para concluir sus acuerdos. La única norma obligatoria que debería establecer la Conferencia, el proyecto de Convención, debería ser el deber de llegar a una delimitación por acuerdo. Es decir, el acuerdo no es una característica ni ningún elemento, es un hecho, y la obligación de hacerlo por acuerdo evita que las partes adopten delimitaciones unilaterales que compliquen más la situación; entonces, la única obligación debe ser el acuerdo, ni siquiera considero que sería práctico y aceptable para las partes en contienda obligarlas a someter, en caso de ausencia de acuerdo, su diferencia a un método obligatorio de solución de controversias, porque creo que no lo van a aceptar. Lo que sí se puede hacer es volver a una fórmula que estaba contenida en el Texto Unico original, cuyo artículo 70, en su párrafo 3, disponía que mientras no hubiera acuerdo, ningún Estado podía extender su plataforma continental más allá de una línea media. Desgraciadamente el Presidente de la Segunda Comisión, al adoptar la revisión del Texto Unico, cambió completamente el párrafo 3 del artículo 70 y puso la siguiente frase: "en tan-

to no se haya llegado a un acuerdo o arreglo, los Estados interesados harán arreglos provisionales, teniendo en cuenta las disposiciones del párrafo uno"; las disposiciones del párrafo uno son precisamente las que nadie puede aceptar en este momento, por lo menos entre las partes contendientes, así es que el haber cambiado el párrafo tres y haber incorporado esta nueva fórmula, no ha hecho nada para solucionar el problema, sino al contrario, yo diría incluso lo ha agravado. Creo entonces que la solución, si se ha de encontrar alguna, será la de establecer solamente la obligación de llegar a una delimitación por acuerdo entre las partes, y disponer, al mismo tiempo, que si no se llega a un acuerdo, entonces habrá un moratorio. Ni siquiera es necesario referirse a la línea media o equidistante como arreglo transicional. Creo que simplemente con la obligación de mantener un moratorio, es decir, que nadie puede entonces hacer unilateralmente su delimitación, será un incentivo suficiente para que los Estados se flexibilicen en las negociaciones para llegar a un acuerdo.

COMMENTARY

Professor Rainer Lagoni
University of Kiel

First of all I would like to express my sincere gratitude to you Mr. Chairman and to Professor Craven for the kind invitation to become a commentator on this panel. I must confess that I feel honored, almost flattered to speak to this very distinguished audience on problems of delimitation that are dealt with in Mr. Hodgson's excellent paper. I would also like to thank Dr. Vargas and his charming assistants for their never tiring hospitality. CEESTAM is a gorgeous place, and I can imagine that it is very inspiring to discuss the social and economic problems of the third world here, as it is inspiring to the discussion of the law of the sea.

It is, of course, impossible for me to match Mr. Hodgson's professional knowledge and personal experience in the very field of state practice on delimitation. I only dare to say anything on this topic because I feel encouraged by his own words, saying "that there must be a clear, mutual understanding between jurists and experts, each in his way should be familiar with the craft of the other."

Yesterday a distinction was made here between prepared and unprepared statements, in the sense that an unprepared statement is one which had been written by the commentator before he read the principal paper. Following that definition I have "unprepared" myself on one very specific problem of the delimitation of continental shelf areas, namely the problem of the unity of a deposit of oil or natural gas. However, before starting I would like to make one final introductory remark. As I am one of those rare animals, I am almost tempted to say "endangered species", at this conference, who did not have the privilege to participate in the deliberations of UNCLOS III, I will confine my comments much to the existing international law, or to the "old law" to use the terminology of certain people who regard the contents of the ICNT already as the new law of the sea.

The problem I am referring to comes up where a field or deposit of oil or natural gas (or other liquid minerals) is situated in an area which is to be delimited and the projected boundary line is going to cut through that field or deposit. This situation created always the danger that a part of such field or deposit which is situated on one side of the boundary line can be exploited, wholly or in part, from the other side of that line. And even more, already the exploitation of those resources which are situated only on one side of the boundary line, normally would change the geological conditions within the whole deposit or field. That could even destroy the

possibility of extracting any oil or gas on the other side of the boundary line. To avoid this danger, the eminent Dutch lawyer Mouton, the author of the first comprehensive treatise on the continental shelf, mentioned already in his Hague lectures of 1954 that "a dividing boundary should not cross an oil-pool" (85 RdC 347, at 421 Seq. [19541]). He stated: never two straws in one glass. Referring to a Memorandum prepared in 1950 for the Secretariat of the U.N. (2. Y.B. ILC 67, at 112 [1950], UN Doc. A/CN. 4/32), Mouton regarded the essential unity of a deposit as "a guide for countries in framing their delimitation agreements or for the arbitrator who is called in in case of dispute."

Since that time of Mouton's lecture several states faced the problem of an oil or gas field lying in an area of the continental shelf which they were going to delimit. A brief look at the treaty practice would show that the states found at least three different solutions for this problem.

The first solution is to attribute the whole deposit or field of oil or gas to one state giving the other state a right to a share of the revenues. The only example for this solution, as far as I know, is the delimitation agreement between Bahrain and Saudi Arabia of 1958. A hexagonal area of the continental shelf in the Persian Gulf, in which an oil field was situated, has been attributed in toto to Saudi Arabia while Bahrain got only the right to one half of the net revenues accruing to the Arabian Government from the exploitation of that field.

In the second solution the states drew the boundary line through the area where the resources were expected, or even through the oil or gas deposit itself. But they established a zone of special jurisdiction over that area in order to encourge and promote unitization agreements between their concessionaires. An example for this solution is in the French-Spanish delimitation agreement of 1974 on the continental shelf in the Gulf of Biscay.

In the third solution the states avoided drawing the boundary line through the deposit or field. Instead the oil field remains like an enclave of joint jurisdiction on the continental shelf of one or both the state parties to the delimitation agreement, as is the case of the al-Bundug oil field in the 1969 offshore boundary agreement between Abu Dhabi and Qatar. Under Article 6 of this agreement the oil field is to be "equally shared" by the parties, which "exercise all the rights on an equal basis." This solution created a kind of condominium between the neighboring states which is limited to the natural resources of a certain area. It is especially appropriate, where the states are interested in an exploitation of the area of overlapping claims but could not agree on the drawing of the boundary line; or where they hesitate to delimit

the area, at all. In their 1965 agreement on the partition of the Neutral Zone, Kuwait and Saudi Arabia retained equal rights to the natural resources of the whole Zone while the continental shelf of the former Neutral Zone has remained an undivided common area to be exploited jointly by both states. Similarly, in 1974 Sudan and Saudi Arabia established a "Common Zone" between their countries on the seabed of the Red Sea beyond the 1000 meter isobath. They claim "equal sovereign rights in all natural resources" of this common zone. Also in 1974, Japan and South Korea established a "Joint Development Zone" on the continental shelf of the East China Sea in order to promote operating agreements between their concessionaires. The final delimitation in that area is complicated by Chinese claims to the continental shelf.

The different solution chosen in these delimitation agreements show that states obviously do not feel bound by any legal rule to preserve the unity of a deposit of oil or natural gas in the conventional delimitation of their offshore areas. Theoretically, however, one could argue that there is such a rule but states could dispose of it by agreement, whereas an international court or arbitrator had to apply it. There is, of course, no doubt that opposite or adjacent coastal states are free to agree on <u>any</u> boundary line between their continental shelf areas, as long as they do not encroach upon an area which belongs to a third state. An international court or arbitrator, on the other hand, normally would have to apply those principles and rules of existing international law which govern the delimitation of continental shelf areas. However, the crucial question is, which are these principles and rules, and would the unity of a deposit have any relevance in this context?

In answering this question I should briefly turn to the existing international law on this matter, as it has been applied (if one would not say "developed") by the International Court of Justice in its 1969 North Sea Continental Shelf Case, and more recently in 1977 by the French-British Court of Arbitration in its first decision, the so-called Channel Case. Unnecessary to say, this analysis is somewhat simplified and incomplete here.

As the concept of the continental shelf is itself a juridical concept, both decisions stress that delimitation of continental shelf areas is not simply a technical process of applying geographical rules (as for example the equidistance line or the median line), but that it is governed by rules and principles of general international law. By the way, the Court of Arbitration considered that, at least in the Channel Case, the rules of customary international law lead to much the same result as the provisions of Article 6 of the 1958 Convention on the Continental Shelf, and I will not dwell myself on the difference between the special-circumstance rule and general

customary law here. To put the net result of both decisions in a nutshell, one could say that the result of the delimitation by third party settlement must be reasonable and equitable. It is, of course, impossible to define in abstracto what a "reasonable and equitable" delimitation would be. The mentioned decisions, however, do give us certain hints. Considering an equitable delimitation as a "function of the geographical and other relevant circumstances of each particular case" (Channel Case para. 97), the Court of Arbitration mentioned in the Channel Case "geographical, political and legal circumstances" (id para. 188) as relevant for the delimitation of the continental shelf of the Channel Islands. As a "legal circumstance" which must not be neglected, the Court of Arbitration considered the rule that island territories of one state close to the coast of another state possess a territorial sea and a continental shelf of their own. In the Case of the Channel Islands, the territorial sea measured 6 nautical miles, and the Court of Arbitration attributed to it a continental shelf of another 6 miles. It would be certainly an interesting question: what would the Court have done if Britain had already declared a territorial sea of 12 nautical miles around the Channel Islands? Would it have achieved a larger enclave on the French continental shelf? In their decisions the Courts mentioned other rules which must not be violated without rendering the delimitation inequitable, i.e. illegal, as equity is part and parcel of general international law. These rules are, for example, that a state "must not encroach upon what is the natural prolongation of the territory of another state, or that regard must be had to differences between a lateral boundary between adjacent states and the median boundary between adjacent states and the median boundary between opposite states." Perhaps it should be noted here that the Court of Arbitration considered the requirement of proportionality between the coastlines and the adjacent continental shelf areas not as a legal rule but merely as expressing "the criterion or factor by which it may be determined whether a distortion results in an inequitable delimitation of the continental shelf as between the coastal States concerned." (Channel Case para. 100).

While the violation of any relevant legal rule in the process of the delimitation would render the delimitation inequitable, the neglect of any factual element would normally have no such effect. In fact, in both delimitation cases discussed here, there were several different factual elements to be considered by the Courts. The decisions had to strike the balance between opposite interests of the coastal states involved, putting different weight on different factors. Every lawyer knows that this balancing process to find an equitable solution is not governed by any simple ready-made rule. Moreover, it is even not a process which could be conceived in terms of logic, because logically one cannot balance, for example, the energy interests of one coastal state against

another coastal state's security interests concerning its continental shelf, which may also be involved in any given case. However, one can attribute generally different importance and weight to different factual elements which are to be taken into account in the process of delimitation. Perhaps I should make it clear that this would of course not mean that there is any numerus clausus of those factual elements, or that one could determine them in advance, nor that there is any strict hierarchy between these factors.

To come back to my initial question of the unity of a deposit, the ICJ considered it in the North Sea Continental Shelf Case as "nothing more than a factual element which it is reasonable to take into consideration in the course of negotiations for the delimitation" (1969 ICJ Rep. para. 97). As the state practice has shown that there are several possibilities to avoid any wasteful and uneconomical exploitation of a common deposit or field shared by two or more states, I would mean that one generally can regard the principle of the unity of a deposit as a factor of minor relevance in the process of the delimitation of continental shelf areas.

With your permission, Mr. Chairman, I would briefly allude to one point of Mr. Hodgson's paper, to which Mr. Beazley already referred in his comment. I would agree with Mr. Hodgson on the point that the articles on the delimitation of the continental shelf and of the exclusive economic zone are identical. But I think that one should be well aware that the result of the delimitation of the EEZ may, under certain circumstances, be different from that of the continental shelf, so that one does not get the same boundary line. I will give you an example. In the 1971 agreement between the Federal Republic of Germany and Denmark on the delimitation of the continental shelf of the North Sea, the Federal Republic agreed to leave certain areas to Denmark, where a Danish company already had been granted an offshore concession by the Danish Government prior to the 1969 ICJ decision. The boundary line established in this agreement deviated from a geographical line, thus forming a "panhandle" as you can see on page 13a of Mr. Hodgson's paper. The parties to the 1971 agreement could easily have chosen another solution for the protection of the rights of the Danish company. For example, they could have agreed that Germany would offer that Danish company a concession on conditions similar to those of the Danish Government. Hence, the solution chosen in the 1971 agreement was a purely political one, which was not in any way required by existing international law. Consequently, when it comes to the delimitation of an EEZ or fishery zone in that area, there are no reasons to follow the boundary line of the continental shelf. Instead, it would be reasonable to draw a geographical line which does not form a "panhandle". Here, I mean, we have an example where the boundary line of the EEZ or a fishery zone must not necessarily follow the boundary of the continental shelf.

COMMENTARY

Dr. Choon-Ho Park
East-West Center

I want to speak mainly on two points. The first one is on the third party involvement in the settlement of boundary dispute or conflict resolution. The second is on the Japan-South Korean agreement on the Joint development of their continental shelf.

First, by third party involvement, I mean international adjudication, arbitration, mediation or other forms. Generally, going to a court of law for the settlement of any dispute is not a very desirable or pleasant endeavor. In some cultures, this is much more so, so that in some regions there is usually stronger preference to out-of-court settlement through direct negotiations. Such preference can be seen not only between individuals but also between countries. For example, the use of the International Court of Justice by East Asian countries has been rather scarce. Professor John Gamble has done an excellent analysis of this in one of his books. With the exception of Thailand and Cambodia over the Preah Vihear Temple case, no East Asian country has appeared before the International Court of Justice yet.

Japan has tried to invite Australia, South Korea, and China to the Court for the settlement of some disputes over sea problems. The first one was over Arafura Sea sedentary fishing rights. But they settled the issue out-of-court because Australia, at the last moment, preferred it that way. The second occasion was over Takeshima-Dokto Island ownership between Japan and South Korea. Japan was willing to go to ICJ, but South Korea was very reluctant for a number of reasons, one of the reasons being the government wasn't really prepared to do so. Over the Senkaku-Tiaoyutai Island dispute, Japan would probably be willing to leave the case in the hands of the Court, arbitration or other forms of third party involvement. I would say it's very unlikely that China would accept this.

Territorial disputes in East Asia have another dimension, I would say. Territories in this region have seldom changed hands except under duress, violence, war or other unusual circumstances. The only case where a piece of territory was swapped through peaceful negotiations in East Asia was one between Japan and the Imperial Russia over southern Sakhalin and part of the Kuriles in 1875. For historical reasons, national sentiment is much more strongly operative in territorial issues than in other disputes. We have seen this over the Senkaku-Tiaoyutai issue which began in 1970. Each

disputant invariably claims that the territory under dispute has always been its own. Then, this leads to some interesting questions. If either disputant is so absolutely sure that the territory has always been its own, then why not go to the Court or employ a third party to settle it for good?

There is also another difficulty in sea boundary disputes. That is, the disputes in East Asia usually involve two very important sea resources -- food and energy -- of great importance to all the countries.

On the basis of their reluctance or readiness to rely on international adjudication the East Asian countries can be grouped into different categories. I would say China, North Korea and North Vietnam wouldn't really be willing to use any form of third party involvement to settle their sea boundaries or other international disputes. South Korea is somewhere in between. I wouldn't say it has no great regard for international adjudication or third party involvement. But, on the other hand, when it comes to the moment of decision, it would be very reluctant to proceed. Something quite similar can be said with respect to Southeast Asian countries as well.

Now, on my second point with respect to the continental shelf joint development of 1974 between Japan and South Korea, it has a very complicated history dating back to 1969. Earlier on, marine geologists concluded that oil was not likely to be present in the seabed areas around Japan and Korea. But, in 1969, a geophysical survey was published by the United Nations Economic Commission for Asia and the Far East (ECAFE, in short). Incidentally, this organization was retitled as ESCAP in 1974 (Economic and Social Commission for Asia and the Pacific). In the 1969 report, it was strongly hinted that at least two areas in the East China Sea and the Yellow Sea were very promising of oil. It turned out to be a gross exaggeration, but, with respect to one of the two zones, the report said that it could very well be done of the future oil provinces of the world.

This was more than ten years ago, but the coastal states have since made only perfunctory efforts to agree on their sea boundaries. Finding international law to be very elastic, each of them just stretched that part of the law of the sea relating to boundary delimitation to reach such areas as the ECAFE report indicated to be very promising. Thus, Japan, South Korea and Taiwan started extending their continental shelf jurisdictions. Consequently, in areas which the report indicated as promising their claims overlapped most heavily. The three coastal states found themselves locked in an endless legal scramble. In 1970, there came up an idea of leaving the boundary issues aside and diving into the sea to develop oil first under joint efforts.

But while the three coastal states were arguing among themselves, Peking was comfortably watching them. When they had agreed to go into joint development leaving the boundary issues aside, then Peking intervened in December, 1970, to say the continental shelf resources belonged to China. China didn't have to shout to scare these countries; a mere whisper was enough. A typical Chinese rhetoric was that Japan, South Korea and Taiwan might as well lift a big rock only to drop it on their own feet. The whole joint development scheme just faded away.

Then in 1973 Japan and South Korea tried again. This time Taiwan excused itself for a number of reasons, and Japan and South Korea signed an agreement in January, 1974. Specifically, it was stipulated that the agreement had nothing to do with the surface boundary. But interestingly enough, the agreement took four years and six months to come into force in June, 1978. There were some interesting reasons for the long delay. South Korea ratified it in December, 1974, but Japan just dragged on because, in the meantime, the law of the sea was oscillating between the median line criterion and the natural prolongation criterion. The joint development area almost entirely lies on the Japanese side of what would be the median line between Japan and South Korea. With the emergence of a 200 mile economic zone regime, many opponents of the agreement in Japan thought that, by just remaining silent the area might eventually fall under Japanese jurisdiction. I don't think this line of reasoning can be ruled out simply as wishful thinking.

The argument has been mainly between the median line principle which Japan relies on and the natural prolongation principle which South Korea relies on. When the natural prolongation criterion originated from the International Court of Justice in February, 1969, the timing was perfect from the standpoint of China and South Korea, but inconvenient and untimely from the standpoint of Japan. In fact, if there were no such judgment, China or South Korea would have had to invent something like it.

The agreement came in force in June, 1978, and the parties are now conducting exploration. With respect to the Japanese ratifiction of this pact, the procedure may be noted with interest. In Japanese parliament, the Lower House has a stronger authority in approving international agreements signed by the government. If an agreement is approved by the Lower House and the parliament remains in session for 30 days or longer, the approval becomes effective without further ado by the Upper House. At the time the agreement was approved by the Lower House, the session had less than 30 days left, nor did the Upper House have enough time to consider it. But it became necessary to extend it to approve the provisional fisheries agreement between Japan and the Soviet Union. Thus,

the parliament's approval of the Japan-South Korean shelf pact was effected automatically and accidentally.

I wish to conclude with my view on the prospect of sea boundary delimitation between and among East Asian countries. China is under no immediate pressure to enter any agreement with other coastal states in the region. It can wait almost indefinitely, whereas Japan, South Korea, North Korea and the countries surrounding the South China Sea cannot afford as much time nor are they as patient. But geographically and politically as well, China is a very important coastal state in the region. If one of the major coastal states can drag on indefinitely, I don't think the prospect for agreement is very good as of now. Let me finish just by quoting an interesting Chinese saying with respect to how patient the Chinese are. Other countries cannot really force China into negotiation unless China really wants to do so, because "if you cannot kill a tiger, just wait and wish him to become a vegetarian."

LEWIS ALEXANDER: I'd like to ask you one question which Bob did not bring up, namely the relationship between these international rules and regulations and those of the several coastal states of the United States which, because of legislative action, have found it profitable to determine their own boundaries. Also, they've been required by legislation to determine their own continental shelf boundaries, one with another, following the principles of international law.

H. GARY KNIGHT: I will do that. I won't take more than two minutes, simply to identify the issue for those of you who may not be familiar with it and may wish access to the source materials.

Due to the federal system of government in the United States, there have arisen a series of continental shelf, territorial sea, and fishing zone boundary problems -- one set between the federal government on the one hand and individual states on the other, another set between individual states and a third set between the newly established regional fishery management councils under our Fishery Conservation and Management Act of 1976. Some of these disputes have been decided by the United States Supreme Court, others by administrative tribunals. In all cases, the courts tend to apply international law, which under our United States Constitution is part of the law of the land and therefore applicable to these disputes. Therefore, the Convention on the Territorial Sea and Contiguous Zones of 1958 as well as customary international law principles have been applied to the resolution of these disputes. They, therefore, provide a rich source of technical and legal precedents for a variety of unusual geographical situations.

I simply so observe and commend those decisions to you for whatever they may be worth.

SANG-MYON RHEE: I have a brief comment and some questions.

It is interesting to notice that unlike the proposals of the committee of experts in the International Law Commission back in the 1950's composed of geographers and also Dr. Hodgson's previous professor, Mr. Bach, and also unlike some of his own previous writings, Dr. Hodgson presents his personal view on the sea boundary problems based on the equitable principles or the convenience methods, showing as examples six agreements. As everyone knows, since the delimitation problem was raised after World War II, the skirmish between the equitable principle group and the equidistance principle group has been continued. And in the first round of the battle in the 1950's, the median line or equidistance principles groups

defeated the equitable principles group. And finally, at the 1958 Geneva Convention on the continental shelf, Article 6, paragraph 2 was adopted. And in the second round of the battle in the Third United Nations Conference on the Law of the Sea, particularly in the negotiation group 7, the battles have been continued, almost evenly divided by 34 or so equidistance groups and 37 or so equitable principles groups.

However, in the Anglo-French continental shelf arbitration decision, the court said that the 1958 equidistance special circumstances rule is identical with the equitable principles supported by the court in the 1969 North Sea continental shelf cases, or even those equitable principles which are being negotiated in the Law of the Sea Conference.

At this moment I think we should clarify the gap between the formulation of customary law with regard to this matter and the principles and the rules stipulated in Article 6, paragraph 2 of the 1958 Geneva Convention on the continental shelf. And also, if we are more ambitious, we should identify the difference between the customary laws and principles and those articles in the ICNT.

And another question is raised by the fact that in the 1958 Geneva Convention on the continental shelf Article 6(2), the rules for opposite states and adjacent states were separated. However, in the ICNT in Article 74 and 83, both rules for adjacent states and opposite states were reunited. I would like to know the causes of this separation and reunion.

And my third comment on this delimitation problem is that of delimitations by a functional approach. The other day Professor Oxman suggested a functional approach to the study of the economic zone. Well, as we know, the economic zone or continental shelf problem should be studied for the use of the continental shelf and the water column. And these days there's some trend by States to extend their jurisdiction over the air space and also there are some state practices concerning the separation of boundaries for the continental shelf and the water column. In some cases those were reunited or joined, and this kind of functional approach should be studied, not only by a line approach, not only by the delimitation, but also we should study more about the allocation of interests and the sharing of interests for the maximum uses of the oceans.

H. GARY KNIGHT: I said initially that I was probably not competent to answer any questions in the area, but I'll take a shot at your second question regarding the reason for the separation in Article 6(2) of the continental shelf convention dealing with opposite and adjacent states. I think this was an accident of drafting and assembling rather than having any substantive reason.

At one point in the deliberation of the International Law Commission, as I recall, and I'm reaching very far back in my memory, it was thought that they would apply separate criteria to the case of lateral boundaries and opposite boundaries. So the drafters created two separate articles. As the negotiations progressed, they concluded that a single standard would be used, but they just never put the two paragraphs back together. Now I could stand corrected, but I'm pretty sure that's correct.

RAINER LAGONI: I would only say something about the question why there is a distinction between lateral boundaries and opposite boundaries. I think I agree with what was said here, that there's really a kind of drafting accident that we have two subparagraphs in Article 6 of the 1958 convention. But both the decisions stress -- the 1969 North Sea continental shelf decision and the Channel case -- that the effect of delimitation may be different in case of lateral boundaries and opposite boundaries. I may quote it from the decision here: "The court of arbitration said in the Channel case that ICJ pointed out that in the case of lateral boundaries, the effect of any irregularity in the coast line on the areas of continental shelf allocated to each state by the equidistance method is automatically magnified the greater the distance the boundary extends from the shore."

Clearly this characteristic of the equidistance method marks a material difference between the geographical situation of opposite states and of adjacent states in the delimitation of continental shelf boundaries. And I can't imagine that the drafters of the 1958 convention had this effect in mind when they drafted two different subparagraphs with the same wording in Article 6.

The other point I wanted to make is that I would agree with Professor Krispis, of course, on the existing international law on delimitation, that if there is an agreement between the states there is nothing to say about any factors which should be taken into account. They can take into account any factor that they like, if they don't encroach upon the continental shelf of a third state. That's the only limitation I can see. But if a court comes in or if you have any third party settlement, then you need these factors. Thank you.

ALBERTO SZEKELY:

Quisiera hacer nada más un comentario adicional a lo que dijo el profesor Christy. El ha venido a dar más fuerza, incluso, a algunas de las ideas que yo había expresado, sobre todo con la manera tan inteligente como ha procedido a ridiculizar el artículo 74, porque es bastante ridiculizable, precisamente por la manera como está expuesto, sobre todo después de que el Presidente de la Segunda Comisión cambió el párrafo tres del entonces artículo 70. Pero sí quiero discrepar con él un poco respec al valor que le da al término acuerdo, al término agreement: Creo que hay una fuerza sustantiva en decir que la delimitación debe celebrarse o debe hacerse por acuerdo entre las partes. Esto quiere decir sustancialmente que ninguna de las partes puede proceder unilateralmente a establecer una línea de delimitación de sus zonas marinas respecto a un vecino, y creo que todos podemos estar de acuerdo en que actos unilaterales de este tipo no irían más que, por una parte, a deteriorar la situación, precluir la posibilidad de una buena negociación basada en los factores que ellos escojan, y sobre todo prejuzgar la posición de ambas partes; así es que el decir que la delimitación se hará por acuerdo entre las partes es una obligación que la Convención está imponiendo a las partes adyacentes u opuestas.

la ponencia del profesor Hodgson, cuando se refirió positivamente al acuerdo entre Venezuela y las Antillas Holandesas, celebrado conjuntamente con el país metropolitano, es decir, los Países Bajos, en Curazao, el 31 de marzo de 1978. Si no me equivoco, allá se adoptó la línea de equidistancia, por ser una plataforma común la que une a los dos países bajo el agua. Pues, es precisa la ocasión, a sabiendas de que no se trata de ninguna reunión oficial, decir que Venezuela nunca ha aceptado la fórmula de criterio de la línea de equidistancia o la línea media. Al ratificar las Convenciones de Ginebra sobre Plataforma Continental y sobre el Mar Territorial, hemos reservado expresamente el artículo 6º de la primera, y los dos últimos del artículo 24 de la segunda, precisamente porque no reconocemos tal línea media como método obligatorio de la delimitación. Ahora bien, durante esas negociaciones, como aquellas habidas entre Venezuela y los Países Bajos en las Antillas, se ve en algunos puntos de la demarcación que existen algunas coincidencias entre la línea media y los puntos, las líneas de embarcación. Esto es perfectamente factible y así fue. En esto tiene razón el doctor Hodgson. Fue de hecho, pero no de derecho, en algunos sectores de la línea, siendo pues la misma frente a Cuba, al Este hacia el Norte en favor de Venezuela, en la parte Oeste hacia el Sur en favor de las Antillas, donde de paso sabemos que existe un riquísimo pozo petrolero, pero allá lo tienen las Antillas Nerlandesas. Sobre este particular, para los interesados, les puedo anunciar tal vez un artículo de un servidor que aparecerá el próximo año en el Ocean Development and International Law. La verdad es que no fue fácil llegar a este acuerdo. Y termino, pues, con una observación breve a lo que dijo el profesor Park en su intervención del lunes. Me la reservé para hoy. Cuando nos hablaba de la línea aquella que Corea del Sur había trazado en torno a sus aguas, y la que él llamó la "Línea de la Paz", pues yo tengo entendido que esa línea se llamaba antes la "Línea Sigman Reed"; no sé si el doctor Park actualmente sugiere cambiar la Linea Sang-Myon Rhee por la Linea Park.

COMENTARIO DE KALDONE NWEIHED:

Quisiera felicitar al doctor Hodgson, cuya ausencia es lamentada, y al panel por una mañana muy fructífera. Ya el doctor Székely prácticamente ha dicho, en su última intervención, lo que yo quería aclarar en cuanto a la importancia del acuerdo para lograr una delimitación equitativa. Ya él lo había dicho de todos modos en su primera intervención; pero me voy a permitir aclarar algo en lo que se refiere al tercer párrafo, agregado por el Presidente de la Segunda Comisión al texto original del artículo en cuestión. Creo que detrás de esta añadidura está la intención apresurada del legislador para preveer una solución eminentemente política a conflictos políticos, y la redacción definitiva de ese párrafo, desde luego, sería delegada en la Comisión de Redacción. Usted diría que la idea más bien complicó, en lugar de facilitó, pero hay casos, hay áreas, en el globo donde existen conflictos, ya con cierto tiempo, y donde un acuerdo provisional podría conducir a una más rápida ratificación de la Convención por las partes interesadas.

También quisiera agregar otro punto a lo que dice el doctor Székely, en cuanto a la rápida conclusión del Convenio entre Estados Unidos y México. Felizmente puedo decirles que también con Venezuela, los Estados Unidos mostraron una gran disposición al llegar a un acuerdo de la forma más veloz posible. Aquéllo fue una sorpresa hasta para los profesores que no estamos en la Delegación. Fuimos sorprendidos cuando, estando el Presidente Carter en Caracas, el 30 de marzo de 1978, supimos que ya se había concluido un acuerdo con Venezuela para delimitar las jurisdicciones, al Norte de la Isla de Aves. Esto será una tendencia promisoria para el resto de los países e islas del área.

El punto que me llama mucho la atención en

ALBERTO SZEKELY: On the issue of the delimitation of the exclusive economic zone and the continental shelf between adjacent or opposite states, an extensive exchange of views took place. A closer study of the discussion, bearing in mind the rule of silence, revealed bold support for the thrust of the article in the single negotiating text.

Since the conference may not adopt a compulsory jurisdiction procedure for the settlement of delimitation disputes, I felt that the reference to the median or equidistant line as an interim solution might not have the intended effect of encouraging agreements. In fact, such reference might defeat disputes, I felt that the reference to the median or equidistant line as an interim solution might not have the intended effect of encouraging agreements. In fact, such reference might defeat the main purport of the article as set out in paragraph 1. Nonetheless, the need for an interim solution was evident. The solution was, in my opinion, to propose the wording in paragraph 3 which alluded more closely to the principles in paragraph 1.

BERNARD OXMAN: Bernard Oxman, University of Miami. With Professor Knight's permission, I'd just like to add a small footnote to your comment which I feel obliged to make as an officer of the drafting committee of the conference.

Ambassador Beesley's report to the conference on the decisions of the drafting committee contained three interesting decisions which bear on Professor Knight's comments. First, the drafting committee decided that the proper terminology should be "to opposite or adjacent coasts," not "opposite or adjacent states."

Secondly, the drafting committee pointed out that the term "median line" should be used in connection with opposite states, and the term "equidistance line" should be used in connection with adjacent waters.

Third, the drafting committee was unable to decide, despite some efforts , whether it should refer to opposite coasts first or whether it should refer to adjacent coasts first. As you can well imagine, states place different priorities on this depending upon their perception of which problem was more important. Among the ideas tossed (and I really wouldn't give it more of a status than tossed about) was a compromise on the issue, as in the 1958 convention; that is, deal with one of them in one paragraph and another in another paragraph.

Finally as the report points out, and it's perhaps one of the most unusual moments in the conference, the committee has recommended to the conference that it delegate the power to make that decision to Ambassador Beesley as chairman of the drafting committee, setting out some criteria. Thank you.

CHOON-HO PARK: Very briefly, I wish to respond to a comment on the Peace Line. I can name six lines dividing sea areas in East Asia, which were all named after the persons responsible for them. First, we have the McArthur Line of 1945 which was drawn around Japan. The second in the Mao Ze-dong Line drawn around the Chinese coast in 1950. The third is this Peace Line or Syngman Rhee Line drawn around the Korean peninsula in 1952. The fourth is the Clark Line also drawn around Korea in 1952, named after General Clark, then Commander of the United Nations Command in Japan. The fifth one is the Bulganin Line of 1956 drawn to ward off Japanees fishermen from some Soviet offshore waters; it wasn't enforced because an agreement was made before the proclamation came into force. The sixth one dates back to 1939, called the Brevie Line named after the French governor of Indochina dividing some islands between Kampuchea and Vietnam.

LEONARD LEGAULT: I'm sorry to keep people from their luncheon, especially from their cervesa, that useful, and only, Spanish word I have learned so far.

I'd like to congratulate Bob Hodgson on a very interesting paper, and I'd like to wish him in absentia a very speedy recovery. I found Bob's paper, as I said, of very great interest. I'm sure that everyone, no matter what his point of view on the particular issue of delimitation, will find in that paper objective elements of great value to him. I would add, however, that quite naturally and not at all improperly the paper does reflect a particular point of view and tends to marshall the evidence in support of that particular point of view.

The basic thrust of the paper is that whether you look at customary law, whether you look at negotiated settlements, whether you look at adjudicated settlements, you are inevitably led to the conclusion that the two basic concepts operating here are the concepts of proportionality and relevant circumstances. I think there are other views as to what conclusion one can reach upon an examination (very careful examination) of the cases and of state practice. But I don't want at this late hour to attempt to take the conference through that procedure.

I would like, however, to refer briefly to the 1958 Geneva Convention and to say that whatever else one may think about that particular convention, it is the applicable law between the parties to the convention and will remain, I assume, the applicable law between the parties to the convention in the future, whatever happens at The Law of the Sea Conference or elsewhere, if the particular dispute or issue between them has arisen at a time when that was the applicable law between the parties. I think that's well worth noting.

On the ICNT, it seems to me that the major difficulty we're facing is that the delimitation article was inserted before the issue had been truly negotiated in the conference. And that is why we're now facing the impasse that was so eloquently described by one of our panelists, namely the impossibility of any kind of negotiation in the present circumstances. The reasons for this are quite simple, of course.

One side has its point of view reflected in the ICNT and, therefore, won't move. There's no need to move. It feels no pressure to move. I don't know. I sometime despair of the possibility of reaching a solution to that question. Perhaps there's only one solution, which I hasten to add is only a personal thought, and that would be perhaps to say nothing in the ICNT on the issue of delimitation except this: that it shall be effected by applicable principles of international law. Maybe we can all go home and chew on that one.

One last point perhaps, Mr. Chairman, and I raise it very seriously, and it obviously has a candidate U.S.A. connotation to it. What do you do when political circumstances prevent a negotiated settlement and other political circumstances prevent an adjudicated settlement? If you come up with any answers to that one in the next few months, I'd be very glad to hear from you, Lew.

FRIDA PFIRTER DE ARMAS:

Después de la excelente ponencia del señor Hodgson, y de los comentarios de la mesa, poco habría que agregar; pero yo quisiera traer al interés de ustedes la solución que los países de América Latina han dado a un problema secular entre ellos.

Aplicando en la delimitación de su mar territorial y de su plataforma continental, el principio de la línea de la equidistancia, se han balanceado muy bien lo que eran los principios equitativos y las circunstancias especiales.

Me refiero al Tratado de Río de la Plata y su frente marítimo, entre Argentina y Uruguay, que realmente plantea, como lo mencionaba la ponencia del doctor Hodgson, algunas características especiales y algún sistema doble o triple, diríamos, en cuanto al régimen del mar. No tendríamos que olvidar que ese Tratado es el Tratado del Río de la Plata y del Frente Marítimo. Acá nos interesaría solamente el frente marítimo; pero toda la solución que se ha dado en ese frente marítimo, dentro del texto del Tratado, ha estado influido y condicionado por el régimen del río. Me voy a limitar a hacer un muy breve análisis de algunas disposiciones del Tratado, que señalan el distinto régimen que los Estados han dado a este plano del mar.

En primer lugar, el Tratado fija la línea divisoria entre el río y el mar, y fija una línea imaginaria entre dos puntos, dos cabos, Punta del Este, en el Uruguay; Punta Raza y Cabo San Antonio, en la República Argentina.

A partir de aquí, diríamos, determina los distintos criterios, con relación a la soberanía y a la jurisdicción. La soberanía sobre las aguas en el lecho y el subsuelo del mar lo determina en base a la línea de equidistancia,

partiendo del punto medio de la línea de la zona imaginaria, que es el límite exterior del río; fija la línea de equidistancia en base a las costas adyacentes. Esa línea de equidistancia determina también el criterio para delimitar la explotación de los recursos no renovables del lecho y del subsuelo, es decir, con una circunstancia especial la explotación puede hacerse en forma conjunta, o puede hacerse en forma individual, y si se hace en forma individual, la proporción que cada Estado llevará del resultado de esa explotación está en relación proporcional con la cantidad de recursos que halla en la zona sometida a su jurisdicción. Este criterio no es el mismo que se sigue en relación a los recursos renovables con relación a la pesca; pero dejando a salvo los recursos mamíferos, que era una preocupación especial, por lo que fue necesario dejar los salvaguardados. Entonces, estos no entran dentro del régimen común de pesca. Pero en cuanto hace a todos los otros recursos renovables, hay una zona de jurisdicción común, formada por dos arcos de circunferencia de 200 millas de diámetro, en el cual los dos Estados tienen el derecho de explotación común, en base a cupos que va a determinar una Comisión Técnica Mixta que se crea y en proporción a la riqueza que aporte cada parte a esa zona en común; esto realmente beneficia mucho a los dos Estados: a la República Argentina porque hay épocas del año en la cual no podría pescar y al Uruguay porque le permitirían tener industrias estables durante todo el año, explotando determinados productos. En esa zona los Estados pueden otorgar a terceros Estados, o permitir a terceros Estados, la pesca.

Con relación a la contaminación, también el ámbito de jurisdicción es distinto. Ya no se trata de este ámbito de circunferencia de 200 millas, sino que se fija un rectángulo que tiene como base el límite exterior del río, la base del mar, y 200 millas de extensión. En toda esa zona las dos partes tienen jurisdicción común y concurrente para controlar la contamina-

ción. Este paso es mucho más grande, incluso, que el que se determina en algunas otras convenciones internacionales.

Con relación a la investigación científica, también el sistema es distinto. En la zona de 200 millas en común, los Estados pueden realizar investigación conjunta o pueden realizarla individualmente, autorizados por la otra parte, que se considera de acuerdo al Tratado obligada a autorizarla, siempre que pueda participar en la investigación y conocer los resultados.

Una referencia especial hay que hacer con relación a la seguridad. La seguridad en la zona también tiene un -ambito especial distinto de los que hemos señalado. No está perfectamente delimitado porque se habla del área total del Río de la Plata, y esa área total puede comprender medidas que tome cualquiera de los dos Estados en la zona de jurisdicción del otro Estado, en la zona común de jurisdicción. De manera que afectaría algunos principios tradicionales en lo que es éste problema de la seguridad del mar.

UNINHABITED ISLANDS AND THE OCEAN'S RESOURCES: THE CLIPPERTON ISLAND CASE

by

Jon Van Dyke* and Robert A. Brooks**

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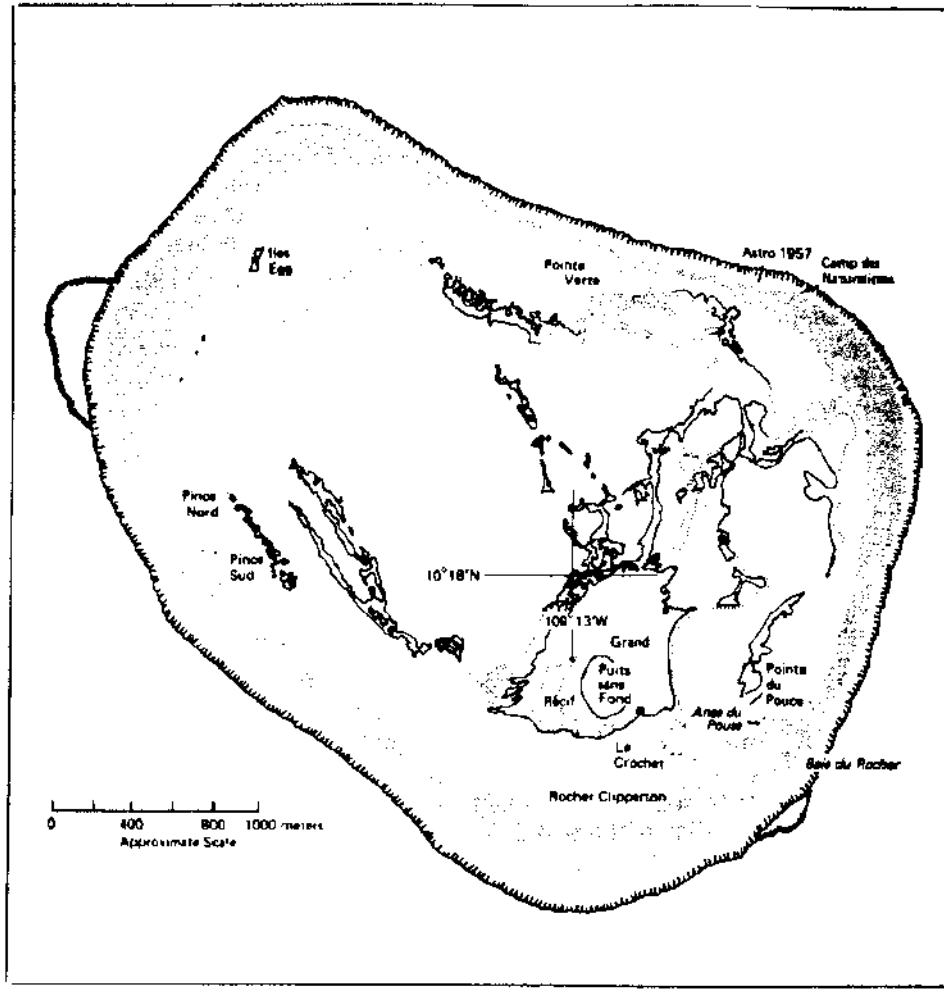
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Pointe Verte
Astro 1957
Camp des Naturalistes
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Pince Sud
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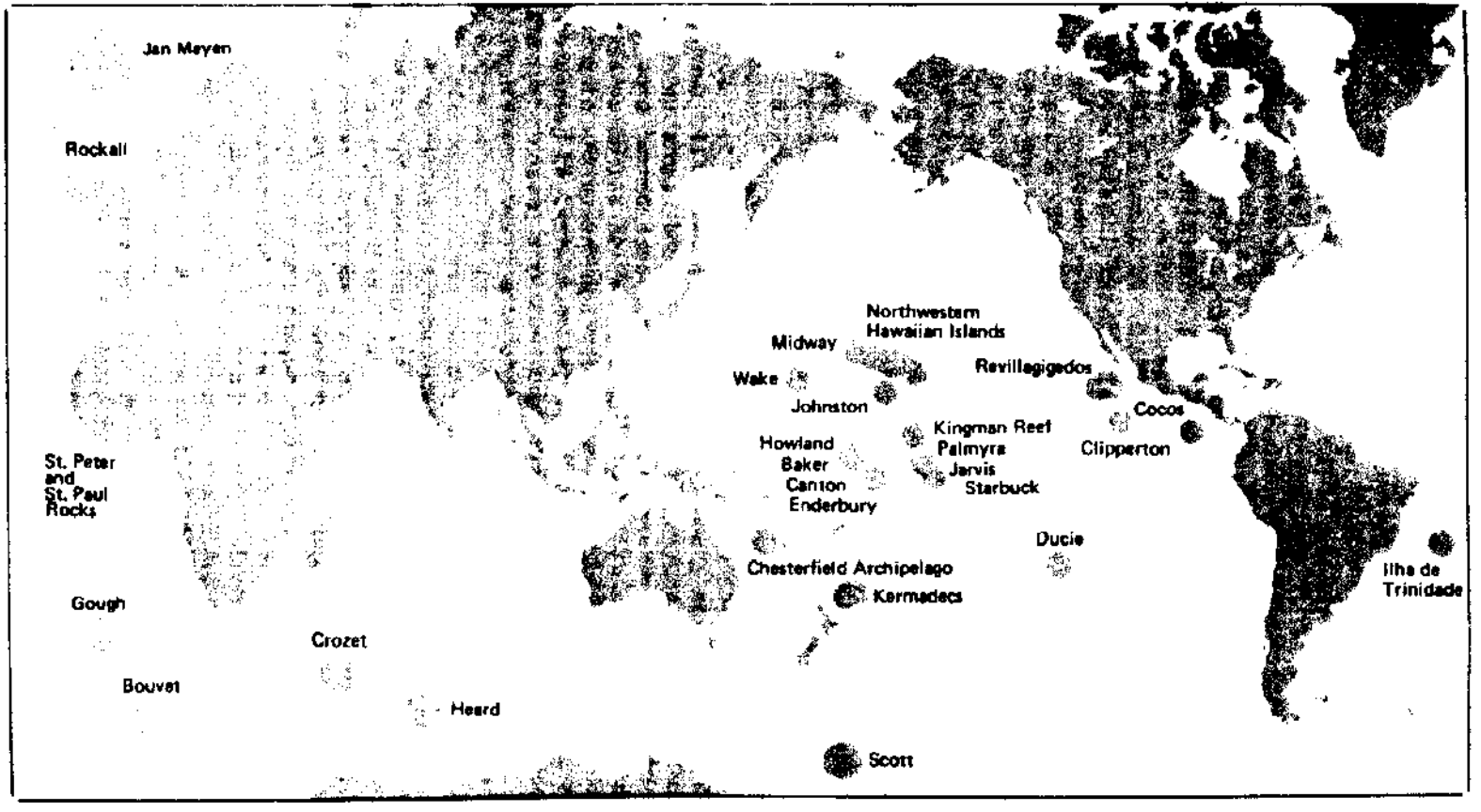
Grand
Puits sans Fond
Récif
Pointe du Pouce
Anse du Pouce
Le Crocher
Baie du Rocher
Rocher Clipperton
0
400
800
1000 metres
Approximate Scale


Jan Mayen
Rockall
Northwestern
Hawaiian Islands
Midway
Revillagigedos
Wake
Johnston
Cocos
Kingman Reef
Palmyra
Jarvis
Starbuck
Clipperton
Howland
Baker
Canton
Enderbury
St. Peter
and
St. Paul
Rocks
Ducie
Chesterfield Archipelago
Kermadecs
Ilha de
Trinidade
Gough
Crozet
Bouvet
Heard
Scott

I. Introduction: The Regime of Islands

Our oceans are currently being carved up among the nations in multilateral bargaining sessions that have been underway for almost a decade [1]. These negotiations began idealistically under the theme that the wealth of the oceans were the "common heritage" of humankind. But the treaty that is emerging gives the vast majority of these resources to the nearest coastal nations, leaving very little for the "common heritage" regime that was designed to aid the developing and disadvantaged peoples.

Under the new treaty, all coastal nations will have virtually exclusive sovereign rights over the fish and mineral resources within the waters that extend 200 miles off their shores. This expansion of national jurisdiction to waters previously viewed as "high seas" open to all, alters legal rights and institutions in a manner that is without precedent in recorded human history. It has been seen as necessary because of the increasing need for careful management of ocean resources.

In most areas, a strong link exists between the inhabitants of coastal regions and the oceans, so it has been seen as logical that these inhabitants should have a special claim to the seafood and hydrocarbon resources that are found off their shores. But the treaty that is emerging from the Law of the Sea negotiations also appears to create 200-mile exclusive economic zones around many of the tiny and remote uninhabited islands that dot the oceans. Many of these barren atolls were claimed during earlier eras of exploration and colonialism by nations thousands of miles away. Through the quirks of previous historical episodes, a few nations thus stand to gain unearned bonanzas of the ocean's wealth and -- if the present text stands -- the amount that will remain for the "common heritage" will be narrowed significantly.

Article 121 of the Draft Convention defines an "island" as "a naturally formed area of land, surrounded by water, which is above water at high tide" [2]. The Article then says that the territorial sea, contiguous zone, exclusive economic zone, and continental shelf of islands are to be determined in accordance with the provisions governing other land territory, with one exception: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf" [3]. This language invites nations to establish settlements on currently uninhabited islands in order to establish rights to a 200-mile exclusive economic zone and a continental shelf around the island. Many specks in the ocean previously of no interest to anyone may become areas of major international conflict.

The United States has claimed jurisdiction over many islands that are now uninhabited or have been uninhabited for all but a few years of human history, including Johnston Island, Kingman Reef, and Palmyra Island, all to the south of Hawaii. Numerous other named and unnamed uninhabited islands have been claimed by the United States under the Guano Islands Act of 1856 [4], including, for instance, Baker Island, Howland's Island, and Jarvis Island, all east of Kiribati (the Gilbert Islands) along the equator. Other nations have made similar claims. The British, which have long-standing claims to a number of these islands, have turned over some of their claims to the newly independent island nation of Kiribati, a nation of about 40 islands and 60,000 people. This nation straddles one of the zones of the Pacific thought to contain some of the most valuable and most accessible polymetallic nodules.

During the late 1970's, the United States relinquished claims to a number of islands in the Phoenix and Line Island chains including Canton and Enderbury, which had been used as landing stations and satellite tracking stations. The United States also relinquished its claims to islands in the Tokelaus, in the Northern Cook Islands, and in the Tuvalu chain.

Other nations have bolstered their claims to uninhabited islands during this same period. The tiny Spratlies and the Paracels in the South China Sea are now in active dispute [5], with several nations maintaining a military presence in the area. Tonga claimed a newly-emerged volcanic isle in its region in August, 1979 [6], and the Japanese are anxious to claim a soon-to-emerge lava tip between Iwo Jima and the Northern Mariana Islands [7], which were formally annexed to the United States in 1976. In May 1979, Mexico's President Juan Lopez Portillo made a widely publicized visit to tiny Clarion Island in the Revilla Gigedo archipelago 500 miles west of Puerto Vallarta to reaffirm Mexico's claim to the 11-square-mile cactus-covered dot and call for volunteers to colonize it [8]. And 600 miles south of Acapulco, the French are conducting scientific experiments on the barren island of Clipperton, reasserting their disputed claim to this lonely coral atoll, located near a potentially-rich zone of polymetallic nodules [9]. The French government transferred authority over Clipperton in early 1979 from the governor of French Polynesia to the government in Paris [10]. If Clipperton has rights to a 200-mile exclusive economic zone and continental shelf, that area would contain 334,000 square kilometers of ocean space.

This paper focuses on the dispute between France and Mexico over Clipperton Island because the legal issues raised by this conflict have current relevance to other unresolved claims. The Clipperton case permits us to disinter ancient doctrines on how sovereignty is obtained over territory and examine them in terms of modern norms of international law.

II. The Clipperton Island Arbitration

A. The Early Voyages to Clipperton

Clipperton Island is named after an English pirate who may have sailed by the island in 1705. John Clipperton was mate on a ship of the English navigator and buccaneer, William Dampier. Clipperton quarreled with Dampier off the coast of Costa Rica in 1704, and with twenty-one other mutineers stole a prize Spanish barque in which he crossed the Pacific twice [11]. During his first crossing, Clipperton is supposed to have encountered the island [12]. No written account remains of this voyage, however, to tell us whether he did indeed land there. No mention is made of the island or its earlier discovery in descriptions of the second voyage [13], but the name of Clipperton Island was indicated on maps from about 1730 [14]. As a renegade, Clipperton had no authority to make a claim of sovereignty over the island on behalf of England, and his "discovery" has not been viewed as having any legal significance.

Mexico maintained in its 1909 arbitral memorials that the island had been discovered by Spanish navigators as early as the sixteenth century, perhaps even by Magellan [15]. Some Mexicans later claimed that documents existed in the colonial archives in Seville to prove these early discoveries [16], but no documents were produced for the arbitrator's eyes. Some argued that the Spanish must have known of the island because of its location along sailing routes between Acapulco and Manila, and coastal routes between Mexico and Peru [17], but this circumstantial evidence could not be corroborated and thus did not provide proof of discovery or justify claims to sovereignty.

The first discovery whose documentation has survived to the present [18] was by the French navigators Du Boccage and De Chassiron in 1711, who sailed the ships Princesse and Decouverte on a commercial voyage from France to the Molucces. They described the island much as it appears today and named the island "Ile de la Passion". They apparently did not make any claims to sovereignty over the island.

The first description of landing on the island was made by an American sea captian Benjamin Morrell in 1825, included in a narrative about his voyages in the Pacific [19]. The island was first mapped by Sir Edward Belcher after an 1839 visit [20]. The map was published by the British Admiralty in 1849 and remained in use by all navigators until the end of the nineteenth century. These visits did not, however, lead to any claims of sovereignty on behalf of any country [21].

B. The Guano Claimants

Several years later, when the commercial interests of Europe and the Americas began to look for islands covered with guano [22] to exploit for their phosphates, a French shipowner named Lockhart wrote to French government officials suggesting that France take possession of several islands which he believed had not yet been claimed, including Clipperton [23]. He offered to supply the necessary ships for the expedition in exchange for a concession to exploit the guano deposits. The French officials agreed, and in April 1858 Lockhart's merchant ship L'Amiral sailed to Clipperton under the command of Captain Detaille, carrying Lieutenant Victor le Coat de Kerveguen who had a government commission to assert sovereignty over the island in the name of Napoleon III. When the vessel arrived within sight of Clipperton on November 17, 1858, Lieutenant Kerveguen issued a proclamation of sovereignty on board L'Amiral.

After considerable landing difficulty [24], one smaller boat was able to reach the shore. The sailors who went ashore reported that the guano deposit (which was mixed with sand and bits of coral) was not rich in phosphates [25].

The French explorers did not leave any permanent plaque on Clipperton Island, but when L'Amiral arrived in Honolulu, Hawaii, the next month they did publish a two square-inch advertisement in the Hawaiian government's newspaper The Polynesian proclaiming "that from this day the full sovereignty of Clipperton Island belongs to His Majesty the Emperor Napoleon III, his heirs and successors in perpetuity" [26]. The newspaper also reported this claim without comment in a one-paragraph, sixteen-line story in its news columns on the same day [27]. No other public recordation of France's claim to Clipperton was made. Hawaii in 1858 was an independent monarchy. About 500 whaling ships were coming to Hawaii's ports each year during this period, and the island nation was carrying on some contact with the United States and the European powers [28]. Hawaii is the most remote archipelago on the planet, however, and it is unlikely that The Polynesian reached many of the world's capitals.

When Lockhart received the full report from L'Amiral back in France, he became discouraged about the economic prospects for the island and never exercised his right to exploit the guano [29]. The sailors' observations on the low quality of the guano, plus the landing and loading difficulties caused by the reef and occasional violent storms, were enough to persuade Lockhart to pursue other islands. It could be argued that the island was thus abandoned, because the French never used the island for the purpose for which sovereignty was claimed [30]. No record exists of any French activity on

or near Clipperton after 1858 for another 39 years, until 1897. In 1861, an American lieutenant named Griswold visited the island in search of guano, but his journal does not mention any guano deposits on Clipperton at all [31].

The island does not figure again in documented history until the 1890's, when the phosphate companies renewed their interest. In 1892, a United States citizen named Frederick Permien visited the island for several days and collected samples of guano. On July 4, 1892, he raised the American flag and claimed possession of the island in the name of the United States [32]. He returned in August to collect more samples and to drop off two men and supplies for the construction of two houses. Back in San Francisco, Permien forwarded an affidavit describing this claim of possession of the island to the State Department in Washington [33]. He filed his affidavit to comply with the requirements of the U.S. Guano Islands Act of 1856 [34] which allows discoverers of guano islands to exploit the guano deposits under the protection of the United States government after certification of their claim. Permien later claimed to have received acknowledgement of his rights to the guano from the State Department [35].

Permien returned again to Clipperton in October 1892 and stayed for almost a month, making a detailed survey of the island. He estimated that the guano deposit was six to fifteen feet deep and that Clipperton rock, a volcanic rock at one end of the coral atoll, was a mass of solid guano [36]. On the basis of these erroneous observations, Permien estimated the value of the guano at about $50,000,000. He subsequently gave a bill of sale for a 30 percent interest in the island to the men who had aided him in making his voyages. These men then separately formed the Oceanic Phosphate Company and proceeded to work the deposits. They then applied to the President of the United States for approval of a bond to be supplied by the company in compliance with the Guano Act [37]. Another company, the Stonington Phosphate Company, also filed affidavits at Washington [38]. Neither company, however, had bought out Permien's interest. When Permien discovered in August 1897 that Oceanic Phosphate Company was negotiating to sell the island to a British phosphate firm, Pacific Islands Company, the ensuing controversy received much publicity in the San Francisco newspapers [39].

The number of workers on the island fluctuated throughout the period Oceanic Phosphate worked the deposits [40]. Apparently they lived in the houses that Permien had constructed and subsisted on supplies brought in by the schooners which transported the guano to California. The workers installed railway tracks on the island to haul the guano to the ship loading area [41].

C. The Events of 1897

The year 1897 was the most active and the most important in Clipperton's history. In May, the British ship Kinkora, laden with timber from Vancouver, crashed on the reef off Clipperton [42]. When the men from the Kinkora were rescued, the three Oceanic employees sent word requesting replacement because they had not had any fresh meat or ordinary food except fish and bread for months and were suffering from scurvy. The steamer Navarro came to replace the three men with a new gang. Also on board was John Arundel, of the British firm Pacific Islands Company, who was investigating the guano deposits as part of the negotiations for purchasing the island from Oceanic Phosphate. When the Navarro returned to San Diego, news accounts appeared in the San Francisco Chronicle of August 14 [43] and of the New York Herald of August 15 [44] regarding the possible British takeover of the island when Pacific Islands Company completed its purchase from Oceanic.

The French learned from these press accounts that the island they had claimed 39 years earlier was the subject of claims from several other countries. The French thus sent a cruiser, the Duguay Trouin, to the island to investigate the situation. The ship arrived three months after the reports, on November 24, to find the three Oceanic employees and the flag of the United States. The ship left the same day it arrived, after the three men complied with a request to lower the U.S. flag [45].

The Mexicans also learned about the British interest in Clipperton, because the New York Herald article was reproduced in the Mexican newspaper El Tiempo on August 24, 1897. Rumors also circulated that a British warship had seized the island. This news incensed the Mexicans because they had always considered Clipperton part of Mexican territory based on acts of discovery by their Spanish predecessors as early as 1527 [46] and on the Bull of Pope Alexander the Sixth [47] which divided the earth between the Spanish and the Portuguese. Although these reports caused agitation in Mexico, no one in Mexico expected any difficulty in recovering Clipperton. The government sent the gunboat Democrata to Clipperton, not on a warlike mission (according to the Mexican Foreign Relations Department), but only to ascertain the true state of affairs [48]. The Democrata arrived at Clipperton only three weeks after the French cruiser Duguay Trouin had departed and were greeted by the three Oceanic Phosphate Company employees. When they were told the island was actually Mexican territory, the three men allowed the soldiers to raise the Mexican flag and left the island [49].

Meanwhile, the French government, upon learning of the encounter between the Duguay Trouin and the three Americans

on Clipperton, sought an explanation from the United States concerning the American claim. In the communication that ensued, the French ambassador presented the French claim based on the ground of discovery in 1711 and on the taking of formal possession in 1858. The United States quickly renounced any claim on its behalf, saying that the Guano Act's provisions had not been complied with. The U.S. response stated that the island was within the lawful jurisdiction of another country and that the State Department had neither approved a bond for any guano company nor issued a certificate establishing jurisdiction over the island [50].

The renunciation by the United States of any interest in Clipperton reduced the number of disputing parties to two, Mexico and France. When the French government learned of the Mexican actions from its envoy in Mexico City, it notified Mexico of its claims. This protest was the start of a long diplomatic exchange which later culminated in arbitration.

In 1898, John Arundel's British-based Pacific Islands Company applied to the Mexican government for a concession to exploit the guano on Clipperton. Mexico granted the concession, but the company immediately ran into problems. First the 73 Japanese workers who were brought to the island to work the guano went on strike, and then the company had problems loading and unloading the guano onto ships in the waters off the island [51]. When the company found other islands [52] with more profitable possibilities, it began to shift the bulk of its attention away from Clipperton.

D. The Agreement to Arbitrate

By 1905, only two employees of Pacific Islands Company remained on Clipperton. In an apparent attempt to strengthen its actual sovereignty over the island, Mexico entered into a new contract with Arundel's company, now known as Pacific Phosphate Company. The contract was signed by the government and approved by the Mexican Senate in order to show the official nature of the agreement. In addition, the Mexican government agreed to establish a military garrison on the island to further demonstrate Mexican control. In September 1905, the garrison was installed and new workers were brought in. The population of the island numbered approximately 40.

Diplomatic exchanges between Mexico and France continued during this period. In 1907, the two countries agreed to settle the dispute by arbitration and began negotiations to select a mutually acceptable arbiter. Finally, in their compromise of 1909 [53], France and Mexico agreed to submit the dispute to King Victor Emmanuel III of Italy. The provisions of the compromis expressly called for both parties to faithfully abide by the decision of the arbiter [54]. No provision allowing an appeal of the decision was included in the agreement [55].

Victor Emmanuel expressed his willingness to arbitrate, and both sides prepared and presented memorials to the Italian emperor.

Mexico rushed its documentation [56] immediately to Italy, while France slowly and meticulously culled relevant historical documents from its archives for presentation [57]. Victor Emmanuel did not issue his judgment until February 3, 1931. It is not known exactly why it took him twenty-two years to render an award, but it is speculated by some scholars that the delaying factors included the European war, the rise of Fascism, other pressing Italian problems, and the seeming unimportance of the Clipperton controversy [58].

While the arbitration proceedings were encountering delay, Mexico continued to support its garrison on the island. The Mexicans provided regular communication and supplies by boat every few months until 1914, whereupon the Mexicans seemed to have abandoned the island's inhabitants. One commentator suggested that after the Mexican government was deposed in 1914, proposals to send supplies to the island were quashed because the inhabitants were supporters of the previous government [59]. Whatever the reason for the neglect of the thirty or so inhabitants of Clipperton, the resulting development was a sordid and sensational affair which focused attention on the little island [60]. This increased interest in the island, although overshadowed by a great extent by the war in Europe, produced several written accounts of the struggles, starvation, and murder on the island, which were often inaccurate in their versions of the history of the island [61].

The few survivors were removed from the island in July 1917, and there was but one other recorded visit to the island [62] until after 1931 when Victor Emmanuel declared that the island belonged to France [63]. The decision was based primarily on the French action proclaiming ownership in 1858 and Mexico's failure to prove any conflicting formal claim of ownership.

The news of the Emperor's decision in favor of France created great controversy in Mexico City. The judgment was announced in February 1931, but Mexico did not immediately accept the verdict. In fact, in December 1931, the Mexicans established a committee to study the decision [64]. Some Mexicans hoped that the United States would object to the award as a violation of the Monroe Doctrine, which prohibited European expansion in the Western hemisphere [65]. Finally, in late 1932, the Foreign Relations Committee of the Mexican Senate recommended approval of the award [66] and officials in Mexico's executive branch accepted the judgment as a point of national honor, in accordance with the arbitration agreement the Diaz government had signed almost 25 years earlier [67]. The cession of any national territory to a foreign power, however,

necessitated a change in the Mexican Constitution. By March 1933, both the Mexican Senate and Chamber of Deputies had voted compliance with the award and all but six of the twenty-eight Mexican states had ratified the change in the constitution [68].

In May 1933, France sent a navy training ship, the Jeanne-d'Arc, to the island to manifest its sovereignty. Unable to land because of ocean and reef conditions, the cruiser made several return visits until it was eventually able to make a landing in December 1934. The French officers then drew a map, wrote descriptions of the island, collected plant and rock samples, took aerial photographs from the ship's seaplane, and sealed a bronze plaque on the face of a rock to commemorate the visit and proclaim French ownership once again [69].

Following publication of the findings and photographs of the visit of the Jeanne-d'Arc, a number of scientific expeditions were inspired to examine the island. Perhaps the most well known visit was by President Franklin D. Roosevelt in July 1938 during a cruise on the U.S.S. Houston. During World War II the island was said to have been visited by Japanese submarines [70]. The U.S. Navy also made reconnaisance visits to the island in 1943 and 1944. The United States established a weather station on the island in December 1944 which lasted for a year [71]. Since the end of the war, French Navy ships have made regular visits, leaving commemorative tablets when landing was possible. The island has also been the subject of numerous scientific expeditions from both the United States and France [72].

E. The Substance of the Decision

Although political factors may have affected Victor Emmanuel's award [73], his short written opinion is grounded in legal terminology familiar to international lawyers. Both Mexico and France submitted substantial memorials and the Emperor responded to their arguments. The decision is significant particularly in its application of the concepts of "discovery" and "effective occupation" to uninhabited islands.

1. Discovery

Victor Emmanuel first concludes that "mere discovery" does not confer sovereignty over territory [74]. He assumes for the purpose of this issue that Spanish navigators had known of Clipperton, but then concludes that no legal consequences resulted from their "discovery" because Spain did not effectively exercise "the right, as a state, to incorporate the island in her possession" [75]. This conclusion is bolstered by Mexico's failure to make any formal manifestaton of its claim to sovereignty over the island until December 1897, after the French had already asserted and reasserted their claim [76].

2. Manifestation of Sovereignty

This additional requirement to discovery, the "manifestation of sovereignty", thus becomes the key to the decision. Lieutenant Kerveguen's simple ceremony on board L'Amiral and the small ad placed in The Polynesian [77] constituted France's "manifestation of sovereignty" [78].

3. Effective Occupation

The troubling part of the decision concerns the question of "effective occupation". In general, a colonial power must do more than sail by an island and proclaim its ownership to gain sovereignty over a place -- it must also occupy the territory and establish actual control over the area [79]. Certainly in the case of an inhabited island "effective control" is a crucial element, because otherwise the inhabitants themselves would have a substantially stronger claim to sovereignty than the colonial power.

But what constitutes "effective control" over an uninhabited island? Victor Emmanuel's opinion states that effective occupation generally requires "the actual, and not the nominal, taking of possession" of the territory:

> This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected [80].

Because Clipperton was uninhabited, however, these rigorous requirements did not have to be met. The only requirement which the arbitrator imposed upon a nation attempting to acquire sovereignty over uninhabited territory is that "from the first moment when the occupying State makes its appearance there", the territory is "at the absolute and undisputed disposition of that state" [81]. A restatement of Victor Emmanuel's reasoning would be that once discovered, an uninhabited territory can be claimed by the discovering nation, and the requirement of effective occupation can be met without any further actions. The result is that all that is necessary to acquire territorial sovereignty over an uninhabited territory is to discover and claim it.

It would seem to be reasonable, however, to require the claimant nation to maintain at least occasional surveillance over its claimed island. This requirement would ensure that the claimant nation intends to maintain its claim and would alert that nation to any encroachment by other powers [82]. France apparently ignored Clipperton Island completely between

1858 and 1897. Victor Emmanuel stated nonetheless that it was not necessary for France to exercise its authority in a positive manner after claiming the atoll [83], and that France could not lose her right by dereliction because it had not intended to abandon the island [84]. Professor C.H.M. Waldock has stated that Victor Emmanuel's ruling goes too far if it requires no further activity for a nation to maintain effective occupation of its territory [85]. It is the exercise of the functions of a nation in a manner appropriate to the circumstances of the territory and to the extent necessary to fulfill the nation's obligations under international law which is the proper test of a nation's title to sovereignty over a territory [86]. It should be necessary, therefore, for a nation claiming sovereignty over uninhabited territory to manifest that sovereignty in order to prevail over any subsequent competing claims by other nations.

D.H.N. Johnson agrees that "considerable" manifestation of a claim to sovereignty is required in the face of competing claims by other nations [87]. Where no competing claims are made, however, he believes that "it may be sufficient merely that loss by abandonment cannot be proved -- provided that, as soon as a competitor intrudes, the reaction of the legitimate proprietor is reasonably thorough and instantaneous" [88]. It is on this basis that he approves of the Clipperton decision -- although France displayed no sovereignty over the Island from 1858 to 1897, it did take steps to assert its title as soon as the United States, Great Britain, and Mexico appeared to present challenges to its claim.

4. Prescription and Acquiescence

Had France acquiesced to either the United States or Mexican activity on Clipperton, the theory of prescription would have operated to transfer legal sovereignty to the other country. Under the theory of prescription, legal sovereignty is transferred to a nation that has exercised its authority in a continuous, uninterrupted, and peaceful manner over the territory for a sufficient period of time to indicate the acquiescence of the previous possessor [89].

It is interesting to note, however, that France did not protest to the United States about the activities of the Oceanic Phosphate Company until 1897, five years after Frederick Permien made his initial claim. This response is hardly the "reasonably thorough and instantaneous" reaction Johnson requires [90]. The French might have argued that their response was reasonably instantaneous considering the isolated and uninhabited nature of the island. In any event, the activities of Oceanic were not ratified by the United States government. It is not possible for an individual's actions to interrupt a nation's claim to territory unless those actions are sanctioned or ratified by the national government [91].

France did respond rapidly to Mexico's claim. It raised protests through diplomatic channels and continued to dispute the Mexican claim. It cannot be said, therefore, that France acquiesced to Mexico's claim, creating a presciptive title in Mexico.

5. Abandonment

It could be argued that France "abandoned" Clipperton by its 39-year absence from the region. Generally, abandonment cannot be presumed from nonuse, but must instead be effected voluntarily [92]. According to the arbitral decision, France's claim based upon the proclamation of 1858 was upheld over Mexico's undocumented discovery and recent occupation because France did not intend to abandon the island and because France had taken some actions to exercise sovereignty. An argument could be made, however, that France did in fact abandon Clipperton. The original purpose of France's claim was to obtain the island for guano. This idea came from Lockhart, the commercial shipping merchant, who supplied the ship and all the provisions for the voyage to Clipperton from France. In exchange, he received a concession for exploiting the guano. The sum purpose of the entire venture, then, was to exploit guano. When the discouraging reports about the practicality of a commercial operation reached Lockhart, a definite decision was made not to exercise the rights which he had acquired [93]. In light of the original purposes and Lockhart's decision to look for guano elsewhere, it might be reasonable to have concluded that France's inactivity constituted abandonment. If such a view had been taken, Mexico's positive acts after 1897 asserting its claim [94] would be adequate to substantiate and validate its claim [95].

6. Contiguity

Victory Emmanuel's opinion does not comment on the geographical proximity of Clipperton Island to Mexico (600 miles away), especially in comparison to France. The doctrine of contiguity and its application to the Clipperton dispute are discussed below [96].

III. Other Controversies Involving Remote Territories

The Clipperton decision, which applies different standards to inhabited and uninhabited territory in determining "effective occupation", has some support in other arbitrations and adjudications. Not all of the comparable controversies were resolved using doctrines identical to those used by Victor Emmanuel in Clipperton, however, and an examination of comparable disputes shows that it might have been possible to resolve Clipperton in favor of Mexico.

A. Aves Island (Netherlands v. Venezuela)

In 1860, Queen Isabel of Spain was asked by the Netherlands and Venezuela to settle a dispute over Aves Island, an uninhabited island in the Caribbean [97]. Venezuela's claim was based on: (1) succeeding to Spain's claim to the island by discovery and by exercising some civil jurisdiction over the island and (2) the relative closeness of the island to the mainland of Venezuela (the theory of "contiguity") [98]. The Netherland's claim was based on old maps showing that Aves and its neighboring island of Saba (which belonged to the Netherlands) were once connected by a sand bar. They presented evidence that many geographers, including several Venezuelans, marked the island as part of the Dutch Antilles, which were under the control of the Dutch government in Curacao, and affirmed that the island was used by Dutch fishermen. The Netherlands also argued that after the islands separated, the citizens of the Dutch islands of Saba and Saint-Eustache continued to use Aves Island for fishing and collecting bird eggs [99].

Queen Isabel decided in 1865 that the island belonged to Venezuela because Venezuela had been the first to visit the island with an armed force and the first to perform formal acts of sovereignty over the island [100]. Although citizens of islands belonging to the Netherlands used Aves Island for fishing and lived there for short periods of time each year, they constructed no permanent buildings and performed no formal acts that demonstrated an intention to assert sovereignty over the Island [101]. Queen Isabel's decision was thus influenced by the discovery of and the symbolic manifestations of sovereignty over this uninhabited island by Spain and later Venezuela. Venezuela's claim to Aves was stronger than France's claim to Clipperton, however, because the formal acts proclaiming sovereignty were buttressed by the geographical contiguity of the island and by some exercise of civil jurisdiction.

B. Bouvet Island (Norway v. Great Britain)

Another case with similar facts and legal issues as Clipperton is the dispute between Norway and Great Britain in 1927 over uninhabited Bouvet Island in the South Atlantic Ocean. The leader of a Norwegian scientific expedition was authorized by the Norwegian government to take possession of the island and exploit the fish in its territorial waters. A voyage was made to the distant island, the Norwegian flag was raised, and on January 23, 1928, a Norwegian Royal decree placed the Island under Norwegian sovereignty and authorized the Minister of Justice to make preparations regarding the exercise of police authority in the island [102].

Subsequently a news report reached Oslo that Great Britain had issued an exclusive license to a sealing company for the use of the island as a base, and the Norwegian government issued a quick note of protest to the British Foreign Office. The note pointed out that the island had never been previously visited, although British explorers had been in the area, and that the island did not lie in either the Falkland or Ross sectors claimed by Great Britain. The British responded that a valid British claim existed as a result of a visit to the island by a British sealing ship over a hundred years earlier, in 1825. The Norwegian government denied that the British landing took place, and argued that, even if the British had landed, a formal act at the time of the alleged landing without any subsequent effective taking of possession was an insufficient basis for a claim to sovereignty. Even if Britain had obtained an inchoate title as a result of the discovery and symbolic annexation, Norway concluded, the fact of British inactivity for one hundred years would have been fatal to their claim in the face of the competing claim by Norway. In November 1928, Britain withdrew its claim to Bouvet Island.

The Bouvet Island Case is cited by von der Heydte [103] as consistent with Clipperton because Britain recognized that Norway had a valid claim over the uninhabited island as a result of Norway's symbolic act and solemn declaration. A more interesting comparison of the Clipperton and Bouvet cases would concern the effect of a long period of inactivity after a discovery and symbolic annexation; that is, a comparison of the claim of France to Clipperton as against that of Britain to Bouvet. How would Victor Emmanuel have resolved the case had it been put before him for arbitration? If Britain could have documented its "discovery" of 1825, would that have sufficed to create a valid and lasting claim despite the subsequent inactivity? Would Victor Emmanuel have viewed Britain's issuance of the license to its sealing company as a reassertion of sovereignty that vitiated Norway's claim just as France's act of surveillance in November 1897 vitiated Mexico's claim? The decision would probably have discussed whether Britain had intended to abandon the island, whether Britain's renewed interest was prior or subsequent to Norway's actions, and whether an intent to abandon can be presumed by a one-hundred-year period of inactivity.

C. The Island of Palmas (Miangas) (United States v. Netherlands)

The Palmas Island case [104], although concerning an inhabited rather than an uninhabited island, contains language reinforcing the principle that less is required in the way of occupation for uninhabited territories than for inhabited ones. Palmas (or Miangas) Island, which lies to the south of Mindanao, was claimed by both the United States (the colonial power governing the Philippines) and the Netherlands (the colonial

power governing Indonesia). The United States' claim was based on its succession to Spain's claim by discovery and on the contiguity of Palmas to the Philippine archipelago [105]. The Netherlands' claim was based on contact with the island by the Dutch East India Company beginning in 1677, including agreements with native princes recognizing Dutch sovereignty over a group of islands including Palmas [106].

The arbitrator, Max Huber of the Permanent Court of Arbitration in the Hague, decided that the Netherlands' claim was superior because it was based on the peaceful and continuous display of state authority over Palmas [107]. The United States' claim was insufficient, he concluded, because the mere discovery by Spain did not confer title, especially where there was no evidence of subsequent occupation or attempts to exercise sovereignty [108]. Huber also rejected the argument of the United States based on contiguity to the Philippine archipelago, because he found that under international law contiguity could not create a valid claim:

> Although states have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even governments of the same state have on different occasions maintained contradictory opinions as to its soundness... This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious [109].

Contiguity is thus rejected in part because Palmas was near both the Philippine and Indonesian archipelagoes.

Arbitrator Huber's decision in favor of the Netherlands recognized the actual interaction between the Dutch and the islanders as showing more sovereignty that the Spanish act of discovery. He characterizes the acts of the Dutch as acts of prescription [110], but requires proof showing peaceful and continuous display of authority for a prescriptive claim similar to that necessary to show effective occupation in the

Clipperton case [111]. The activities of the Dutch East India Company in Palmas were sporadic and not geographically continuous [112]. Huber's analysis is similar to Victor Emmanuel's, in that the character of the activity necessary for proving occupation or display of authority varies according to the circumstances of the region involved:

> Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or... regions accessible from, for instance, the high seas [113].

Less is thus required to establish sovereignty over a remote region than a populated area.

D. Eastern Greenland (Norway v. Denmark)

Another case holding that less is required to establish sovereignty over remote and climatically unfavorable territories than for inhabited areas is the 1933 Eastern Greenland Case decided by the Permanent Court of International Justice [114]. Denmark claimed the territory based on the continuous and peaceful exercise of sovereign rights over a long period, coupled with a recognition of those rights by Norway [115]. Norway claimed that the area was unclaimed territory (territorium nullius) in 1931 when Norway proclaimed sovereignty over it. The Court found evidence of the exercise of sovereign power by Denmark, especially through legislation. Norway argued that the Danish laws were intended to operate only in the settled areas of Greenland and thus were not instructive on the issue of sovereignty of the unsettled area in dispute. The Court concluded that the Danish enactments illustrated the intention of Denmark to exercise sovereignty over the entire region and that such evidence of intent was sufficient considering the arctic and inaccessible character of those areas [116]. The Court relied on the principle that claims to sovereignty based upon continuous display of authority must show both the intention to act as sovereign and some actual exercise or display of sovereign authority, but the Court also recognized that in the case of remote regions much less is required in the way of actual exercise or display of authority:

> It is impossible to read the records of the decisons in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual

exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries [117].

IV. A Summary of the Governing Doctrines

The legal principles applied in the disputes over sovereignty of remote or uninhabited areas evolve from the five traditional theories of the acquisition of territory: discovery, symbolic annexation, occupation, prescription, and contiguity. A summary of these theories as applied in the disputes can provide a more complete view of the problem.

A. Discovery

Mere discovery, by itself, has not been accepted as a valid basis for a claim to title. In the Palmas Case Judge Huber stated that although discovery may have been enough to acquire territory in the sixteenth century (when Spain supposedly discovered Palmas), current law also requires "effective occupation" [118]. The most that discovery -- the mere act of seeing land -- can produce is an inchoate title.

Victor Emmanuel similarly rejected Mexico's claim based on discovery by Spanish navigators. He grants that Spain had the right to appropriate and formally take possession based on its discovery of the island, but ruled that its failure to do so destroyed that right. Mere discovery, then, gives at most an inchoate title which must be augmented by taking of possession before title can be complete.

B. Symbolic Acts of Annexation

Once a territory has been "discovered", the discoverer may attempt to buoy his claim to the territory by performing symbolic acts of annexation, such as making proclamations, erecting signs, or planting flags. Traditionally, these acts are considered merely to be devices to publicize to the world that a country has a claim to an inchoate title to the territory. This inchoate title, however, perishes unless followed and perfected by effective possession in a reasonable time [119].

Although symbolic acts may only create an inchoate title as to areas capable of habitation, it is obvious from the decisions concerning uninhabited and remote areas that it can create a complete and valid claim. The symbolic annexations of Clipperton by Lieutenant Le Coat de Kerveguen in 1858, of Aves by Venezuelan armed forces, and of Bouvet by a Norwegian Royal Decree, each were decisive in creating their respective

titles to territory. These symbolic acts were capable of creating valid titles because the nature of the territory did not require validation by effective occupation, or rather because the symbolic act was viewed as the equivalent of effective occupation considering the circumstances.

C. Occupation

Victor Emmanuel formulated the modern requirements of occupation in his award in the dispute between Great Britain and Brazil over the boundary between British Guyana and Brazil. He stated that to constitute "occupation" a nation must establish "effective, uninterrupted, and permanent possession being taken in the name of the State... a simple affirmation of rights of sovereignty or a manifest intention to render the occupation effective cannot suffice" [120].

A strict application of these principles to Clipperton, Aves or Bouvet would require much more activity than occurred. It is important to remember, however, that "the relationship between sovereignty and territory is built upon a connecting link: the people in the territory or, if it is devoid of permanent settlement, at least the activities of people within the territory" [121]. Because effective occupation thus refers to effective display of state activity rather than to settlement, Victor Emmanuel's reasoning in the Clipperton Case does not necessarily conflict with his earlier statement in the Great Britain-Brazil Case.

Lauterpacht [122] has, however, criticized this result, and has concluded that the requirement of effectiveness of occupation has been practically relinquished in the Legal Status of Eastern Greenland Case [123] and in Clipperton. Referring to Clipperton, Lauterpacht complains that

> it is clear that there was in this case nothing in the nature of an initial taking of possession in the ordinary sense of the word. There was a symbolic act, a proclamation. Such symbolic act cannot, without doing violence to language, be regarded as occupation. The Clipperton Island case shows that the notion of occupation, as traditionally understood, may be valueless, in relation to some areas, for the purpose of acquiring title [124].

D. Presciption

Although an actual, continuous, and peaceful display of state authority over uninhabited areas does not require inhabiting that place or maintaining constant surveillance, it does require that the claimant state make a reasonably thorough and instantaneous reaction in the event of an intrusion

by another state. If this requirement is not met, it may be possible for the intruding state to gain title to the territory by prescription, i.e., an actual, continuous, and peaceful display of state authority over the territory with the acquiescence of the prior claimant state.

These principles are evident in Victor Emmanuel's denial of the validity of Mexico's acts of possession after France reasserted its sovereignty to both the United States and Mexico in 1897. It is also evident in Judge Huber's denial of the United States' claim to Palmas based on the acquiescence of Spain to the acts of sovereignty by the Dutch trading companies.

E. Contiguity

Judge Huber also denied the United States' claim based on contiguity, saying that international law had not accepted contiguity as a basis of territorial sovereignty. Queen Isabel in the Aves Case, however, certainly considered the contiguity of the island to the Venezuelan mainland to be important. Although questions remain about the validity of contiguity as a legal ground to title in and of itself, contiguity may raise a presumption of fact that a state is displaying effective control over an outlying territory even if there is no noticeable impact of that state's official activity [125]. This view prevailed in the Eastern Greenland Case where the Permanent Court of International Justice decided that Denmark's legislative intent to exercise sovereignty over all the region was sufficient considering the remoteness of the disputed areas.

Recent writers have emphasized the growing importance of the contiguity concept. O'Connell lists a number of historical instances where sovereignty was founded on a geographical conception: the concept of the watershed, the rule that archipelagoes should be treated as a unit, and the delimitation of coastal and high seas jurisdiction, especially in the evolution of the continental shelf conception [126]. The recent expansion of allowable territorial seas and the creation of "exclusive economic zones" at the Law-of-the-Sea Conference are important recent recognitions of the role of geographic contiguity. When newly emerged volcanic islands appear, the nearest coastal state would appear to have a logical claim to the new island because it could provide protection and a political community to settlers who might move there [127]. And the contiguity concept should have particular applicability to remote islands: "Contiguity would appear to have considerable practical value, however, in uninhabited or sparsely inhabited areas where the manifestion of state functions is minimal, and the notion of possession is somewhat fictional" [128].

To summarize the existing principles, a claimant for sovereignty over an uninhabited island must, if the island has

not been previously claimed, make some formal proclamation of sovereignty and be prepared to react thoroughly and instantaneously in the event some other state intrudes. A claimant to an uninhabited island which has been previously claimed may gain title by the same method if the previous claimant has abandoned its claim. If there is no proof of abandonment, the new claimant must exercise sovereignty over the island with the acquiescence of the previous claimant in order to gain title. Claimants that are geographically contiguous to the disputed island may be presumed to be exercising sovereignty over the island, but that presumption can be rebutted.

V. Conclusion: Should Clipperton Island Have Rights to an Exclusive Economic Zone and a Continental Shelf?

The Clipperton decision is in accord with traditional international law in recognizing that discovery and symbolic annexation can be enough to perfect a claim to an uninhabited territory. The decision is not entirely consistent with other cases, however, on the question whether further acts of sovereignty are necessary to maintain a claim in the fact of opposing claims of other nations. A strict reading of the language of the Clipperton decision yields the impression that nothing more is necessary -- that France's claim would be paramount to any subsequent claim as long as France did not intentionally abandon its earlier claim. Victor Emmanuel was not faced with a situation of another country claiming prescriptive rights based upon long, continuous, and peaceful display of authority over the island, but he did not give much importance to the actions that Mexico did take indicating an interest in the island. It would probably be prudent for any nation claiming an uninhabited island to reassert periodically its sovereign rights by conducting regular surveillance of the island rather than relying merely on its discovery and symbolic annexation. France is now paying much more attention to Clipperton Island to avoid having its claim challenged again.

The Clipperton arbitration ignores the contiguity doctrine, which could have been a substantial argument in favor of Mexico, even though it has not been explicitly recognized as a governing doctrine in any of the analogous cases discussed. The doctrine would seem to be strongest in a Clipperton-type case where the dispute is between a developing nation lying closest to the disputed territory on the one hand and a distant colonial power on the other. An arbitrator more sympathetic to Mexico might have weighed the geographical contiguity of the island plus Mexico's occasional attempts to exercise sovereignty against France's formal act of discovery and protest 39 years later, and might have tipped the balance in Mexico's favor. The legal doctrines are not so precise that they lead to one automatic conclusion.

The most important question concerning Clipperton Island is whether it should have a 200-mile exclusive economic zone and a continental shelf, no matter who has sovereignty over the atoll. It is ironic that France, which ignored Clipperton Island for so long and acquired sovereignty by such minimal efforts, should now reap such a potential bounty over its ocean space. Should Clipperton Island have an exclusive economic zone? Is it a "rock" or an "island"? Can it "sustain human habitation or economic life" of its own? This language is the standard set by Draft Convention Article 121(3) to determine whether an island is entitled to an exclusive economic zone and continental shelf [129].

The "regime of islands" of Article 121 owes much to its predecessors at the League of Nations Codification Conference at the Hague in 1930, the United Nations Conference on the Law of the Sea at Geneva in 1958 which produced the Territorial Sea and Continental Shelf Convention, the Committee on the Peaceful Use of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction in 1972-73, and finally to the Second Committee's meetings during the Caracas Session of the Third United Nations Conference on the Law of the Sea in 1974. Throughout all these proceedings, the nations have argued over the proper definition of an island and the amount of maritime space properly allocable to islands.

It has proved difficult to pin down precise definitions of the terms because of the immense diversity of island situations. Land protrusions surrounded by water do not lend themselves to tidy categorization on the basis of criteria such as size, population, position, and political status. As a result, many countries will interpret the language of Article 121 as best suits their national interest.

France apparently believes that it is entitled to a 200-mile zone around Clipperton Island, because on February 12, 1978, it claimed an exclusive economic zone around the atoll. France can be expected to defend its claim to the ocean space around Clipperton Island by arguing that the geological definition of a "rock" must govern. It will also advance a minimal interpretation of the requirement to "sustain human habitation or economic life" to include a few persons supplied from outside or use as a periodic base rather than as a home.

Clipperton Island is not, geologically speaking, merely a rock. It includes both coral and volcanic features. The land area is about 1.6 square kilometers. Under several geographers' classifications of land protrusions surrounded by water according to size, Clipperton Island would qualify as an "islet" -- slightly larger than a rock and smaller than a full-fledged island.

If required, it would be difficult for France to show that the island has in fact sustained a population and an economic life of its own from the guano. Very small communities lived together in uncertain conditions between 1892 and 1917, but their survival depended upon constant resupply [130]. The island does not appear to have "an economic life of [its] own" today and it is doubtful whether anyone ever made any profit from the guano.

The Clipperton Island arbitration -- like other decisions involving disputes over remote territories -- is based on legal doctrines that apply differently to uninhabited territories than to inhabited areas. The standards that usually govern sovereignty were relaxed by arbitrator Victor Emmanuel. Because the island was deemed uninhabitable, France was not required to "effectively occupy" the island as would normally be required.

It thus seems inappropriate that France should be able to claim an exclusive economic zone and continental shelf on behalf of this remote and seemingly uninhabitable atoll. It is surprising that no nation has complained about France's action, and that even Mexico seems willing to go along. Because so much ocean space is involved in this question, the negotiators at the Law of the Sea Conference should examine the issue once again before settling on the language of Article 121. But because many nations have uninhabited islands (including Mexico and the United States), most nations are keeping quiet about this issue.

The amount of the ocean's resources that will be placed under international control for the benefit of all has gradually been reduced during the Law of the Sea negotiations because of expanding claims of national sovereignty. If Article 121 remains unchanged, even less of the ocean's resources will remain as the "common heritage" of humankind.

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1. Third United Nations Conference on the Law of the Sea (UNCLOS III), 1974-present. Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (August 28, 1981).

2. Draft Convention, supra note 1, Art. 121(1).

3. Id., Art. 121(3).

4. 48 U.S.C. 1411-19 (1976); see note 34, infra.

5. Honolulu Advertiser, September 7, 1979, at B-4, col. 1; Park, The South China Sea Disputes: Who Owns the Islands and the Natural Resources?, 5 Ocean Dev. and Int. L.J. 27 (1978); Chiu and Park, Legal Status of the Paracel and Spratly Islands, 3 Ocean Dev. and Int. L.J. 1 (1975); N.Y. Times, May 27, 1979, at 4, col. 1.

6. Sankei (Tokyo), Aug. 9, 1979, at 5, col. 7 (morning ed.).

7. N.Y. Times, Nov. 21, 1976, at 6, col. 1.

8. N.Y. Times, May 27, 1979, at 4, col. 1.

9. Sachet, Geography and Land Ecology of Clipperton Island, Atoll Research Bull. No. 86, at 29-30 (1962); D. Horn, B. Horn & M. Delach, Factors Which Control the Distribution of Ferromanganese Deposits and Proposed Research Vessels Track North Pacific (1973).

10. Pacific Islands Monthly, May 1979, at 7.

11. Pacific Islands Yearbook 49 (13th ed., 1978).

12. 4 J. Burney, A Chronological History of the Voyages and Discoveries in the South Sea 447-448 (1816). "The name now given to the atoll bears witness to the belief held by Burney in his history of Pacific exploration that it was probably sighted by the English sea-rover Clipperton in 1705; but this depends on little more than conjecture". (51 Geographic J. 405 (1918).)

13. 1 W. Betagh, A Voyage Around the World 121-169 (1728).

14. F. Moller, Vierteljahrskarten des Niederschlags fur die ganze Erde 1-7 (95(1), 1951).

15. See also note 46, infra. Some authorities maintain that Magellan may have encountered the island in 1521 (Nunn, Magellan's Route in the Pacific, 24 Geographic Rev. 615-633 (1934)), but others doubt that he ever got that far north in his travels (Niaussat, Bilan des recentes missions biologiques sur l'atoll de Clipperton etat actual de la question, 34 Comtes Rendus Trimestriels des Seances del'Academie des Sciences d'Outre Mer 676 (1974).

16. Marte Gomez, President of the Mexican Senate in 1932, claimed that "in the colonial archives in Seville, I understand, there is sufficient documentary evidence to prove that Clipperton Island was discovered by Spanish mariners". (N.Y. Times, Dec. 15, 1932, at 6, col 4.)

17. The controversy turns on the regime of winds and currents in that part of the ocean. One side has argued that this regime was unfavorable to sailing ships and made encounter with Clipperton less likely, and the other side has maintained that the island was almost certainly on the track of ships on the Acapulco-Philippines route. See 51 Geographic J. 405 (1918); 55 Geographic J. 154-155 (1920).

18. The original documents are kept in the French National Archives and are published in the French memorial to the arbitration. Memoire defensif par le gouvernement de la Republique francaise dans le litige relatif a la souverainete de l'ile Clipperton soumis a la decision arbitrale de Sa Majeste Victor-Emmanuel III, roi d'Italie, en execution de la convention entre la France et le Mexique du 2 mars 1909 (Paris, 1912).

19. B. Morrell, A Narrative of Four Voyages to the South Sea, North and South Pacific Ocean 219 (1832). The descriptions were of some of the plant and animal life which he found on the island. See also Pease, On the Existence of an Atoll Near the West Coast of America, and Proof of its Elevation, 3 Proc. Calif. Acad. Sci. 199-201 (1868).

20. 1 E. Belcher, Narrative of a Voyage Round the World 255-257 (1943); see Pease, supra note 19.

21. The accounts of these navigators only discuss the plant and animal life and the weather on the island. Whether they ever considered to whom the islands belonged is unknown. See Sachet, Histoire de l'Ile de Clipperton, 2 Cahiers du Pacifique 1, 6-8 (1959?).

22. Guano is the excrement of sea-going birds. On certain islands, such as those of Peru, it is the excrement itself which is collected. In most cases, however, the term is improperly used for the chalk phosphates which are formed by a still little-understood process when rain washes over the guano deposited on coral formations. The high nitrogen and phospheric acid content make guano an excellent fertilizer.

23. Sachet, supra note 21, at 8.

24. It is dangerous and difficult to land at Clipperton because of the shallow reef that encircles the atoll. The reef is almost dry at low tide. Id. at 5. "It is difficult for a vessel of any size to find anchorage, and only small vessels can come close enough inshore to find holding ground. Landing is dangerous except in a calm sea". 21 Geographic Rev. 488 (1931).

25. Sachet, supra note 21, at 9.

26. The Polynesia, Dec. 18, 1858, at 2. The advertisement (col. 6) was as follows:

EMPIRE OF FRANCE!

IN THE NAME OF THE EMPEROR, and in conformity with his orders, transmitted to us by His excellency the Minister of the Navy, we, the undersigned, Victor Le Coat de Kerveguen, Lieutenant, Commissioner of the Government of the Emperor of the French, do hereby proclaim and declare that from this day the full Sovereignty of Clipperton Island, situated by .10 deg. 19 min. latitude North, and 111 deg. 33 min. longitude West, meridian of Paris, belongs to His Majesty the Emperor Napoleon III, his heirs and suceessors in perpetuity.

Given under our Seal on board the merchant ship "Amiral", the 17th day of November, 1858. The Lieutenant, Commissioner of the Government,

(Signed) V. LE COAT DE KERVEGUEN

27. The news column (Id., col. 3) entitled "France in the North Pacific", was as follows:

> By an advertisement in another column we learn that the Imperial Government of France did on the 17th of November last claim the sovereignty of "Clipperton Island" situated in the North Pacific, Lat. 10°28' North, Longitude 109°19' West as laid down by Bowditch, but in Latitude 10°19' North, Longitude 109°13' West, as marked by the French Commissioner. The Island we are told is low and small but covered with guano. The French ship Amiral, which touched at this port during the past week, is the pioneer of French guano enterprises and has the government officer on board, to whom the taking possession is entrusted. The island is distant from Hawaii 2700 miles and from the nearest point on the Mexican coast (Acapulco) about 550 miles.

28. See note 78, infra, for a list of the foreign consular agents residing in Honolulu in 1858.

29. Sachet, supra note 21, at 8-9.

30. For a discussion of the doctrine of abandonment, see text at notes 92-94, infra.

31. Pease, supra note 19.

32. San Francisco Chronicle, Aug. 19, 1897, at 12, col. 1.

33. Id.

34. 42 U.S.C. 1411-1419 (1976):

> "Sec. 1411. Guano districts; claim by United States
> "Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States. R.S. Sec. 5570.
>
> "Sec. 1412. Same; notice of discovery, and proofs
> "The discoverer shall, as soon as practicable, give notice verified by affidavit, to the Department of State, of such discovery, occupation, and possession, describing the island, rock, or key, and the latitude and longitude thereof, as near as may be, and showing that such

possession was taken in the name of the United States; and shall furnish satisfactory evidence to the State Department that such island, rock, or key was not, at the time of the discovery thereof, or of the taking possession and occupation thereof by the claimants, in the possession or occupation of any other government or of the citizens of any other government, before the same shall be considered as appertaining to the United States. R.S. Sec. 5571.

"Sec. 1414. Exclusive privileges of discoverer

"The discoverer, or his assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying such island, rocks, or keys, for the purpose of obtaining guano, and of selling and delivering the same to citizens of the United States, to be used therein, and may be allowed to charge and receive for every ton thereof delivered alongside a vessel, in proper tubs, within reach of ship's tackle, a sum not exceeding $8 per ton for the best quality, or $4 for every ton taken while in its native place of deposit. R.S. Sec. 5573.

"Sec. 1415. Restrictions upon exportation

"No guano shall be taken from any island, rock, or key mentioned in section 1411 of this title, except for the use of the citizens of the United States or of persons resident therein. The discoverer, or his widow, heir, executor, administrator, or assigns, shall enter into bond, in such penalty and with such sureties as may be required by the President, to deliver the guano to citizens of the United States, for the purpose of being used therein, and to none others, and at the price prescribed, and to provide all necessary facilities for that purpose within a time to be fixed in the bond; and any breach of the provisions thereof shall be deemed a forfeiture of all rights accruing under and by virtue of this chapter. R.S. Sec. 5574.

"Sec. 1416. Regulation of Trade

"The introduction of guano from such islands, rocks, or keys shall be regulated as in the coasting trade between different parts of the United States, and the same laws shall govern the vessels concerned therein. R.S. Sec. 5575.

"Sec. 1417. Criminal jurisdiction

"All acts done, and offenses or crimes committed, on any island, rock, or key mentioned in section 1411 of this title, by persons who may land thereon, or in the waters adjacent thereto, shall be deemed committed on the high seas, on board a merchant ship or vessel belonging to the United States; and shall be punished according to the laws of the United States relating to such ships or vessels

and offenses on the high seas, which laws for the purpose aforesaid are extended over such islands, rocks, and keys. R.S. Sec. 5576.

"Sec. 1418. Employment of land and naval forces in protection of rights

"The President is authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer or of his widow, heir, executor, administrator, or assigns. R.S. Sec. 5577.

"Sec. 1419. Right to abandon islands

"Nothing in this chapter contained shall be construed as obliging the United States to retain possession of the islands, rocks, or keys, after the guano shall have been removed from the same. R.S. Sec. 5578."

35. A letter from the State Department to the Post Office Department regarding a request by Permien for mail service to Clipperton states that the State Department simply acknowledged Permien's affidavit. The letter does not mention any assertion of sovereignty on behalf of the United States. San Francisco Chronicle, Aug. 19, 1897, at 12, col. 1.

36. The reports concerning the quality and quantity of the guano on Clipperton were inconsistent over the years. Lockhart was discouraged by the reports by the crew of L'Amiral (see text at note 29, supra). Permien's extravagant claims were the result of a survey with a Washington chemist. San Francisco Chronicle, Aug. 19, 1897, at 12, col. 1. J.T. Arundel of Pacific Islands Company found Permien's claim to have been "grossly exaggerated":

> Captain Permien, for instance, is declaring that the Island is one mass of guano, and that a certain eminence, 1000 feet in circumference at the base and 100 feet high, is a mass of hardened guano... Captain Permien or someone else chipped off some big blocks of the rock under the hallu- cination that it was hardened guano, and hauled them two miles across the lagoon to the place where it was intended to ship the stuff. It lies there still. One might as well use cobble stones for a fertilizer as to use that rock...
>
> While... there is considerable guano on the island... there is a question... whether it would pay to transport it. (San Francisco Chronicle, August 20, 1897, at 4, col. 5.)

By 1917, when the Mexicans left Clipperton, the guano deposits, whatever they had once been, were exhausted. N.Y. Times, July 9, 1933, at sec. IX, p. 2, col. 7.

37. In order to gain protection under the Guano Act of 1856, it was necessary to execute a bond as security that the discoverer would only deliver the guano to the United States. 42 U.S.C. 1415 (1976) (for text see note 34, supra.)

38. Both Stonington (October 26, 1892) and Oceanic (May 25, 1893) Phosphate Companies filed claims under the Guano Act. Stonington's claim was not acknowledged. The State Department replied to Oceanic's claim, citing the affidavits already on file and noting that they had no assignment of interest on file. San Francisco Chronicle, Aug. 19, 1897, at 12, col. 1, and Jan. 29, 1898, at 2, col. 7.

39. San Francisco Chronicle, Aug. 14, 1897, at 4, col. 3; Aug. 19, 1897, at 12, col. 1; Aug. 20, 1897, at 4, col. 7; Nov. 7, 1897, at 15, col. 1.

40. In 1893, seven men were on the Island (Sachet, supra note 21, at 10), but in 1897, when the French and Mexicans arrived, there were only three (Id. at 11).

41. A photograph of three workers, two pigs, two coconut palms, and the tracks is in the official document published by the Mexican government in support of its position. Mexico, Secretaria de Relaciones Exteriores de Mexico, Isla de la Pasion Llamada de Clipperton 20 (1909).

42. San Francisco Chronicle, June 5, 1897, at 12, col. 1; July 20, 1897, at 2, col. 3; July 21, 1897, at 12, col. 1.

43. One of the passengers of the Navarro is reported to have said:

> "The island is supposed to belong to Mexico, but then it is not down on the map as included in Mexico's possessions. At any rate, once the English company secures the guano deposits, there will be no difficulty as to the island. It will be ready to pass into British control as a matter of course". (San Francisco Chronicle, Aug. 14, 1897, at 4, col. 3.)

44. New York Herald, August 15, 1897, at 3.

45. According to 21 Geographic Rev. 488 (1931).

46. Mexico claimed that the log of Captain Saavedra of the Spanish Navy, preserved in the library of the Escorial, infers that Saavedra discovered the island on November 15, 1527, on a voyage to the Moluccas. El Universal, Nov. 16, 1932.

47. Alexander VI's "Inter Caetera" in 1493 granted to Spain the right to acquire all non-Christian lands west of the meridian one hundred leagues west of the Azores and Cape Verde; Portugal was granted all lands to the east of that line. Although it has been advanced as valid claim to territory, it has been accorded little legal authority except perhaps between Spain and Portugal. I. Brownlie, Principles of Public International Law 150-151 (1973); N. Hill, Claims to Territory 145-146 (1945); Waldock, Disputed Sovereignty in the Falkland Island Dependencies, 25 Brit. Y.B. Int. L. 311, 321-322 (1948); Von der Heydte, Discovery, Symbolic Annexation and Virtual Effectiveness in International Law, 29 Am. J. Int. L. 448, 450-451 (1935).

48. N.Y. Times, Dec. 17, 1897.

49. N.Y. Times, Jan. 6, 1898, at 2, col. 5; Sachet, supra note 21, at 11-12; 24 Geographic Rev. 488 (1931); Morris, Island the World Forgot, 164 New Outlook 51, 55 (No. 1, July 1934).

50. See San Francisco Chronicle, January 29, 1898, at 2. The decision was announced in a letter by Secretary of State Sherman to Senator Perkins.

51. See note 24, supra.

52. Guano deposits of excellent quality were found on Ocean and Nauru islands around 1900. Pacific Islands Co. became more interested in these islands because they had more vegetation and were more suitable for habitation. A. Rossfelder, Clipperton: L'Ile Tragique 112-113 (1976).

53. Convention en vue de regler, par la voie de l'arbitrage, le desaccord au sujet de al souverainte de l'ile de Clipperton, signee a Mexico, le 2 mars 1909, reprinted in 5 G. Martens, Nouveau Receuil General de Traites 9-9 (3rd ser. 1912); XVII Revue general de droits internationale publique, docs. 1; English translation in G. Ireland, Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean 320 (1971) and 26 Am. J. Int. L. 390-391 n. 2 (1932).

54. Id., art. 3.

55. Victor Emmanuel arbitrated two other disputes over territory, one between Great Britain (for British Guyana) and Brazil and another between Great Britain and Portugal over African boundaries. The latter involved determining which tribes were dependent upon a certain kingdom in Central Africa, to define the disputants' spheres of influence. For a discussion of the principle relied upon in the Great Britain/Brazil decision, see text at note 120, infra.

56. Mexico, Secretaria de Relaciones Exteriores, supra note 41.

57. France, Memoire defensif, supra note 18.

58. K. Baarslag, Islands of Adventure 296 (1941).

59. "The reason the colonists were forgotten was, that soon after the shipwrecked crew of the Nokomis were taken off, Huerta was deposed, and whenever it was suggested to the Carranza government that supplies be sent to the island, the answer was, 'They are Huertistas. Let them die.'" Account of Navy captain who rescued the remaining inhabitants from Clipperton in 1917. Perrill, Letter, 164 New Outlook 4-5 (No. 4, Oct. 1934).

60. The last supply boat to Clipperton was in early 1914. Shortly thereafter, the survivors of the shipwreck of an American schooner reached the island and were rescued by the U.S.S. Cleveland in June, 1914. After the departure of the Cleveland, the next ship to reach Clipperton was the U.S.S. Yorktown in July, 1917. Between 1914 and 1917, the inhabitants were reduced to eating the flesh of the gannets that populated the island. There were not enough coconuts to ward off scurvy, and the illness claimed several lives. Arnaud, the Mexican Army captain and head of the garrison, set out to sea in a small boat with several other healthy soldiers in order to seek help. Apparently they were lost at sea. By 1917 only three women and eight children were left along with a large man who ruled the island as a despot. The day before the Yorktown arrived, one of the women took the opportunity to kill the man with the blunt side of an ax. Pacific Islands Yearbook 49 (13th ed., 1978); Niaussat, supra note 15, at 679-680; Sachet, supra note 9; Morris, supra note 49, at 31-32; Baarslag, supra note 58, at 297-298; Sachet, supra note 21, at 14-15; N.Y. Times, Aug. 13, 1917, at 18.

61. See sources cited in note 60, supra.

62. According to a letter in the United States National Archives, several men from the schooner Ethel M. Sterling

from San Pedro landed on Clipperton on January 5, 1929, after several days of bad weather kept them on board ship off the island, and they collected samples of guano and lagoon water. Sachet, supra note 9, at 7.

63. Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico), Jan. 28, 1931, 26 Am. J. Int. L. 390 (1932).

64. N.Y. Times, Dec. 20, 1931 at 8, col. 3.

65. N.Y. Times, Nov. 15, 1932, at 14, col. 7; Nov. 22, 1932, at 6, col. 4; Nov. 27, 1932, at sec. 11, p. 7, col. 4; Current History, Jan. 1933, at 466. The Monroe Doctrine "is opposed to (1) any non-American action encroaching upon the political independence of American States under any guise and (2) the acquisition in any manner of the control of additional territory in this hemisphere by any non-American power." (Address by Charles Evans Hughes (Secretary of State) before the American Bar Association at Minneapolis, Aug. 30, 1932, "Observations on the Monroe Doctrine" reprinted in 17 Am J. Int. L. 611, 612 (1923).)

Although some (e.g., President Cleveland) advanced the doctrine as international law, others regarded it as only a policy of the United States whose importance was political rather than legal. M. Lindley, The Acquisition and Government of Backward Territory in International Law 74-79 (1926); 5 Hackworth, Digest of International Law 435-454 (1940).

66. N.Y. Times, Nov. 10, 1932, at 24, col. 3.

67. N.Y. Times, Dec. 15, 1932, at 6, col. 4; March 1, 1933, at 11, col. 5. "One time the government favored buying it (Clipperton) from France. [N.Y. Times, Dec. 17, 1932, at 12, col. 5]. Then last winter it decided to abide by King Victor's decision". N.Y. Times, July 9, 1933, at 2, col. 7.

68. N.Y. Times, March 1, 1933, at 11, col. 5.

69. Reports of the visits by the Jeanne d'Arc include the observation that all the guano had been removed. Articles in the French journal L'Illustration include some excellent aerial photographs of the atoll. L'Illustration, Jan. 12, 1935, at 39; Feb. 4, 1935, at 190; March 2, 1935, at 262.

70. Sachet, supra note 9, at 7.

71. According to one author, the American presence on Clipperton in 1945 provoked France to send a French Navy

ship to display sovereign rights, despite assurances from the United States that it did not challenge French sovereignty. J. Gottman, The Significance of Territory 4 (1973).

72. Summaries of the results of these expeditions can be found in Niaussat, supra note 15, at 675; Sachet, supra note 9; and Sachet, supra note 21.

73. Many Mexicans opposed Victor Emmanuel's award, arguing that it had been influenced by Italy's desire for Mediterranean naval concessions from France. N.Y. Times, Nov. 15, 1932, at 17, col. 7; Current History, Jan. 1933, at 466; G. Ireland, supra note 53.

74. Although claims have been made in the name of (and some support exists for) the proposition that the international law of the sixteenth century recognized title by bare discovery, most writers maintain that even during that time the Roman view still prevailed that the act of discovery is only sufficient to give clear title when it is accompanied by actual possession. See J. Goebel, The Struggle for the Falkland Islands xii (1927); A. Keller, O. Lissitzyn & F. Mann, Creation of Rights of Sovereignty through Symbolic Acts 1400-1800 148 (1938); Von de Heydte, Discovery, Symbolic Annexation and Virtual Effectiveness in International Law, 29 Am. J. Int. L. 448 (1935).

75. Clipperton Arbitral Award, supra note 63, at 393. When Victor Emmanuel said that it would be necessary for Mexico, even admitting Spanish discovery, to establish that Spain had effectively exercised the right to acquire the island, he was in accord with the generally accepted position that at least some acts of symbolic annexation were necessary to confirm title based on discovery. M. Lindley, supra note 65. Although some scholars maintain that discovery and symbolic acts were sufficient to establish valid title (A. Keller, O. Lissitizyn & F. Mann, supra note 74), others hold that, until recent years, actual occupation was always also required to establish valid title (Von der Heydte, supra note 74).

76. In other words, Victor Emmanuel concluded that Spain did not acquire even an inchoate title because it did not perform any symbolic acts, nor did Mexico perfect that title (assuming the existence of an inchoate title) because it failed to manifest its sovereignty until after France had perfected its claim.

77. See note 26, supra.

78. The arbitrator rejected Mexico's contention that France did not give adequate notice of its claim to the other

powers, primarily because the only formal international law requirement of "notification" was found in Article 34 of the 1885 Act of Berlin, which applied only to territories on the coast of Africa and only between signatory powers. The Act of Berlin was designed to provide rules for occupying new territories on the coast of Africa. M. Lindley, supra note 65, at 292-302; G. Smedal, Acquisition of Sovereignty over Polar Areas 18-20 (1931).

Under customary international law, notification is not required. Judge Huber rejected a claim for the necessity of notification in the Palmas case: "Notification, like any other formal act, can only be the codification of legality as a consquence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply de plano to other regions." Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925, between the United States of America and the Netherlands relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (Miangas), April 4, 1928, reprinted in 22 Am. J. Int. L. 867,909 (1928); see also M. Lindley, supra note 65.

Although Victor Emmanuel dismissed the requirement of notification, he also said that the published claim in the Honolulu paper provided sufficient notification of the act. (Clipperton Arbitral Award, supra note 63, at 394.) An announcement in a Honolulu newspaper in 1858 probably did not reach the notice of most countries. The only consular agents (who were usually only business agents) in Honolulu that year represented Bremen, the United States, Peru, Chile, Sweden, Norway, Hanover, France, Lubeck, Hamburg, Great Britain, Prussia, and Oldenburg. Report of the Minister of Foreign Relations to the Legislature of the Kingdom of Hawaii, of 1858, Appendix No. 112.

79. According to Judge Huber, to manifest sovereignty is to exercise independently, to the exclusion of any other State, the functions of a state. Palmas Arbitral Award, supra note 78, at 875. In addition, it would include exercising responsibility in international law with respect to those other states which the claimant state would exclude. D. O'Connell, International Law 475 (1965).

Although the occupation theory of acquiring territory originally required settlement as the only method of meeting the requirement of effective occupation (1 J. Moore, International Law Digest 258 (1906)), the arbitral decisions of the past century "have established beyond all doubt that 'effective occupation' does not mean

physical settlement of the territory but effective display of state activity." Waldock, supra note 47, at 343.

80. Clipperton Arbitral Award, supra note 63, at 393-394.

81. Id. at 394

82. See Waldock, supra note 47.

83. "There is no reason to suppose that France has subsequently lost her right by dereliction, since she never had the animus of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected." (Clipperton Arbitral Award, supra note 63, at 394.)

84. Id.

85. Waldock, supra note 47, at 324-325. Professor Waldock was Chicele Professor of Public International Law at the University of Oxford.

86. Id.

87. Johnson, Consolidation as a Root of Title, [1955] Cambridge L.J. 215. Professor Johnson was a Reader in International Law, London School of Economics.

88. Id. at 225.

89. The theory of acquisitive prescription is not accepted by all the commentators on international law. Some believe that this municipal law theory has no place in international law, because no rules define the fixed period of time within which a prescriptive title could be established. Those who favor this doctrine see it as fulfilling the need to preserve international order and stability. For a full discussion of the theory, see Johnson, Acquisitive Prescription in International Law, 28 Brit. Y.B. Int. L. 332 (1951) and Y. Blum, Historic Titles in International Law 6-37 (1965). See generally, N. Hill, supra note 47, at 157-158; M. Lindley, supra note 65, at 178-180; I. Brownlie, supra note 47, at 156; Johnson, supra note 87, at 340-353; J. Brierly, The Law of Nations 168 (1963).

    It is often difficult to distinguish prescription from effective occupation, especially because the latter is a necessary element in establishing the former. This difficulty arose in the Island of Palmas Case. I. Brownlie, supra note 47, at 142.

90. See text at note 88, supra.

91. Palmas Arbitration Award, supra note 78, at 897.

92. A declaration of abandonment is not necessary. "In the absence of any definite statement of abandonment and any expression of an intention to reoccupy, or to occupy effectively, a reasonable time, depending on the circumstances, must be allowed to elapse before the territory can be regarded as abandoned or forfeited; but even when such an intention is expresssed, it amounts to nothing more than an element to be considered in determining what is a reasonable time". (M. Lindley, supra note 65, at 53.)

Abandonment should be seen as the negative element of the specific rule that sovereignty must be continuously maintained. Waldock interprets Judge Huber's pronouncement in the Palmas Case that effectiveness is required equally for the act of acquisition and for the maintenance of title to mean that an established title "may be lost not only by voluntary abandonment but by mere inactivity, that is, by failure to display state activity with a continuity appropriate to the circumstances." (Waldock, supra note 47, at 321.)

93. See text at notes 29-30, supra.

94. See text at notes 45-61, supra.

95. Of course, Mexico's neglect of the garrison from 1914 to 1917 and its subsequent inactivity might raise questions about the continued validity of Mexico's claim, at least against another active claimant.

96. See text at notes 98, 109, and 125-128, infra, and at page 365, infra.

97. A reproduction of the decision and a discussion of the "Affaire de l'Ile d'Aves" can be found in La Pradelle and Politis, Recueil des Arbitrages Internationaux 404 (1957).

98. Id. at 411, 413. The claim based on the theory of contiguity was not directly discussed in the Aves Island decision, but it was considered in the Palmas Island Case. See text at note 109, infra.

99. LaPradelle and Politis, supra note 97, at 410, 412.

100. Sentence du 30 Juin 1865, Spanish text in 4 R. Seijas, El derechio internacional hispano-americano 210 (1884); French translation in La Pradelle and Politis, supra note 97, at 412-415.

101. Id.

102. 1 G. Hackworth, Digest of International Law 468-470 (1940).

103. Von der Heydte, supra note 74, at 464.

104. Palmas Arbitration Award, supra note 78.

105. Id. at 879-894.

106. Id. at 894-907.

107. Id. at 910.

108. Id. at 867.

109. Id. at 893-894 (emphasis added.) "The title of contiguity as a basis of territorial sovereignty has no foundation in international law." Id. at 910. Huber concludes that there are no precedents "sufficiently frequent and sufficiently precised in their bearing" to support contiguity as a rule of international law. While holding that contiguity is inadmissable as a legal method of deciding questions, he allows that "(t)he principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one state rather than another, either by agreement between the parties, or by a decision not necessarily based on law." Id. at 893.

But see von der Heydte, supra note 74, at 467-471, for his discussion of contiguity as a logical extension of the concept of effectiveness of occupation, especially virtual effectiveness.

110. "The Netherlands found their claim to sovereignty essentially on a title of the peaceful and continuous display of state authority over the island (so-called prescription)." Palmas Arbitral Award, supra note 104, at 867.

111. I. Brownlie, supra note 47, at 142.

112. Ordinarily, only persons authorized by the sovereign are competent to perform the activities of a sovereign. In the Palmas Case, however, the acts of the Dutch East Asia Company were characterized by Huber as being of a colonial nature. Palmas Arbitral Award, supra note 104, at 897-898. See generally, D. O'Connell, supra note 79, at 480-483.

113. Palmas Arbitral Award, supra note 104, at 877.

114. Legal Status of Eastern Greenland (Denmark v. Norway), P.C.I.J., Ser. A/B, No. 53 (1933).

115. Id. at 26

116. Id. at 44-45.

117. Id. at 28 (emphasis added)

118. Judge Huber's analysis of intertemporal law is that the significance of facts in the past to the creation of rights of sovereignty should be read in the light of international law as it then existed, but that the present state of those rights must be analyzed in the light of present international law as it has evolved since the earlier time. Palmas Arbitral Award, supra note 104, at 883. See Y. Blum, supra note 89, at 195-208; Waldock, supra note 47, at 320-321; R. Jennings, The Acquisition of Territory in International Law 28-35 (1963).

In a discussion of the dispute over the South China Sea, C.H. Park restates the question in terms of fairness:

> "Fairness would seem to require that significance of the facts relating to each party's discovery and use of the disputed islands should be interpreted in the context of the time when they occurred rather than in the context of the modern law of nations." (Park, supra note 5, at 36.)

119. The territory must be effectively occupied within a reasonable time or else the title may be forfeited. See note 92, supra. "An inchoate title, unless carried farther, has the same vice as a sphere of interest; it seeks to exclude the sovereignty of others without providing any of the guarantees for the observance of international law which sovereignty entails." (Waldock, supra note 47, at 324.)

Although it has been stated that "a prior State act of formal annexation cannot after a long interval prevail against an actual and continuous display of sovereignty of another State" (Waldock, supra note 47, at 325), Brownlie maintains that a competitor State could only succeed, if at all, on the basis of prescription or acquiesence. (Brownlie, supra note 89, at 151.)

120. G. Martens, supra note 53, at 487.

121. J. Gottman, supra note 71, at 4. See also Van der Heydte, supra note 74, at 463.

122. Lauterpacht, Sovereignty Over Submarine Areas, 27 Brit. Y.B. Int. L. 377 (1950).

123. P.C.I.J., Series A/B, No. 53, at 45, 46.

124. Lauterpacht, supra note 122, at 417.

125. The presumption can be rebutted by better evidence of sovereign possession by a rival claimant. R. Jennings, supra note 118, at 75. For discussion of contiguity as "a technique in the application of the normal principles of effective occupation," see I. Brownlie, supra note 47, at 151-154; Von der Heydte, supra note 74, at 467-471; Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II, 29 Brit. Y.B. Int. L. 20, 72-75 (1952) (contiguity is inconsistent with the requirement of effective exercise of state functions); Waldock, supra note 47, at 342-346; supra note 65, at 228-231.

126. D. O'Connell, supra note 79, at 484: "When... it is said that contiguity is not a conception of international law, no more is meant than the obvious rule that a reasonable relationship must exist between the two areas of land before they can be legally assimilated."

127. See generally, Note, Eruptions in International Law: Emerging Volcanic Islands and the Law of Territorial Acquisition, 11 Cornell Int. L.J. 121, 131-135 (1978).

128. Munkman, Adjudication and Adjustment -- International Judicial Decision and the Settlement of Territorial and Boundary Disputes, 46 Brit. Y.B. Int. L. 1, 100 (1975).

129. See text at note 3, supra.

130. See text and notes at notes 32-61, supra.

131. See text at notes 73-128, supra.

PART VI

NON-RENEWABLE RESOURCES

PONENCIA DE ALEJANDRO SOBARZO:

Entraremos pues a hacer una breve presentación del tema intitulado: "Los aspectos legales de los recursos marinos no renovables", recursos que sin duda constituyen un tema de creciente atención en el mundo entero, tanto desde el punto de vista jurídico como, obviamente, desde el punto de vista económico. Pero, para ello, resulta prudente hacer algunas breves consideraciones por lo que respecta a los antecedentes que fueron definiendo los derechos de los Estados sobre su plataforma continental. Sin duda, estos antecedentes resultan importantes porque nos ilustran el proceso de creación en una de las más importantes instituciones que actualmente tiene el derecho del mar.

Antes de las declaraciones sobre plataforma continental, las reivindicaciones sobre los recursos minerales en el lecho del mar y en el subsuelo fuera del mar territorial, hechas por diversos Estados antes de 1945, resultan de extraordinaria importancia. Se detectan posturas ya de origen doctrinal, ya de origen estatal. Bastaría pensar en la declaración del gobierno imperial ruso del año de 1916, en la que dicho gobierno notificaba a los gobiernos de los países aliados y amigos, que incorporaban a sus dominios determinadas islas árticas, recién descubiertas, por ser la continuación septentrional de la plataforma continental de Siberia.

Convendría también recordar la doctrina del mar epicontinental del jurista argentino José León Suárez, expuesta en el año de 1918, donde hace referencia específica a lo que él llama "meseta, zócalo o escalón continental". Más aún, no se podría dejar de hacer referencia al Tratado anglo-venezolano del 26 de febrero de 1942, relativo al Golfo de Paria, en que ambos países dividen entre sí el lecho y el subsuelo fuera de las aguas territoriales. También cabría aquí recordar el importante decreto argentino de 1944, en que se declaraba al zócalo

continental como "una zona de reserva de minerales".

Sin duda, estos y otros casos que se pudieran citar, son valiosos precedentes; pero el hecho es que no fue sino hasta la declaración del Presidente Truman, del 28 de septiembre de 1945, lo que suscitó la cadena de proclamaciones de diversos Estados sobre la plataforma continental o sobre sus recursos minerales.

Es cierto que por esas fechas también se inició una serie de declaraciones unilaterales sobre los recursos vivos en zonas contiguas de alta mar, y que algunas de esas declaraciones hablaban conjuntamente de recursos vivos y de recursos minerales; pero ello se explica porque en la misma fecha el Presidente Truman expidió, como la mayoría de ustedes saben, una declaración sobre pesquerías en zonas de alta mar contiguas a las costas de Estados Unidos de Norteamérica, y ese ejemplo fue seguido con gran decisión por otros países.

Pero, volviendo a los recursos minerales, cabe destacar que mientras la medida adoptada por el gobierno de Estados Unidos de Norteamérica produjo un impacto decisivo, un impacto sumamente fuerte en el ambiente jurídico internacional, el acto unilateral del gobierno argentino que tuvo lugar apenas un año anterior, pasó prácticamente inadvertido.

La explicación estriba en aquellos antiguos valores del derecho internacional, que treinta años antes permitían ver en el acto unilateral de una potencia mundial todos los elementos promisorios de una naciente costumbre; pero si el mismo acto emanaba de un Estado menos conspicuo, se prefería guardar silencio.

El ejemplo norteamericano se vio fortalecido a medida que se lograban mayores avances en la técnica, por lo que pronto la doctrina de la plataforma continental se desarrolló con extraordinario vigor en la práctica legislativa de los Estados.

A nivel unilateral, cabe aquí señalar la X Conferencia Interamericana, celebrada en Caracas en el año de 1954, la Tercera Reunión del Consejo Interamericano de Jurisconsultos del año de 1956 y la Conferencia Interamericana de Santo Domingo, celebrada el mismo año, donde se aprobaron importantes resoluciones sobre la materia.

Todas estas tendencias sobre plataforma continental se vieron obviamente fortalecidas al aprobarse, en Ginebra, la Convención correspondiente en el año de 1958; si acaso este instrumento ha sido criticado, al haber aprobado y adoptado el criterio de explotabilidad en la definición de plataforma continental, por prestarse este criterio a las interpretaciones, ya que aún dejaba imprecisa la extensión de la plataforma continental, llevaba, sin embargo, fuera de toda duda, el derecho del Estado ribereño sobre los recursos minerales en esa zona submarina.

Algunos años después, cuando comenzó a tomar forma la tesis de la zona económica exclusiva, se fue consolidando el derecho del Estado costanero sobre los recursos tanto vivos como minerales, sobre el agua, el lecho y el subsuelo, hasta la distancia de 200 millas marinas. Pero esta institución de la zona económica marina se fue afianzando, al menos en lo que respecta a Latinoamérica, sin perjuicio de los derechos del Estado sobre la plataforma, y al respecto bastaría recordar la declaración de los Estados latinoamericanos sobre el derecho del mar, del año de 1970, y de manera muy especial, la declaración de Santo Domingo del año de 1972.

La nueva postura garantizaba, pues, a los Estados ribereños, salvo que la cercanía obviamente de otro Estado lo impidiera, derechos sobre los recursos minerales hasta una distancia de 200 millas, independientemente de la conformación del suelo marino cercano a sus costas.

Es decir, como ya señalábamos, hasta entonces el fundamento del Estado ribereño sobre las riquezas minerales en las zonas submarinas adyacentes a las costas, pero fuera del mar territorial, se había fundado en la plataforma continental o sea, en la prolongación natural del territorio, con desventaja, obviamente, hacia los Estados que carecían de plataforma geográfica, o en la debatida tesis, aprobada en Ginebra en 1958, de la explotabilidad de los recursos. Sin embargo, en la naciente institución de la zona económica exclusiva, se compensaba, en cierta forma, por las desigualdades geográficas de los Estados costaneros, y se precisaban los derechos de los Estados carentes de plataforma o con plataformas sumamente estrechas. Como caso típico se ve en los Estados del Pacífico Sur: Ecuador, Chile y Perú.

En los trabajos de la III Conferencia de las Naciones Unidas sobre Derecho del Mar, desde un principio se detectaría la fortaleza del nuevo espacio, en el ánimo de todos los delegados que a ella han concurrido. Ello se reflejaría nada menos que en el Texto Unico de Negociación, elaborado por cada uno de los participantes de las Tres Comisiones principales, a raíz de la reunión celebrada en Ginebra en el año de 1975, y además en los documentos resultantes de posteriores periodos de sesiones, que en lo regular siguen los lineamientos de quel Texto Unico celebrado en Ginebra. Pero, a su vez, resulta indiscutible la influencia que tiene este documento en la práctica de los Estados, independientemente de que llegue a formularse o no en una Convención de carácter general. Baste decir que en nuestra Ley Reglamentaria del párrafo octavo del artículo 27 constitucional, relativo a la zona económica exclusiva, se siguen de cerca los lineamientos previos trazados en ese Texto Unico, resultante del periodo de sesiones de Ginebra de 1975.

De acuerdo, pues, con el documento que podríamos llamar base, y de acuerdo con los siguientes en lo referente a la zona económica exclusiva, el Estado ribereño tiene derechos soberanos para

los fines de exploración, explotación, conservación y administración de los recursos naturales, tanto vivos como no vivos, del lecho y del subsuelo del mar, así como de las aguas suprayacentes. Sin embargo, por lo que toca a los derechos relativos al lecho del mar y al subsuelo, ellos se ejercerán de conformidad con las disposiciones establecidas para la plataforma continental.

Ya en los trabajos de la III Conferencia de las Naciones Unidas sobre el Derecho del Mar se aceptó una noción dual de plataforma continental, es decir, la propiamente geomorfológica que toma en cuenta la prolongación natural del territorio del Estado ribereño y que la hace llegar hasta el borde del margen continental, y la que fija la distancia en 200 millas marinas, cuando el borde exterior del margen no llegue a alcanzar la distancia susodicha. Es decir, en este último caso, la noción se separa totalmente del aspecto geográfico, y el límite exterior de la plataforma se fija donde termina la zona económica exclusiva. Con esto, a la vez que se da un mínimo a todos los Estados ribereños, gracias a la consolidación de la institución de la zona económica exclusiva, se reconocen derechos a aquellos Estados cuyo límite exterior de la plataforma se extiende a más de 200 millas, como lo sería Argentina, Australia, Unión Soviética, Estados Unidos, China, Irlanda, Gran Bretaña y Canadá.

Los derechos del Estado ribereño sobre los recursos de la plataforma son exclusivos, es decir, en el sentido de que si el Estado ribereño no explota sus recursos naturales, nadie podrá emprender esta actividad sin consentimiento de dicho Estado.

Decíamos que los recursos naturales de la plataforma están adquiriendo un creciente interés económico en el mundo; si bien es cierto que dentro de estos recursos de la plataforma se incluyen los organismos vivos pertenecientes a especies sedentarias, obviamente el interés funda-

mental estriba en los recursos naturales no vivos, entre los que se deben destacar por su importancia el petróleo, el gas y los nódulos polimetálicos, también conocidos con el nombre de manganeso.

La técnica de explotación de los dos primeros ha logrado avances sumamente destacados en los últimos años: de ocho millones y cuarto de barriles de crudo que se obtenían diariamente fuera de la costa, en el año de 1975, la cifra se elevó a once millones y medio en 1978, o sea, un poco más del 19% de la producción total.

En México, entre las regiones altamente prometedoras fuera de costa, debemos hacer mención especial del Golfo de Campeche, donde hasta el momento se ha certificado la existencia de diez mil cien millones de barriles de reservas profundas, es decir, una cifra similar a las reservas profundas que se tiene en Alaska. Baste agregar que, en Campeche, los cinco pozos que ahí se encuentran en operación están produciendo la cantidad de ochenta y dos mil barriles diarios, lo que significa un promedio por pozo de más de diez y seis mil barriles, un promedio espectacular en cualquier parte del mundo.

Tenemos, pues, en la Sonda de Campeche, una cantidad muy considerable de hidrocarburos, que irá haciendo sentir su influencia creciente en la producción nacional.

Por su parte, la producción mundial de gas fuera de costa tuvo aumentos verdaderamente espectaculares en el año de 1978, al elevarse de diez y ocho mil millones de pies cúbicos a veintiseis mil millones, o sea, un incremento de más del 42%.

Aquí cabe destacar el aumento espectacular que han logrado algunos países, entre ellos Noruega, que tuvo un aumento de más del 400%, y aquí en Latinoamérica debe destacar el aumento que tuvo Brazil, que fue del 163%. Estos dos recursos, el gas y el petroleo, constituyen, pues,

recursos sumamente valiosos de la plataforma continental, que año con año aumentan su importancia en el mercado internacional de hidrocarburos. Claro que los atractivos precios de estos influyen en que cada vez se explore más en sitios que antes se consideraban inaccesibles y se perforen más pozos. De ahí que en el año de 1978 se hubiesen perforado más de tres mil pozos costa fuera, o sea un 11% más de los que se perforaron en el año anterior.

Vayamos ahora al otro recurso importante de los recursos naturales de la plataforma continental; se trata de los nódulos polimetálicos, que es cierto se encuentran en aguas de mayor profundidad, y también es cierto que las mayores acumulaciones predominan en zonas fuera de la jurisdicción nacional, aunque no deja de haber concentraciones importantes dentro de las 200 millas.

Hasta la fecha, la zona de mayor concentración de nódulos, de mayor importancia, parece ser la del Pacífico Norte, entre las llamadas "facturas" o "fallas de Clarion y de Clipperton". Principalmente forma parte de esta región una zona ubicada dentro de las 200 millas de la Isla Clarión, es decir, una zona ubicada dentro de la plataforma continental mexicana.

Puede ser de extraordinaria importancia la localización de esta parte de la plataforma continental mexicana, pues ésta lleva a pensar en la conveniencia futura de que se establezca una planta de procesamiento de nódulos de manganeso en algún punto de nuestras costas del Pacífico. Al respecto, por ejemplo, podría pensarse en Las Truchas, que es un punto donde ya existe buena parte de la infraestructura necesaria. Fs más, la cercanía de nuestro país a la zona internacional, abundante en nódulos, puede llevar a pensar en la conveniencia de que, partiendo de la circunstancia de que sería una ruta más corta que yendo a cualquier otro país para su procesamiento, puede pensarse en la posibilidad de que aquí en México se establezca una planta que procese los nódulos

provenientes del patrimonio común de la humanidad.

No sería eso algo, pues, que se pudiera descartar a priori, sino que, por el contrario, todo indica que nuestro país es geográficamente el más indicado para ello. Aunque no deja de influir la circunstancia de que, en la Conferencia del Mar, aún no se ha llegado a un acuerdo sobre el régimen de explotación de las riquezas minerales en los puntos oceánicos fuera de la jurisdicción nacional, para que se vean estimuladas las actividades en turno a los nódulos polimetálicos. Lo cierto es que, hasta el momento, no se han podido comprobar los cálculos extraordinarios que desde el punto de vista económico han señalado algunos autores como Mero. En todo caso, nos encontramos actualmente en la etapa de historia, y ello ya de por sí ha amparado la erogación de considerables recursos económicos. Sin embargo, como bien se ha dicho, no debería extrañar que los fondos marinos logren atraer importantes flujos de capital a fines del presente siglo, o a principios del próximo siglo, una vez superados los problemas tecnológicos y los problemas jurídicos, y en la medida de que se vayan agotando tales minerales en tierra, que hoy en día parecen mucho más rentables.

Por lo que respecta, y haciendo otra referencia a México, a la zona exclusiva de México, además de la zona de Clarión ya mencionada, algunos estudios de tipo nacional ubican importantes localizaciones de nódulos tanto en el Golfo de California como en la zona del Pacífico, y esto de manera especial en la zona del Pacífico que se encuentra frente a la Península de Baja California. De hecho, tenemos que reconocer que en nuestro país se ha puesto bastante poca atención a nódulos polimetálicos que se encuentran en la plataforma continental. Ello se explica por una sencilla razón, es decir, puesto que falta mucha exploración por hacerse en tierra, resultan los costos mucho más económicos, resulta que los recursos y los esfuerzos se concentran en esta parte de nuestro territorio nacional; sin embargo,

podríamos decir que en términos generales, se puede hablar de optimismo respecto de los nódulos que se encuentran en la plataforma mexicana.

Pues bien, los derechos soberanos sobre todas estas riquezas minerales que se encuentran en la plataforma continental, generalmente se extienden hasta una distancia de 200 millas, en virtud de lo señalado en la definición misma de plataforma continental aceptada en los diversos Textos aprobados en la Conferencia del Mar. Sin embargo, cuando la prolongación natural del territorio del Estado, hasta el borde exterior del margen continental, sobrepasa la extensión de 200 millas, como ya lo señalábamos sucede en algunos países, se nos plantea el problema del límite externo y, en su caso, de los derechos y obligaciones que corresponderán al Estado ribereño.

Existe una corriente que pretende limitar todo derecho del Estado ribereño hasta una distancia de 200 millas, independientemente de las características geográficas de la zona submarina. Otra corriente propone que en ningún caso el borde del margen continental pueda extenderse a más de 100 millas del límite exterior de las 200 millas, lo que nos daría un límite máximo de 300 millas medidas desde la costa.

Los argumentos hechos valer en contra de esta postura, y de las demás posturas que se han venido reflejando en el seno de la III Conferencia del Mar, se incluyen en recientes estudios y no dejan de suscitar interés; sin embargo, pensamos nosotros, como una opinión totalmente personal, que no se puede privar a los Estados de lo que constituye una prolongación natural de los territorios. Pero, también reconocemos que resulta de elemental justicia que, ante esta situación de privilegio de que gozan esos contados Estados, se hagan determinados pagos a la comunidad nacional.

Como es bien sabido, esto se contempla en los Textos resultantes de la III Conferencia

del Mar, donde se establece que dichos pagos se harán por conducto de la Autoridad Internacional de los Fondos Marinos, la cual los distribuirá entre los Estados partes en la Convención, sobre la base de criterios equitativos, teniendo en cuenta los intereses y necesidades de los países en desarrollo, particularmente de los Estados menos adelantados y con una consideración especial a los países sin litoral.

Pensamos que este pago no obliga tanto como se ha dicho, porque entraña una disminución de la zona internacional, que al fin y al cabo es una disminución que no depende propiamente de la voluntad del Estado ribereño, sino de factores geográficos que, por un mero azar, le han correspondido y que legítimamente debe aprovechas, sino que la situación de privilegio debe obligar a contribuir en éste y en otros casos que se podrán citar, a la búsqueda de justicia social internacional.

Entrando a otra materia, sólo señalaremos que la cuestión de la delimitación de plataformas contiguas o adyacentes, ya fue materia de otra sesión y fue desarrollada en interesante ponencia elaborada por el señor Robert Hodgson, a quien deseamos un rápido restablecimiento, por lo cual no haremos al respecto ninguna consideración.

Partiendo pues de la hipótesis de que existe algún acuerdo entre los Estados con plataformas limítrofes, la explotación de los nódulos de manganeso y de otros minerales sólidos, no ofrece absolutamente ningún problema al limitar alguna de sus actividades de exploración y de explotación en la zona donde ejerce derechos soberanos sobre los recursos. Basta, pues, con que sus actividades se lleven a cabo dentro de la zona señalada como su plataforma de acuerdo con la delimitación, para que la explotación de tales recursos, en general, no suscite problema de ninguna índole. Sin embargo, no sucede lo mismo cuando se trata de minerales líquidos o gaseosos que se extienden a ambos lados de la frontera terrestre

o de la línea divisoria de las plataformas continentales.

Por salir del ámbito del presente comentario, sólo nos limitaremos a señalar con brevedad, que el problema también se presenta en tierra con motivo de la explotación de las aguas subterráneas en uno y en otro lado de la frontera. Por ejemplo, en el Acta 242 que solucionó el problema de la salinidad de las aguas del Río Colorado, entre México y los Estados Unidos de Norteamérica, en el año de 1973, se hizo referencia a una futura Convención de alcance general sobre aguas subterráneas en las zonas fronterizas. Mientras ello sucede, cada uno de los países se obliga a limitar el bombeo de las aguas subterráneas en determinadas zonas de la frontera. Sin embargo, hasta el momento no se ha celebrado el Tratado de referencia, y en caso de que esta situación se prolongue por largo tiempo, no resulta difícil prever problemas entre ambos países, a medida que van creciendo las actividades agrícolas en las zonas fronterizas y, además, que van creciendo los asentamientos humanos en cada uno de los dos lados.

Pero, volviendo a nuestra materia, tratándose de minerales líquidos o gaseosos, se pueden presentar situaciones conflictivas entre dos países limítrofes o entre dos países con plataformas contiguas, ya que tales yacimientos se pueden explotar ya sea en todo o en parte del otro lado de la frontera o desde la otra plataforma continental. Este problema ya fue contemplado hace algunos años, hace unos diez años, por la Corte Internacional de Justicia, en el fallo sobre la Plataforma Continental del Mar del Norte. Ahí se reconoció, pues, que es frecuente que un yacimiento se extienda a ambos lados de la frontera de la línea divisoria de la plataforma continental, y puesto que es posible explotar esa riqueza de uno o de otro lado de dicha zona, surge el riesgo de una explotación perjudicial o de una explotación que entrañe desperdicios de los hidrocarburos; es decir, que es bien sabido que una explotación irracional, tratándose de hidro-

carburos, puede afectar la presión de los yacimientos según señalan los técnicos y, en tal caso, el rendimiento será mucho menor de lo que se pudiese lograr en circunstancias favorables de explotación. Entonces, una explotación desmedida de un pozo, llevaría, pues, a lamentables desperdicios.

Esta circunstancia ha llevado, en los últimos años, a diversos países a concertar un buen número de acuerdos, por lo que respecta a yacimientos límitrofes de hidrocarburos. Se han distinguido, al respecto, varios tipos de acuerdos; sin embargo, sólo conviene hacer referencia a los que constituyen tipos más característicos de los mismos. Por ejemplo, hay un tipo de acuerdo llamado "de cooperación geológica", destinado a que cada uno de los Estados explote una parte de la producción en proporción a la cantidad de reservas cuantificadas en su territorio en el momento de haberse concertado el acuerdo; como ejemplo de este tipo se cita un acuerdo suscrito entre Checoslovaquia y Austria.

Hay un segundo tipo de acuerdo, que estimula las operaciones conjuntas por ambas partes y en los que se distribuyen entre ellos una proporción igual del petróleo y el gas extraído. Como ejemplo de este tipo de acuerdo se cita uno concertado entre Holanda y la República Federal de Alemania.

También hay un tercer tipo de acuerdo que contempla una sola explotación de los recursos, es decir, una explotación unitaria y una distribución igual del recurso obtenido, lo que, obviamente, evita los gastos que significaría la duplicación de instalaciones en cada uno de los Estados limítrofes. Como ejemplo de este último acuerdo se cita uno celebrado entre Japón y Corea del Sur.

En México, desde hace muchos años, se ha llevado a cabo intercambios de información en la frontera norte, específicamente en la zona de Reynosa, lo que ha redundado en beneficio de

las actividades realizadas por los dos países, México y Estados Unidos de Norteamérica, en la prospección y en la explotación de los recursos petroleros.

Por lo que respecta a la frontera con Guatemala, y teniendo en cuenta los descubrimientos extraordinarios hechos por Petróleos Mexicanos en la zona sur, actualmente se encuentran en estudio las bases de un posible acuerdo entre ambas partes.

Dado el extraordinario número de acuerdos que se contemplan en el ámbito internacional, tomando en cuenta también la buena fe que debe haber en las relaciones entre los Estados, tomando en consideración el deber de cooperación que tienen todos los Estados y, además, la necesidad de evitar desperdicios de los recursos no renovables, pensamos que cuando se lleguen a detectar yacimientos comunes importantes, yacimientos comunes que lo ameriten, los Estados tienen la obligación, en derecho internacional, de llegar a acuerdos que permitan la utilización óptima de esos recursos minerales.

Sólo nos cabe agregar que esto, por otra parte, iría finalmente de acuerdo con el espíritu del Plan Mundial de Energía que acaba de proponer el Presidente de México ante las Naciones Unidas.

COMENTARIO DE RICARDO MENDEZ SILVA:

La ponencia que nos ofrece el maestro Sobarzo es rica y podría muy bien ser objeto de comentarios en distintas de sus reflexiones fundamentales. Me concretaré, por limitaciones obvias de tiempo, en mi calidad de comentarista, a abundar en algunos puntos de interés.

El derecho del mar ha sido siempre escenario de controversias; de polémicas de gran duración histórica, muchas de ellas inacabadas todavía, de conflictos de confrontaciones entre países poderosos industriales y países de menor desarrollo relativo.

Dentro de la III Conferencia de las Naciones Unidas sobre Derecho del Mar, se aprecian, aunque sea a nivel institucional, estos antagonismos y estas contraposiciones.

Los Textos Unicos de Negociación que se han ido elaborando y que han ido surgiendo de las ya largas sesiones de trabajo, en la mayoría de los casos plantean soluciones; pero tales soluciones dan lugar, todavía, a interpretaciones subjetivas con unas fórmulas de compromiso que, sin lugar a dudas, en el momento de la aplicación práctica, cuando se logre la aprobación en paquete de este nuevo derecho del mar, dará lugar a controversias. No obstante, respecto a las fórmulas generales de arreglo o de componenda que se han convenido en el seno de la III Conferencia de las Naciones Unidas sobre el Derecho del Mar, el surgimiento de nuevas figuras, en sí, provoca criterios antagónicos y viene a afectar a otras figuras ya tradicionalmente aceptadas. Las nuevas fórmulas de arreglo, los nuevos entendimientos jurídicos, no rebasan muchas veces el plano de un compromiso accidental; así, por ejemplo, cuando surge la figura de la plataforma continental, es obvio que la reclamación de los Estados se concentre al zócalo submarino, al suelo y subsuelo del mar, que son la prolongación natural del territorio, sin que existan reclamaciones sobre las aguas suprayacentes.

Convendría tener presente que, en la noción del mar epicontinental, que en los años 40 reclama jurídicamente Argentina, existe una reclamación de derecho soberano sobre las aguas suprayacentes de la zona submarina.

Si bien, repito, de manera general no se afecta el régimen de las aguas suprayacentes, es obvio que la explotación de los recursos submarinos, de los recursos no renovables, la construcción de plataformas artificiales, habrá de dar lugar a una interrumpción en áreas específicas a la navegación internacional. De esta suerte, el principio tradicional de la libertad de navegación, prevaleciente en el alta mar a pesar de no verse afectado teóricamente, de cuerdo con las definiciones técnicas, por las reclamaciones de la plataforma continental, de hecho sí viene a significar una afectación a las nociones jurídicas de las figuras tradicionales, como es el alta mar. Esta misma circunstancia se viene a apoyar en la definición jurídica de la zona económica exclusiva, dentro de la III CONFEMAR; es obviamente una de las figuras que ha logrado un consenso mayor, y que puede señalarse en un consenso casi total. Uno de los elementos sobre los principios, objeto de reclamación, ha sido principalmente el del derecho del Estado a señalar limitaciones a la navegación dentro de las aguas de su zona económica exclusiva, principalmente para poder realizar las explotaciones y las exploraciones de petróleo, a través de este tipo de plataformas artificiales.

Los criterios a que se ha llegado contemplan algunas salvedades subjetivas, en cuanto a que la precisión de estas zonas de salvaguarda adyacentes a las plataformas artificiales, habrán de ser determinadas por el Estado de acuerdo con necesidades estrictas.

Como en numerosos campos del nuevo derecho del mar que está surgiendo de esta Conferencia

de Naciones Unidas, apreciamos que habrá de ser, como ha sido hasta ahora el derecho del mar, fuente todavía inagotable de conflictos en las delimitaciones específicas o en las precisiones particulares que se vayan señalando.

En otro orden de ideas, quisiera apuntar que, al entrar en vigor las reformas constitucionales al artículo 27 constitucional, en lo relativo a la zona económica exclusiva, en el año de 1976, México obtuvo un nuevo espacio marítimo adyacente por dos millones de kilómetros cuadrados, lo que viene a implicar que, en cuanto al suelo y subsuelo marítimo, cuenta también con un espacio adyacente de dos millones de kilómetros cuadrados; aproximadamente, únicamente trescientos ochenta y ocho mil kilómetros cuadrados corresponden a la plataforma continental y el resto a completar los dos millones de kilómetros cuadrados, vienen a ser realmente suelo submarino, o sea, extensión submarina fuera de lo que es propiamente el zócalo submarino. Esta diferenciación nos puede ayudar a comprender la disponibilidad de recursos, toda vez que el petróleo se encuentra fundamentalmente en el zócalo submarino, en la plataforma continental, como en el caso de los yacimientos hasta ahora explotados en el Golfo de México.

Posiblemente, únicamente en la llamada Fosa Sigsby, que se encuentra en el centro del Golfo de México, a la altura de Callo Arenas, se encuentra fuera de la plataforma continental; sin embargo, este yacimiento se encuentra aproximadamente a cuatro mil metros de profundidad, por lo que las posibilidades de explotación al momento presente son en extremo limitadas.

Las explotaciones se están concentrando en el Golfo de México, en donde, de acuerdo con una estimación de 1975, se estaba produciendo el 5% de la producción petrolera nacional.

Convendría aclarar que, en la medida en que se iba extendiendo la explotación terrestre, ese 5% de 1975 ha descendido al momento presente a menos del 1% de la producción nacional; el grueso de la producción petrolera proviene, al momento, de las fuentes terrestres, de los yacimientos terrestres, algunos de los cuales, como es el caso de la Faja de Oro, son continuación hacia el espacio oceánico inmediato.

Respecto a los nódulos polimetálicos, existe, como ya señalaba el maestro Sobrazo, un gran desconocimiento respecto a la cuantía, a la disponibilidad efectiva a favor de México; esto porque en general, como seguramente se ha planteado en otras de las mesas redondas, el no ser México, a pesar de tener litorales por diez mil kilómetros aproximados de costas, un país esencialmente marítimo, implica un gran desconocimiento sobre las disponibilidades reales, no únicamente en cuestiones tan sofisticadas como pueden ser los nódulos polimetálicos, sino inclusive de especies vivas que pueden ser explotadas por parte de México. Sin embargo, como bien ha señalado el doctor Sobarzo, en algunas zonas, que es la de Clarión, y recientemente según se sabe en el Golfo de California, existen depósitos importantes. Se puede tener alguna implicancia de interés para México, en virtud de que en 1974 una empresa norteamericana, la llamada Deepsea Ventures, solicitó a los Estados Unidos una concesión para exploración y explotación, y protección diplomática de recursos contenidos dentro de la zona económica exclusiva de México. Por supuesto, de acuerdo con la ley mexicana sobre las doscientas millas, la soberanía de esa zona corresponde a México. Los lineamientos generales y la tendencia general de la III Conferencia de las Naciones Unidas sobre el Derecho del Mar, avalan la posición de México; pero toda vez que se espera una aprobación en paquete, esto se encuentra pendiente y en algún momento podría ser objeto de conflicto entre México y los Estados Unidos.

Una de las razones por las cuales existe un desconocimiento y una falta, inclusive, de interés respecto a estos recursos, es la carencia de una tecnología y de recursos financieros sumamente elevados para proceder a labores de exploración de estos materiales, y el hecho de que aún para las empresas que desconocen los recursos y pueden emprender la aventura tecnológica de explorar los nódulos polimetálicos en algunos metales, por ejemplo, como es el caso del zinc, la minería submarina será un hecho únicamente a partir del año 2000.

Uno de los aspectos que resulta de interés considerar, es que existe un enlace indisoluble entre los distintos tipos de recursos existentes en nuestros mares adyacentes, y no sólo recursos no renovables, sino también los recursos mineros, los recursos energéticos, de otras especies vivas, y que emergiendo México como una potencia petrolera, y concentrando gran parte de su experiencia de desarrollo en función del petróleo, una de sus preocupaciones básicas será la de no perjudicar los otros elementos y recursos del mar con los recursos no renovables. Obviamente, tengo en mente el problema del desafortunado derrame del pozo Ixtoc I; en este sentido, es obvio que habrá de evolucionar la normatividad internacional, para comprender soluciones para varios países y lograr la cooperación en los esfuerzos. Tengo aquí una relación de los desastres más importantes en esta materia en los últimos años, entre los cuales se encuentra el muy conocido en la Bahía de Santa Bárbara en California, que concurrió en el año de 1969, cuando un pozo de la Union Oil derramó de 18,500 á 780,000 barriles; el caso del Golfo de México, en 1970, cuando un pozo de la Shell Oil arrojó entre 53,000 y 133,000 barriles; el del Golfo Pérsico, en 1971, cuando se derramaron 200,000 barriles; el de la Ensenada Cook, en Alaska, en 1962, y en 1963, cuando el pozo de Amoco estuvo arrojando petróleo al mar durante catorce meses.

El doctor Sobarzo daba el dato de que, en el año de 1968, se perforaron 3,069 pozos, y de acuerdo con una estimación del promedio histórico, entre el año de 1953 y 1977 se estima que por cada 500 pozos que se perforaron, uno constituye un desastre grave en cuanto a derrame; así que, si tenemos una estimación muy conservadora de una construcción de mil pozos anuales, estaríamos de acuerdo con el promedio histórico que afortunadamente no es un fatalismo invencible. Pero dentro de un marco de riesgo bastante elevado, detener por lo menos dos derrames de gravedad, comparable a los que se han señalado, implicará que la comunidad internacional deberá contemplar la posibilidad de arreglos para que, dentro del estricto respeto a la soberanía de los Estados y dentro de un sistema de consulta entre las partes interesadas, se unan esfuerzos a fin de prevenir los accidentes, o bien de tratar de encontrar fórmulas que aminoren o contrarresten un desastre de esta naturaleza. Esto se encontraría profundamente ubicado dentro de los razonamientos y planteamientos que el doctor Sobarzo nos presenta al fin de su ponencia, cuando señala que sobre el tipo de acuerdos regionales para la explotación del petróleo, con el aprovechamiento equitativo de los recursos energéticos, surja un panorama y perspectivas amplias a la cooperación internacional.

COMENTARIO DE FERNANDO LABASTIDA:

El doctor Alejandro Sobarzo ha presentado, de una manera muy completa, el régimen aplicable a los recursos mineros de la plataforma continental. Yo trataré de añadir una dimensión más a ese régimen aplicable, a la luz de una noción que dice que no hay derechos sin obligaciones correspondientes.

El nos ha explicado cuáles son los derechos del E tado costero con respecto a los recursos mineros en la plataforma.

Me gustaría ahora atraer su atención a cuáles son las obligaciones del Estado costero, que se han formulado en el marco de la Conferencia del Mar, y que se encuentran explícitamente mencionadas en el Texto Integrado Oficioso para Fines de Negociación.

Esta contrapartida de obligaciones no nace solamente de la lógica jurídica. Nace de una urgencia muy real, de una preocupación ante la integridad del medio marino, de una preocupación porque este medio marino quede libre, en tanto sea jurídica y humanamente posible, de la contaminación.

El Texto inicia su Parte XII, de una manera contundente. En su artículo 192 asienta el principio de que los Estados tienen la obligación de proteger y preservar el medio marino. Yo recuerdo, en los primeros días del Comité de los Fondos Marinos, varios años antes de que la Conferencia comenzara en Caracas, cómo este principio y su formulación suscitó enormes sospechas y dio muchos "dolores de cabeza" para su redacción.

En efecto, un gran número de Estados consideraban que una obligación amplia, para proteger el medio marino, podría considerarse como una cortapiza para su derecho muy legítimo y también muy urgente de desarrollar su economía, de explotar sus recursos naturales.

Como ha demostrado la última década que ha visto nacer, a raíz de la Conferencia de Estocolmo sobre el Medio Ambiente, una organización de las Naciones Unidas para proteger el medio ambiente humano, entre ellos el medio marino, este aparente conflicto o antinomía se ha resuelto de una manera armónica. No hay en realidad una contraposición entre el derecho a explotar los recursos naturales y la obligación de proteger el medio marino o el medio en general. Este equilibrio también lo expresa de una manera clara y profesa el artículo 193, porque consigna que los Estados tienen el derecho soberano de explotar sus recursos naturales, y hacerlo así con arreglo a su política en materia de medio ambiente, y subrayo su política, la política nacional por la que deberán hacerlo de conformidad con su obligación de proteger y preservar el medio marino. Estas obligaciones generales necesitan, desde luego, consignarse en detalles más precisos. Es necesario que se diga qué es lo que deben hacer los Estados en concreto para ejercer sus derechos, explotar sus recursos y cumplir con sus obligaciones de proteger el medio marino.

Entre las normas que constituyen el marco general, contamos con los artículos 194, en particular sus párrafos uno, dos y tres, inciso c; los artículos 198 y 199, y con referencia explícita a la plataforma continental o a las actividades en los fondos marinos, contamos con los artículos 208 y 214. Finalmente, se completa este panorama de normas jurídicas con las normas incluidas en la sección 9, relativas a "obligaciones y responsabilidades", n el artículo 235, en sus párrafos 1, 2 y 3.

Conviene, también, que no se excluya, para completar este panorama aplicable, al artículo 237, que indica cuál es la relación entre el Convenio que se está formulando en la Conferencia del Mar y otros convenios sobre materias conexas, ya sea convenios existentes o convenios que se van a celebrar o acordar en el futuro.

¿Qué tan detalladas o qué tan precisas son las normas que se han formulado en el seno de la Conferencia? Con respecto al marco general para proteger, para prevenir y reducir y controlar la contaminación del medio ambiente, nos encontramos con que estas normas son normas que yo llamaría "normas de carácter formal", normas que en sí mismas no nos dan los detalles, la solución, sino que nos indican a dónde debemos ir para encontrar la solución. Esto es porque estas normas indican que debemos ir tanto a la legislación nacional de los Estados ribereños como a las normas internacionales existentes para allí, en esos dos tipos de no mas, encontrar la respuesta acerca de lo que deben hacer el Estados, de los pasos concretos que se deben tomar para proteger el medio marino. Veamos que en el artículo 194 se habla de que los Estados adoptarían todas las medidas necesarias, desde luego compatibles con la Convención. Se añade que estas medidas necesarias garantizarán que las actividades bajo la jurisdicción o control del Estado ribereño, no causen perjuicios por contaminación a otros Estados ni a su medio ambiente, y que la contaminación causada por incidentes o actividades bajo su jurisdicción o control no se extienda más allá de la zona donde los Estados ejercen derechos de soberanía.

Cabría observar que la protección jurídica del medio marino se hace en esta norma, y en las subsecuentes, en atención a dos tipos de intereses que han merecido, en opinión del legislador, la protección jurídica. Uno es el interés de terceros Estados, individualmente considerados, y otro es el interés de la comunidad internacional en general, que se define en el interés porque haya un medio ambiente protegido, libre de contaminación. Estos dos van a dar o van a suscitar distintos tipos de problemas, porque los intereses de terceros

Estados individualmente considerados, pueden en última instancia definirse en relación al concepto de daño, y una vez definido el concepto de daño, pueden tal vez ser objeto de una compensación que repare al menos monetariamente el daño. Pero el interés de la comunidad internacional en el medio ambiente marino, en general, presenta dificultades mucho mayores, para las que va a pasar mucho tiempo antes de resolverse. Esto es porque, como no hay un sujeto jurídico que pueda reclamar un daño, no tendremos posibilidad de exigir medidas concretas de reparación, cuando la contaminación no ha causado un daño económico que pueda ser exigible por una persona individual identificable, o sea, que hay una laguna o un vacío jurídico en la titularidad de la comunidad internacional respecto al medio ambiente marino en general, o sea el medio ambiente marino más allá de toda jurisdicción nacional.

Una de las fuentes de obligaciones y derechos para proteger el medio marino es la legislación nacional. En efecto, el artículo 208 dice que los Estados ribereños dictarán sus propias leyes y sus propios reglamentos para prevenir, reducir y controlar la contaminación del medio marino resultante directa o indirectamente de las actividades en los fondos marinos realizadas bajo su jurisdicción, etcétera.

Debemos preguntarnos si, al adoptar sus propias leyes, el Estado es libre de adoptar los criterios y los niveles de contaminación que sean convenientes a la luz de su propio interés. Este fue un punto muy controvertido en la redacción de estos artículos, ya en el seno de la Conferencia. Había dos escuelas de opinión: la que decía que el nivel debería ser un nivel nacional, que cada Estado tenía la facultad de adoptar las medidas que juzgara apropiadas; pero hubo otra escuela, que decía que la contaminación o el nivel de contaminación, debería fijarse mediante normas y reglamentos de carácter internacional.

La solución a este conflicto aparece en el artículo 208, párrafo 3, porque al referirse a las leyes nacionales, el Texto dice que tales leyes, reglamentos y medidas no serán menos eficaces (y estas palabras fueron muy cuidadosamente escogidas entre muchas otras fórmulas alternativas que se consideraron) que las reglas, normas y prácticas y procedimientos recomendados de carácter internacional. Luego entonces, el legislador nacional, para cumplir su obligación de dictar sus propias leyes y reglamentos, tiene que ver si no van a ser menos eficaces que las leyes y reglamentos y medidas internacionales. Aquí es donde surge el conflicto más grave. El legislador nacional se va a encontrar con que hay un vacío jurídico internacional que no va a tener esa medida internacional de eficacia, con la cual va a comparar los efectos o eficacias de sus propias leyes; entonces, el vacío jurídico internacional se tendrá que llenar mediante la cooperación internacional, ya sea a nivel grupal o a nivel regional; pero fundamentalmente a nivel grupal, porque se considera que el medio marino es una unidad ecológica.

Nadie puede predecir, excepto los geólogos, y todavía no muy exactamente, a dónde van a terminar en última instancia los efectos nocivos de la contaminación que ocurra en un determinado lugar. Bien puede ser que los efectos nocivos de la contaminación en este lugar vayan a terminar en los mares más distantes, al otro lado del globo terráqueo.

Por eso, la primordial importancia que el Texto otorga a la cooperación internacional a nivel global, ya el párrafo 5 del artículo 208, establece esta obligación cuando dice que los Estados, actuando en particular o por conducto de las organizaciones internacionales competentes, o en una conferencia diplomática, establecerán reglas, normas y prácticas

y procedimientos recomendados de alcance mundial y regional para prevenir, reducir y controlar la contaminación del medio marino. A mayor abundamiento, el artículo dice que tales reglas, normas y prácticas y procedimientos recomendados serán objeto de un examen periódico, serán reexaminados siempre que sea necesario, desde luego para mantenerlos al día a la luz de los avances de la tecnología, para prevenir la contaminación. Estas normas, estas obligaciones de cooperación internacional, de obligación de legislar domésticamente, creo que tendrán que ser objeto de un escrutinio muy serio y detallado, yo diría a partir de ahora; pero, desde luego, una vez que se considere como concluído el nuevo Convenio sobre el Derecho del Mar, es ya urgente y será desde luego inaplazable, que los Estados cooperen en esas organizaciones internacionales competentes, para que de una manera similar a lo que se ha hecho con respecto a la contaminación proveniente de buques, se establezca un marco de normas jurídicas prácticas eficientes, que permitan a los Estados cumplir sus obligaciones de proteger el medio marino con relación a los riesgos y daños que surjan de actividades en su zona jurisdiccional.

Yo creo que sería oportuno, entonces, brevemente, recomendar el examen de los eruditos, de los estudiosos del derecho del mar, tal vez sopesar posibles enseñanzas de una analogía que nos pueden proporcionar el régimen jurídico, que se ha elaborado dentro del marco de la OCMI, ésto no tanto para prevenir la contaminación proveniente de barcos, puesto que la tecnología y las normas que se requieren para prevenir la contaminación proveniente de pozos petroleros son muy distintas que las que los barcos necesitan; pero sí en lo que corresponde a la consecuencia del daño, o sea, a la posible obligación de compensar para la posible responsabilidad civil.

Quiero, de una manera muy precisa, dejar claro que me refiero sólo a la responsabilidad

civil; la responsabilidad de los Estados es sumamente delicada. En ella surge el concepto y la realidad de la soberanía; hablar de la obligación de los Estados a compensar, sobre todo en ausencia de normas jurídicas ya establecidas y acordadas, es sumamente riesgoso. La soberanía toca a los nervios más delicados y sensitivos de la identidad y de la esencia de los derechos de los Estados.

Pero podemos darle la vuelta a estos problemas espinosos. Considerando que las actividades de explotación, en última instancia, las van a desarrollar entidades que no son el Estado mismo en sí; sumo que serán personas individuales, personas jurídicas, serán entidades gubernamentales creadas para ese propósito y, entonces, las podemos tratar como sujetos de responsabilidad del derecho civil. Y así podemos entonces asomarnos ante la posibilidad de que, para que estas personas puedan responder por sus obligaciones de no causar daños, de proteger, podríamos hacerlas objeto o sujeto de de un régimen de seguros, de un régimen de compensación, parecido al que existe a este respecto al daño causado por accidentes de barcos por petróleo.

Me gustaría entonces simplemente presentar para vuestra consideración, y como una sugestión para el futuro, que éste sea un tema individual, explícito y separado en una próxima sesión del Instituto. ¿Cuáles serán, en rasgos generales, los elementos de un esquema de responsabilidad civil y de garantías y seguros por daños, causados por la explotación de los recursos en los fondos marinos?

El Convenio aplicable más cercano a este problema, es el Convenio de la Responsabilidad Civil por Daños por Conteminación de Petróleo, que se concluyó en Bruselas en 1969, bajo los auspicios o patrocinios de la OCMI. Este Convenio internacional de responsabilidad civil, presenta características muy interesantes, yo diría tentadoras, para estilizarse analógicamente a la otra situación. Como dije, los sujetos de

la responsabilidad son personas individuales o colectivas, públicas o privadas.

Veamos ahora qué tipo de responsabilidad se le exige a un Estado. Como ustedes recordarán o sabrán, tenemos responsabilidad cuando existe una actividad intencional o dolosa, o sea, cuando el individuo que causa el daño sabe cuáles van a ser las consecuencias de sus actos, y busca ese resultado intencionalmente.

Tenemos también responsabilidad cuando una persona es negligente, tiene una obligación de preveer lo que va a ocurrir y no es cuidadoso, lo suficientemente para prevenir el resultado dañoso.

Existe otro tipo de responsabilidad que se llama absoluta, porque la persona es responsable independientemente de que se vayan a preveer o no los resultados dañosos de su conducta.

La solución que los convenios de la OCMI han adoptado es una solución que se inclina un poco hacia la responsabilidad absoluta; pero la equilibra con ciertas excepciones, o sea que el sujeto no es responsable si el daño surge a causa de una guerra o de un hecho natural.

Lo más interesante, y que constituye un incentivo para otros arreglos en otros campos de explotación, es que el Convenio permite que la persona que puede ser responsable por daños, puede limitar su responsabilidad en términos monetarios, fijar un límite, en contrapartida a su facultad, en contrapartida a esta facultad o ventaja que se le otorgue. El sujeto de responsabilidad deposita una cantidad determinada, que se negociaría como una cantidad adecuada, en una jurisdicción ante el tribunal o una autoridad competente de un Estado determinado. Entonces, al constituir este fondo de garantía, se constituye al mismo tiempo la jurisdicción; se le otorga jurisdicción a ese país y a ese tribunal, para resolver las cuestiones que pueden surgir por reclamaciones y

por daños. Entonces, la entidad que explota o que explotaría un pozo podría, en los Estados adyacentes vecinos, constituir sus fondos de garantía, lo cual es desde luego una seguridad para sus ciudadanos, que podrían ser posibles víctimas, y es una ventaja para el explotador, porque sabe que su responsabilidad está limitada al límite de la cantidad del fondo.

Hay otros detalles, y no quiero cansarlos, pero atraigo su atención a que los diversos elementos están en este Convenio, así como en otro Convenio muy interesante que lo complementa y que es el Convenio Internacional sobre el Establecimiento de un Fondo Internacional de Compensación por Daños Resultantes de la Contaminación por Petróleo. Como Convenio de la OCMI, este Convenio de 1971 está limitado a daños que resulten por derrames o accidentes de barcos; pero los lineamientos, los elementos principales de la institución de este fondo internacional, se podrían, mediante una analogía, también aplicar a los daños resultantes de un derrame de un poco petrolero.

Ojalá que los elementos que he mencionado puedan ser recogidos por los estudiosos aquí presentes, en sus futuros estudios o escritos.

COMENTARIO DE EDUARDO FERRERO COSTA:

Me voy a permitir hacer dos comentarios complementarios concretos a la exposición del doctor Sobarzo. Deseo complementar algo que se ha dicho, y luego un comentario más general relativo a un tema que no ha sido tocado, y que me parece también podría ser interesante mencionarlo, aunque sea brevemente.

En cuanto a los comentarios específicos, en primer lugar, el doctor Sobarzo ha mencionado diversos precedentes que han habido hasta el día de hoy, a través de los cuales se ha llegado a los derechos de soberanía del Estado costero sobre la plataforma continental. Me parece oportuno señalar rápidamente un precedente muy importante, y permítanme que hable de mi país, que es el de Chile. Primero Chile y luego el Perú, en el año de 1947, y finalmente Ecuador, Perú y Chile en el año de 1952, a través de la Declaración de Santiago, fueron los primeros Estados que proclamaron soberanía y jurisdicción exclusivas sobre el mar adyacente a sus costas y, asimismo, sobre el suelo y subsuelo que se encuentra debajo de dicho mar hasta las 200 millas. Y creo que vale la pena comentarlo porque se introdujo un criterio de distancia, distinto al morfológico. Ese criterio, en gran parte, ha sido recogido en el artículo correspondiente, el artículo 76 del Texto, al hablarse de un lado, del criterio morfológico; pero que si la plataforma no llega hasta las 200 millas, el derecho del Estado costero llegará hasta dicho límite. Creería que era un precedente importante para efectos de un análisis histórico sobre este caso.

En segundo lugar, debía yo complementar que es muy importante referir que en el Texto Integrado se confirma un principio básico que fue, en mi opinión, quizás el único criterio realmente novedoso que quedó reconocido en la Convención de Ginebra de 1958, y es que en término general, pero sobre todo substancial, el artí-

culo 77 del Texto nuevamente reconoce los derechos del Estado ribereño en la plataforma continental, derecho de soberanía en la forma que ustedes conocen. Esta, que fue la forma novedosa, como digo en mi opinión, ha sido recogida nuevamente en el actual Texto Integrado materia de negociación.

De otro lado, pasaría ahora a un término general, si me lo permiten. Dice el doctor Sobarzo que aún no se ha llegado a un acuerdo en relación al régimen aplicable a los fondos marinos y a sus recursos más allá de la zona de jurisdicción nacional. Lo que él decía es cierto, pero creo que ya hay bastantes bases, que inclusive vienen antes de la actual Conferencia Mundial, y que claramente se reflejan en la Declaración de la Asamblea General de las Naciones Unidas, especialmente la famosa Declaración de Principios. Hay bastantes bases para pensar que ya está estableciendo principios muy importantes y que están recogidos en el Texto. En relación a esto, el artículo 77 nuevamente reconoce los derechos del Estado ribereño en la plataforma continental. derechos de soberanía, en la forma que ustedes conocen.

El tema de esta mesa redonda, decía: "Régimen legal de los recursos no renovables"; lo que, obviamente, puede ser materia de toda una Conferencia. Dentro de los recursos no renovables hay claramente tres zonas: el mar territorial, que no trae ningún problema; la plataforma continental, que ha sido muy bien expuesta por el doctor Sobarzo y complementada también acertadamente por los colegas mexicanos, doctores Méndez Silva y Labastida; finalmente, la tercera zona, la que yo creo es de mayor importancia en el futuro, es la zona de los fondos marinos. Y a pesar de que intenté de ser muy breve, confesaré que la tentación me ha ganado y voy a caer en el pecado de los abogados, que les gusta hablar mucho. Trataré de ser breve. Sin considerarme un experto ni mucho menos, voy a permitirme complementar la ponencia con algunos puntos relativos a los prin-

cipios generales del régimen legal aplicable a los recursos no renovables, en la zona de los fondos marinos más allá de la jurisdicción nacional. Deseo hacerlo de una forma global, con una visión académica, más que una visión política. Y como punto de partida creo que es fundamental mencionar el artículo 136 del Texto Integrado, que es el fundamental como iniciativo, que establece el principio básico. Dice: "La zona y sus recursos osn patrimonio común de la humanidad".

Decía que, como académico, esto me causa una fuerte impresión, y creo que es algo demasiado importante para no mencionarlo en este panel. Ese es un concepto nuevo que surge como creación también del nuevo derecho del mar y del nuevo derecho internacional. A pesar de las objeciones que muchos señalan sobre el término "patrimonio común de la humanidad", el hecho es que se está establecidno un nuevo sujeto del derecho internacional muy especial, el cual en rigor no será la Autoridad, porque no hay otro sujeto que pueda tener relaciones jurídicas con la humanidad; pero, sin embargo, este sujeto opera a través de los Estados. Y esta noción es muy importante, porque me parece que es la gran oportunidad histórica en la cual los Estados pueden separarse, dejar atrás, de la utilización de la fuerza y del poder como medio de división de territorios, que es la historia del mundo.

A través del principio que estoy mencionando, se pretende establecer un nuevo régimen, que supere las experiencias del pasado, que supere las reglas y realidades internacionales de nuestra historia universal, establecida en cada momento de la historia por los países detentadores del poder. Y a través de este principio del patrimonio común de la humanidad, lo que se intenta es crear nuevas normas que traten de equiparar las diferencias o, por lo menos, de que tales diferencias entre Estados desarrollados y en desarrollo no aumenten.

Se está pasando a un nuevo derecho del mar, a un nuevo derecho internacional, a través de

esta institución emergente que, como decía el gran autor Friedman, lamentablemente fallecido, estamos realmente, a través de este caso, por ejemplo, pasando de un derecho internacional de controversias a un derecho internacional de cooperación. Quizás en un futuro, siendo optimistas, pasemos a un derecho de coordinación entre soberanías estatales, a un derecho de subordinación en lo que se afecta a la zona de los fondos marinos.

Es muy importante precisar, me parece, que se puede establecer un régimen nuevo, distinto, en los fondos marinos, porque estamos frente quizás al único caso importante que nos queda en el planeta, que cubre casi dos tercios de la superficie del mundo. Es una situación nueva, que permite establecer normas nuevas y un nuevo régimen para ésta, como decía, impresionante zona de los fondos marinos.

En este sentido, los principios básicos de las zonas se separan de las normas que en realidad han caracterizado al derecho internacional y a la realidad internacional hasta nuestros días; los principios básicos que deseo resaltar, obviamente, sin entrar en detalles y sin mencionarlos todos, y que ustedes conocen pero que deseo mencionar, son los siguientes (los cuatro principios los considero fundamentales):

En primer lugar, el más importante, el más complejo, que está regulado en los artículos 136 y 137, párrafo segundo, 140 y 148 del Texto, entre otros artículos. Bajo este principio, la zona y sus recursos, que son patrimonio común de la humanidad, pertenecerán a dicha humanidad y, en consecuencia, las actividades en la zona se deben realizar en beneficio de toda la humanidad, en cuyo nombre actúa la Autoridad. Esto, que ya parece común a todos los diplomáticos y a los estudiosos del derecho del mar, si lo revisamos es una gran novedad a nivel internacional, algo que no se daba antes. Por eso creo yo que se le debe una especial consideración; pero este principio va más allá, pues intenta además, con todas sus

limitaciones, explicables con toda lógica por todos los estudiosos de los Estados, intenta además ser un medio que contribuya a acortar el desequilibrio entre países desarrollados y en vías de desarrollo. Así, por ejemplo, el artículo 140 del Texto dice que "las actividades se realizarán prestando consideración especial a los intereses y necesidades de los países en desarrollo", y el artículo 148 señala que "se promoverá la participación efectiva de los países en desarrollo en las actividades en la zona".

Un segundo principio igualmente importante, que será contraparte del principio anterior y que está enunciado en el artículo 137 del Texto, párrafo primero y tercero, trata de evitar las experiencias históricas del pasado. Señala que "ningún Estado podrá reivindicar o ejercer soberanía sobre parte alguna de la zona o recursos", así como que "ningún Estado o persona puede apropiarse parte alguna de la zona", aclarando que "no se reconocerán reivindicaciones de ninguna naturaleza sobre dicha zona". Este es otro principio que altera el método tradicional mediante el cual los Estados han adquirido territorios.

Un tercer principio, que está regulado en el artículo 141 del Texto, es el que proclama que esta inmensa zona, que lamentablemente solamente está relacionada con el fondo del mar y no con el agua supradyacente, estará abierta a la utilización exclusivamente para fines pacíficos por todos los Estados; ésta es quizás una oportunidad, en la realidad del mundo actual, única, en que se puede tratar, y hasta ser optimistas, de evitar que esta zona también sea una zona de utilización de armas, armas nucleares y todo tipo de utilización que no sea con fines pacíficos.

Y un cuarto principio, sin agotarlo, por supuesto, que deseo mencionar y ha sido dicho ua algo sobre esto por el doctor Labastida, cuando habló de la responsabilidad de los Es-

tados, porque efectivamente es un tema muy delicado, ya que no hay normas codificadas y aprobadas por los Estados sobre ese particular. Aún con limitaciones e imperfecciones, se establece expresamente la responsabilidad internacional de los Estados en caso de que estos o sus nacionales desarrollen actividades en la zona que no estén de conformidad con las normas del Texto Integrado. Esto también, creo yo, es una gran evolución en derecho internacional, en la eventualidad de que el proyecto de tratado algún día fuere aprobado y suscrito y ratificado.

Ahora bien, deseo destacar que, aún con todas las limitaciones e imperfecciones de los órganos de la Autoridad, donde destaca el caso del Consejo, de normas operativas, de las actividades en la zona y de la solución de controversias, entre otras, que ustedes conocen más que yo, puesto que yo no soy un especialista en este tema, y aun cuando todavía no se puede afirmar que próximamente, como acababa de señalar, o lejanamente, habrá definitivamente un tratado internacional aceptado, suscrito y ratificado, me permito manifestar la conclusión de que, viendo el tema como un académico y no como un político, que está más relacionado con el aspecto detallado del día y del año; pero analizándolo con una previsión histórica, en la que la historia no se valúa por años, sino por decenios, inclusive por siglos, estimo que los principios sobre la zona de los fondos marinos y el concepto de patrimonio común de la humanidad, están causando y causarán en el futuro un cambio fundamental, de carácter cualitativo en el campo del derecho internacional público y en el campo de relaciones internacionales.

Para terminar, sin perjuicio de lo expuesto, me permito plantear, como interrogante, a ser resuelta por el ponente, los panelistas y, por supuesto, por el distinguido público, maestros excelentes e igualmente diplomáticos, una pregunta que es un problema ya conocido: teniendo en cuenta la Declaración de Principios aprobada por la Asamblea General de Naciones Unidas, así

como diversas resoluciones en el tema, y el mismo contenido del Texto Integrado, pregunto yo: ¿hoy día serían legítimas o ilegales las medidas unilaterales que pudieran ejercer unilateralmente algunos Estados?

Dejo esta pregunta planteada, como otras más que pueden haber surgido, teniendo en cuenta el concepto de si es real que hoy en día ya estamos frente a una nueva norma imperativa de derecho internacional general, que establece que la zona de los fondos marinos y sus recursos son patrimonio común de la humanidad.

LEWIS M. ALEXANDER: I'm Lew Alexander from Rhode Island. I'm here to raise two points on a statement which was made earlier, namely that the Deep Sea Venture's claim might have become a potential source of conflict between the United States and Mexico.

At the 9th meeting of the Law of the Sea Institute in Miami in January of 1975, Jack Flipse of Deep Sea Ventures produced a map which has been reproduced since then several times showing the coordinates of the claim. My distinct recollection then is that he stayed more than 200 miles away from any land whatever. He was very careful about this when drawing up the claim to avoid the possibility of conflict. Perhaps a more important part of this is that the United States government never acted on the claim or supported it in any way.

The third point is that Deep Sea Ventures in effect went out of business. It's been reorganized now, and Tenneco, which was its principal investor, has gone over with them. Thank you.

JOSE LUIS VALLARTA:

Quiero referirme a la aclaración hecha por el doctor Sobarzo, en el sentido de que los Estados están obligados a celebrar acuerdos, a los efectos de la explotación de los recursos naturales compartidos en la plataforma continental. El hizo especial referencia a los yacimientos de petróleo.

He escuchado con enorme satisfacción esa declaración, por lo siguiente: Ese principio está consagrado en la Carta de los Derechos y Deberes Económicos de los Estados. Creo que es el artículo 3º ó el 4º donde se dice que esos recursos compartidos entre dos o más Estados serán explotados mediante un régimen de información y consulta previa, es decir, que ningún Estado, tratándose de esos recursos compartidos, tiene el derecho de iniciar una explotación sin antes consultar con el vecino y, desde luego, sin antes informarle sobre los planes que tenga respecto de esos recursos.

A mí me tocó en turno trabajar como experto gubernamental en el Programa de las Naciones Unidas para el Medio Ambiente, precisamente en el grupo que preparó la declaración sobre el régimen jurídico de los recursos naturales compartidos entre dos o más Estados. Ahí no fue posible lograr unanimidad y algunos de los expertos reservaron su posición. La razón era muy clara. Sus gobiernos habían iniciado ciertas obras en recursos compartidos sin haber informado ni consultado al vecino, y en esas circunstancias el experto gubernamental difícilmente podría aceptar ese principio. No obstante, veo con enorme satisfacción que el doctor Sobarzo ha hecho una relación de acuerdos bilaterales existentes entre muchos países, que nos permiten pensar que ya es una práctica de los Estados, además de que existen documentos, como la Carta de los Derechos y Deberes Económicos de los Estados, que

aun siendo incorporadas en una resolución de la Asamblea General, por el carácter del principio a que me refiero, a ese de la información y consulta previa, pues tiene un carácter, en mi opinión, obligatorio.

Ahora, ¿por qué me decidí a hacer este comentario?, por lo siguiente: porque en el Texto que ha preparado la Conferencia sobre el Derecho del Mar, la Revisión Uno, cuando se trata de la zona económica exclusiva, sí hay una referencia a esa obligación de coordinar las actividades respecto a la explotación de los recursos vivos; pero no hay una referencia a la parte relativa a la plataforma continental. Evidentemente, creo que el Texto en sí tiene ya demasiados elementos, y que sería imposible añadir un elemento más. Tan sólo quisiera expresar aquí la opinión, y me gustaría conocer la opinión de los panelistas y de cualquiera de los profesores aquí presentes sobre eso, de que existe, a pesar de que no esté expresamente mencionado en el capítulo relativo a la plataforma continental, debido a otras fuentes de derecho internacional, la obligación, respecto a esos recursos naturales compartidos, de explotarlos mediante un régimen de información y de consulta previa. Y estoy totalmente de acuerdo con el doctor Sobarzo, cuando dice que se puede ir aún más allá y hablar de la obligación de los Estados de llegar a un acuerdo sobre la materia.

Esta mañana, en relación con otro tema, se puso en duda la obligación de los Estados de llegar a acuerdos sobre determinado tema. Yo creo que esa obligación está explícita en la Carta de las Naciones Unidas, en el principio de que los Estados tienen la obligación de resolver sus controversias por medios pacíficos; si hay obligación de resolver las controversias por medios pacíficos, hay la obligación de utilizar todos los medios hasta llegar a un acuerdo.

PROFESSOR CARDASH: I would first like to compliment Dr. Sobarzo and the panel for this very comprehensive and illustrious survey of this very extensive topic. I think I have personally very little to add, but I would make one point in connection with the interesting comments made by my old friend and collaborator in law of the sea matters, Fernando Labastida, concerning responsibility and liability.

There is one convention which may be of general interest which he did not mention. I guess that is because that is only a regional convention at the moment. But that is the convention of May 1, 1977 between the states in the North Sea area including France and Ireland, concerning liability for damage caused by oil pollution from offshore operation. This convention is a result of diplomatic conferences between those states in '75 and '76 where I had the honor to serve as vice president as head of the Norwegian delegation. The idea was at least to find some general principles which could also be applicable in other areas.

And indeed I know that under the auspices of UNEP some studies are being carried out at the moment between the states in the Mediterranean region trying to make a protocol supplementary to the Barcelona convention which was discussed yesterday concerning more or less the same principles. And especially with regard to this convention, the principle of strict liability, as was also mentioned by Dr. Labastida, goes a little further in the direction of strict liability with fewer exceptions than the 1969 Brussels convention. Further, there is a limitation on liability, but there is also a provision in Article 15 of the convention for a State that wishes to do so to apply a higher ceiling on liability or even unlimited liability, particularly in regard to pollution which is of no international concern because it hits persons or things within the same jurisdiction.

This was what I wanted to add, but I expect that further studies of this convention may be of use in further work by UNEP and by IMCO to regulate this matter.

THOMAS A. CLINGAN, JR.: I'm from the University of Miami Law School. I would like to respond in a very special kind of way to Eduardo's question about the legality of mining. I must first say that I feel in a somewhat awkward position. Were I to enter into a debate on this subject, I would obviously have to expound the United States' position. As program chairman and member of the Board of LSI, I don't think it would be appropriate for me to do that. I would simply say, therefore, that the United States' position was set forth in a speech by Elliot Richardson in response to the Group of 77. And that speech could, of course, be made available to anyone who's interested. Thank you.

PART VII

ENFORCEMENT

INTRODUCTION

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This morning we are concerned not so much with rules and theoretical behavior as with the actual behavior of states.

The question, as always, is "is the particular useful for the understanding of the general?", because this morning we deal with a case study. We can't answer this rather complex question, but I think it is true that we can get a much clearer picture of the motives of states and their reactions to direct economic and political incentives than is apt to be found in deliberations over the intellectual development of legal structures. I think this is true since no one can anticipate how market forces will work out. But even more important, in my view, than the working out of market forces, is the role of technology in the whole question of the oceans.

In fact, it would be interesting and perhaps useful, in my view, to examine the hypothesis that the whole history of the law of the sea is in large part a reaction of the political and diplomatic mechanism to the economic and political opportunities created by technology for the exploitation of ocean resources. It is precisely these forces that reveal themselves in the paper presented to us this morning by Terrin Hanson. The over-fishing of the resources in the Gulf of Thailand, the rapid expansion under certain pressures of the Thai fishing fleet, the extension of that fishing activity into the areas claimed by their neighbors all result in a set of activities on the part of these states that indicates how they respond when pressed by economic and political circumstances.

ENFORCEMENT OF 200 MILE EXCLUSIVE ECONOMIC ZONE CLAIMS OVER LIVING MARINE RESOURCES IN SOUTHEAST ASIA

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** Formerly Terrin Hanson

I. Introduction

The recent proliferation of coastal state claims to 200 mile exclusive economic zones (200 MEZ) has generated new ocean enforcement responsibilities which are being met with varying responses and degrees of success worldwide. To date, Southeast Asian nations appear to have met these responsibilities with little skill, achieving little and generating considerable costs.

The paper deals with those Southeast Asian nations which declared 200 MEZs prior to 1979: Vietnam, Cambodia, and Burma, describing the manner in which they are enforcing their 200 MEZ claims. The paper identifies some of the characteristics of the Southeast Asian experience which might account for the general ineffectiveness of enforcement in the region. The paper focuses only on application of 200 MEZ claims to the exploitation of living marine resources because that appears to be the one area in which enforcement has been attempted thus far. The claims of each country are broad enough to suggest that when enforcement over pollution, research, and navigation is attempted it may follow the same patterns as the enforcement discussed in this paper.

Vietnam unilaterally extended jurisdiction over a 200 mile "area of special economic rights" in a broadcast statement on May 12, 1977, entitled "Statement of Vietnam's territorial waters, adjacent areas, areas of special economic rights and the continental shelf (Vietnamese Statement), claiming authority as follows,

> The areas of special economic rights of the SRV lie immediately adjacent to the Vietnamese territorial waters, and form, together with the Vietnamese territorial waters, a sea area 200 nautical miles wide measuring from the base line used to compute the width of Vietnamese territorial waters. The SRV has total sovereignty over the exploration, exploitation, protection and control of all natural resources, both biological and non-biological, in the waters, the sea bottom and the earth layers under the sea bottom in the areas of special economic rights of Vietnam; has the right and special authority to set up and use projects, equipment and artificial islands; has special authority over other activities designed to serve the exploration and exploitation of these areas of special authority of scientific research in the areas of special economic rights of Vietnam. The SRV has authority over the protection of the environment against pollution in the areas of special economic rights of Vietnam. Vietnamese Statement, Paragraph 3 [1].

Cambodia broadcasts a similar statement, "Statement of the Spokesman of the Ministry of Foreign Affairs of Democratic Kampuchea," on January 15, 1978 (Cambodian Statement) in which is asserted that,

> Democratic Kampuchea has exclusive sovereign rights for the purpose of exploring and exploiting, conserving and managing all the natural resources of the superjacent waters, the bed and the subsoil of her exclusive economic zone situated beyond her territorial sea and extending up to 200 nautical miles from the baselines. Cambodian Statement, Paragraph 3 [2].

Burma adopted a 200 MEZ by legislation in 1977, "Territorial Sea and Maritime Zones Act," (Burmese Act) The Burmese Act provides,

17. The exclusive economic zone of Burma is an area beyond and adjacent to the territorial sea and extends to a distance of two hundred nautical miles from the baselines.

18. Burma has in the exclusive economic zone:

(a) sovereign rights for the purposes of exploration, exploitation, conservation, and management of its natural resources, both living and nonliving, as well as for producing energy from water and winds;

(b) exclusive rights and jurisdiction for the construction, maintenance of operation of artificial islands, offshore terminals, installations and other structures and devices necessary for the exploration and exploitation of its natural resources, both living and nonliving or for the convenience of shipping or for any other purpose;

(c) exclusive jurisdiction to authorize, regulate, and control scientific research;

(d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution; and

(e) such other rights as are recognized from time to time by international law.

19. Subject to the exercise by Burma of its rights;

(a) freedom of navigation within the exclusive economic zone; and

(b) aircraft of all States shall enjoy the freedom of overflight within the air space over the zone.

20. No one shall conduct any activity in the exclusive economic zone in relation to exploration, exploitation or research, without the prior express permission of the Council of Ministers:

Provided that nothing in this section shall apply to fishing in accordance with law by a citizen of Burma [3].

The first part of the paper surveys the invocation and application of law in the Vietnamese, Cambodian and Burmese 200 MEZs. Analysis is in terms of phases of the process; invocation through detection, boarding, searching, characterization of conduct, and apprehension; application through judicial proceedings and the imposition of sanctions [4]. Where appropriate, factors which seem to affect the process are suggested and implications of the process are noted. The second half of the paper makes some general observations about the gestalt and momentum of the Southeast Asian enforcement experience, mentioning the major characteristics, noting implications and speculating briefly on future patterns.

The limited information regarding the national legislation provides little detail of suggestion as to how the Southeast Asian 200 MEZ claims will be enforced. Since the national legislation contains few specifics on enforcement, descriptions of the enforcement process are derived indirectly. First, nonspecified elements of the enforcement process can be inferred from other stated elements [5]. Second, inferences can be made from media reports which indicate how the coastal state is actually enforcing its 200 MEZ claim.

Inference of jurisdiction over and authority to engage in all phases of the enforcement process can be based on the sovereign rights Vietnam, Cambodia, and Burma claim in their 200 MEZs. Other language in the national legislation supports inferences of inclusive enforcement jurisdiction. The Vietnamese Statement contains some very broad language which can be interpreted to invite officials to exercise enforcement jurisdiction: "specific problems relating to the... areas of special economic rights... will be defined with more details on the basis of the protection of the sovereignty and interests of (Vietnam) and in conformity with international law and customs" [6]. Similarly, the Cambodian Statement contains some language from which enforcement jurisdiction can in inferred: Cambodia claims it will take "appropriate measures in order to entirely safeguard the sovereignty, rights and interest of (Cambodia) over... [the 200 MEZ] ..." and asserts that Cambodia "will settle with the parties concerned [by the 200 MEZ] in accordance with the concrete situation" [7]. Inference of enforcement jurisdiction are readily made from the Burmese Act which, while not directly establishing such jurisdiction, does grant authority to regulate and penalize in a prescribed fashion [8].

When evaluating inferences drawn from media reports, four points of possible inaccuracy in these reports should be noted. First, translations may be imprecise, especially when made of broadcast statements. Second, press accounts are often secondhand and quite dated. Third, reporting may be selective by nation, i.e., one nation reports 200 MEZ incidents but another does not, or a national press may emphasize only certain aspects of the 200 MEZ enforcement process. Fourth, reporting may promote national interests and biases rather than journalistic objectivity.

A. Invocation and Application of Law

1. Surveillance

Reports of national practice supplement the inferences drawn from the legislation and indicate that Vietnam, Cambodia and Burma have made rather intensive surveillance commitments.

In the Vietnamese 200 MEZ, both military and civilian personnel are engaged in surveillance. Vietnam relies heavily on civilian groups, assigning surveillance tasks to all state-owned fishing groups, which they evidently perform quite efficiently [9]. The press regularly reports incidents of groups such as the Min Hai Sea Patrol Unit detecting foreign fishing vessels within the 200 MEZ [10]. Vessel and personnel limitations on enforcement efforts make utilization of civilian sensors very sensible. It greatly expands available surveillance means without attendant capital outlay. This system may, however, induce costs related to lost fishing time and training efforts.

Cambodia too has instituted an extensive surveillance system which apparently depends upon both military and civilian efforts. Since creation of the Cambodian 200 MEZ, the Thai press has continually carried accounts of regular Cambodian naval patrols in the Gulf of Thailand [11]. Civilian involvement is inferred from a Cambodian broadcast in which a government spokesperson referred to the relocation of an unknown number of civilians to Gulf of Thailand islands [12], to act in surveillance capacities. It is not known to what extent, if at all, these civilians have aided naval patrol groups. This approach carries a large cost in allocation of labor.

Burmese naval units patrol regularly in their 200 MEZ [13]. Thais describe the Burmese surveillance effort as discriminatory, alleging Burmese gunboats are assigned specifically to chase Thai trawlers in transit from Bangladesh to Thai waters [14]. Whether or not this allegation is valid, surveillance of this kind may be legitimate and probably deploys scarce enforcement resources efficiently. Burma also relies to some extent on civilian surveillance. The government has

requested publicly that all citizens help the navy and unspecified regional organizations to detect illegal fishing vessels. The government broadcast expressions of gratitude indicate that citizens have responded affirmatively [15].

Civilian involvement is a common characteristic of the Southeast Asian approach to surveillance and seems to have both good and bad effects on enforcement. Vietnam has integrated civilians into an organized program of detection. This has the economic advantage of capitalizing on the incentive of the fishermen to enforce the 200 MEZ claim to protect their resource. This compares favorably with Cambodia's forced program of civilian participation and with Burma's seemingly ad hoc program. It also contrasts favorably with attacks on foreign vessels by coastal state fishermen, acting as self-appointed ocean vigilantes in other parts of the world [16].

The negative effect of civilian involvement in the surveillance phase enforcement is speculative. Certainly it is possible to launch a civilian defense program which will not generate international hostilities. But civilian involvement in ocean enforcement might be undesirable for two reasons. First, civilian involvement might catalyze violence. Civilians who are not as accustomed to discipline and prescribed conduct at sea as naval personnel may over-react to the presence of foreign fishing fleets, perhaps escalating into armed conflict situations that only called for warnings. Civilians who become involved in enforcement efforts may be ill-trained, if at all. This increases the chances of inaccurate reports of illegal fishing, triggering unnecessary enforcement efforts and apprehension of foreign fishing vessels without justification, producing international tensions. Second, civilian efforts may be half-hearted where there is little incentive to comply with government requests for compliance by government fiat. This can lead to both enforcement blunders and losses of natural resources as illegal fishing continues undetected and unreported.

2. Boarding and Searching

Boarding and searching a vessel are intermediate steps in the enforcement process prior to apprehension, designed either to verify a suspected violation, to ascertain the extent and nature of a detected violation, or to function as a routine spot check. They provide a mechanism to screen trivial violations of groundless suspicions out from the enforcement process. This not only conserves enforcement resources but can also inject a sense of proportion into the process.

Generally, neither the national legislation or press accounts indicate that boarding and searching activities for these purposes are common practices in Southeast Asia. National legislation contains no specific authority to board and search

foreign vessels within the 200 MEZs and Vietnamese and Cambodian practices seem to omit these enforcement activities. News reports which detail the cargo carried by apprehended foreign vessels suggest that Burmese officials conduct searches [17]. These accounts are ambiguous, however, and searches may occur for the purpose of confiscation rather than verification of violations and then only after apprehension.

The available data is insufficient to support a conclusion that Southeast Asian practice omits boarding and searching. However, the media have on several occasions reported apprehension of vessels prior to any boarding and searching. Even if isolated, these incidents are significant in that they suggest the violation toward which surveillance and apprehension efforts are directed can be entry for whatever reason into the 200 MEZ. This in turn suggests at least occasional hypersensitivity about 200 MEZ boundaries.

3. Characterization of Prohibited Conduct

The significance of any Vietnamese, Cambodian, or Burmese label given to conduct of foreign vessels within these national 200 MEZs depends upon the credence attached to the translation of media accounts. The national legislation does not attempt to describe behavior which might occur within the 200 MEZs. Media accounts contain the only references to official charges; these are few and may not be representative. The data on which this discussion is based is very scant.

Although no information is available on Cambodia, Vietnam and Burma appear to make official charges. Vietnamese authorities generally charge foreign vessels with "trespass" or "encroachment" [18] whereas Burmese authorities charge "poaching" as well [19]. Assuming accurate translations, it should be noted that characterizing distant-water fishing vessels as trespassers carries strong territorial overtones which do not entirely comport with the 200 MEZ concept: a resource conservation and management device. It also implies a perception of the 200 MEZ as ocean space available to the international community at large only at the largesse of the coastal state.

4. Apprehension

Violence often accompanies apprehension of foreign fishing vessels by coastal state authorities in Southeast Asia. Regional media have reported, with depressing regularity, armed encounters which result in fatalities, serious injuries, and lost or damaged vessels [20]. Far more chilling than recitation of the number of attacks by Vietnamese, Cambodian, or Burmese authorities are the circumstances surrounding these attacks, especially in the case of Cambodia. Typical is an incident reported in the Bangkok World on August 4, 1977:

Trat. Two Thai fishermen were killed and another wounded last Friday when two Khmer Rouge speedboats equipped with machine guns opened fire on a convoy of Thai fishing trawlers in (waters described by the Thai press to be Thai territorial waters) at Ban Hat Lek in the Klong Yai district of this province.

According to a report from the deputy commander of Zone 2 provincial police, Pol Col Damkoeng Ruannam, received at the police department this morning, the two Khmer Rouge speedboats also seized two Thai trawlers -- the "S. Wirachai" and the "Saeng Phet" -- and towed them into (waters described by the Thai press as Cambodian).

The report said the two fishermen, both crewmen of the "Saeng Phet," were killed instantly when the Khmer Rouge fired on the Thai trawlers. All remaining nine crewmen of the "S. Wirachai" and "Saeng Phet" jumped into the sea and were later rescued by other Thai trawlers [21].

Striking here is the degree and kind of response by Cambodian officials. Assuming the offense is illegal fishing, the response seems inacceptably inappropriate.

Absent allegations of and trial for illegal fishing, apprehension such as that described in the Thai press is essentially made for simple unauthorized entry into a 200 MEZ. This has serious implications for transit passage when the penalty can be an ad hoc death sentence. Even if illegal fishing has occurred, the penalty may be so swiftly administered and so irrevocable as to rob the enforcement process of any pretensions to fairness. Although Cambodian enforcement has been the most brutal, Vietnam and Burma have also contributed to the developing pattern.

Local ocean enforcement occurs in an environment in which three conditions appear to induce violence in the course of apprehension. These are: the continuing presence of the Thai distant water fleet, the deployment of military units for 200 MEZ enforcement, and disputed or conflicting marine boundaries. Each of these is discussed more fully in turn. It is recognized that not only has a motif of violence long characterized geopolitics in Southeast Asia, but that the players come to ocean enforcement with a tradition of enmity. Certainly historic incidents of territorial aggression and defense could and do influence the approach these nations utilize to enforce their 200 MEZ claims, in addition to the conditions discussed.

a. Thai Distant Water Fishing

With the exception of a few Hong Kong and Japanese fishing boats apprehended off Vietnam [22], the regional press reports indicate that the Thai distant water fleet causes or catalyzes most ocean enforcement encounters in Southeast Asia. Vietnam, Cambodia, and Burma have, in effect, implemented their 200 MEZ claims to exclude Thailand. Accordingly, Thai fishermen have been the target of nearly all armed hostilities in these 200 MEZs [23]. Despite the risks, the Thai fleet has persisted in fishing in these areas which should indicate the value Thailand places on these fisheries.

The economic health of the Thai fishing industry only recently has become dependent upon fishing off the coasts of Vietnam, Cambodia, and Burma. Overcapitalization and overfishing in Gulf of Thailand fisheries and their resultant decline in profitability spurred distant water fishing in the 1960's [24]. At this time, the Thai government began a program of exploration for potential fisheries in areas adjacent to the territorial waters of Vietnam, Cambodia, Burma, and Malaysia [25], while expanding fishing capability through introduction of trawl fishing [26].

The growth of the Thai distant water fleet was rapid. By 1972 Thailand ranked seventh in world fish production [27]. That this success was achieved in great part by exploiting the fishery resources of waters adjacent to neighboring states is clearly indicated in the 1976 national fisheries records which report that nearly a third of the total Thai catch originated in distant waters [28].

Unilateral extensions of ocean jurisdiction by neighboring states are therefore a grave threat to the Thai fishing industry. The Exclusive Economic Zone Committee of the Thai Ministry of Agriculture and Cooperative estimates that Thailand stands to lose 660,000 metric tons of its annual catch and 300,000 square kilometers of fishing grounds by the extensions [29]. Affected are 257,254 individual Thai fishermen, thousands of Thai fishery-dependent households, and a nation heavily dependent on fish and fish products for protein [30].

Thailand actively seeks bilateral arrangements, such as that concluded with Bangladesh [31], to salvage the regional situation. To date, reception has not been good. Absent successful negotiations for access, Thailand has only two options: permit the near demise of the Thai distant water fishing industry, or delay official recognition of regional 200 MEZs, warning Thai fishermen that continued fishing in customary grounds involves considerable risk. The Thais have taken the latter option. The government does not subsidize any resulting illegal fishing, but also makes no apparent effort to contain it [32].

With de facto governmental acquiescence to illegal intrusions of the Thai fleet into waters now controlled by Vietnam, Cambodia and Burma, it is not surprising that violence erupts often. Even more violence may occur when Malaysia declares a 200 MEZ as expected [33]. Unless Thailand receives permission to enter the 200 MEZs of countries with which clashes have occurred, violence can be expected to continue to accompany enforcement efforts in the region.

b. Naval Ocean Enforcement

A navy ordinarily assumes two primary roles in its offshore capacity, provision of support to civil authorities and assumption of offensive or defensive stances when violence is expected [34]. Extended jurisdiction forces nations without other options to assign their navies to enforcement of fishery and other resource regulations, a neither traditional nor particularly legitimate naval function. Vietnam, Cambodia and Burma rely primarily on their navies to enforce their 200 MEZ claims. Although these nations probably have no choice but to rely on military units for enforcement, this reliance may generate undesirable results.

Many violent confrontations between naval enforcement units and foreign fishing vessels have occurred in these 200 MEZs. Gunfire is routinely exchanged, commonly resulting in death or serious injury. Attempts to evade naval patrol boats have destroyed vessels, frequently causing deaths by drowning or loss of crew at sea [35]. Violence seems to escalate rapidly, converting apprehension efforts into naval skirmishes. For example, when Royal Thai navy patrol craft intervene in situations involving Thai fishing vessels and Cambodian patrol craft, the result is a confrontation between two national defense units [36]. Enforcement efforts can also escalate into full-blown displays of naval force as when the Thai government sent a warship on a forty-day Andaman Sea patrol in response to a series of Burmese arrests of Thai vessels [37].

It appears then that when the navy is assigned to enforcement work, the support offered to civil authorities becomes identical to naval action against state enemies. This "eliminates a useful firebreak; ... the escalation ladder is made shorter and steeper" [38]. This seems to be the situation with naval enforcement in the Vietnam, Cambodian and Burmese 200 MEZs.

c. Marine Boundaries

Southeast Asian marine bondary issues are of two types, either of which can potentially generate violence. First, claims to islands may conflict or overlap as with the Spratley and Paracel Islands in the South China Sea [39]. Of perhaps more immediate concern are overlapping Vietnamese, Thai and

Cambodian claims. Cambodia claims a continental shelf which runs across the Thai island of Kut while ignoring the claims of Vietnam to certain islands [40]. Although not currently an issue, this situation could flare up should one nation choose to make it so. Second, misunderstandings over the location of ocean boundaries can cause problems. Such misunderstandings have led to frequent clashes between enforcement units of Burma and Thai fishermen [41], leading frustrated Thai fishermen to lobby for better boundary directions. Thai officials, while acknowledging that boundaries were unclear and that few Thai fishing vessels had equipment able to detect limits, responded only by advising Thai fishermen of Burmese claims [42]. Similarly, after clashes between Vietnamese enforcement units and Hong Kong fishermen, the latter accused their government of having failed to provide them with adequate information on the Vietnamese claims, an accusation Hong Kong officials denied[43].

Where lack of knowledge about boundaries results in an inadvertent entry into the 200 MEZ of a nation, public notice is a fast and economical solution, at least where the nations concerned agreed upon boundaries. At the least it seems incumbent upon nations with distant water commercial fleets to publicize the claims of other nations even where disputed. This is especially important when regional legislation does not impose a duty upon the coastal states to publicize either their baselines or the limits derived from those baselines; this is the case in Southeast Asia.

5. Detention of Vessels

The 200 MEZ claims of Vietnam, Cambodia and Burma make no provision for the release of vessels following apprehension but prior to trial and imposition of sanctions. Press reports suggest that none of these countries utilize a procedure whereby vessels may be released but rather all customarily confiscate vessels upon seizure. For example, media account refer to the Cambodian practice of recycling captured vessels[44], the Burmese practice of confiscating Thai vessels for "training purposes" [45], and Thai Fisheries Association allegations that Vietnam at one time held 200 Thai vessels [46]. On the other hand, Vietnamese officials deny that they do not release captured vessels [47] and the press on at least one occasion noted that a Thai trawler was released from Vietnamese custody under Soviet escort [48].

The inference seems stronger that Southeast Asian nations have a no-release policy. Such a policy would probably be deliberate. It provides a source of relatively sophisticated fishing vessels without the need to invest scarce hard currency and without the creation of any political debts. A no-release policy might also be designed to deter further intrusions; given the thrust of the Thai fishing effort, the deterrent effect seems negligible.

6. Trial

Vietnam and Burma appear to have made trial proceedings a regular part of their enforcement processes; this does not seem to be the case with Cambodia. The inference is stronger for Burma. The Burmese Act specifically provides for prosecution of violations and adds a theoretical measure of protection for defendants by making the prior approval of the Council of Ministers a prerequisite [49]. The media report that violators are regularly brought before the People's Court [50] in Rangoon, indicating active implementation of the law. It would be interesting to know how often, if at all, the Council of Ministers withholds approval for prosecution. The inference is fairly tenuous for Vietnam, based on an isolated account of the Min Hai Sea Patrol Unit's apprehension and subsequent escort of some foreign fishing vessels to the "state organization responsible for instituting legal proceedings" [51].

It is not possible to do more than surmise the nature and extent of any postulated judicial proceedings. If the suggestion that trespassing is the most likely charge is valid [52], foreign fishermen may find it difficult to defend themselves, making any trials purely formalistic proceedings.

7. Sanctions

Although Vietnam, Camboda and Burma all impose severe sanctions in the course of 200 MEZ enforcement, each nation tempers this imposition individualistically. However, all nations endorse imprisonment and none appears to tailor sanctions to fit a given offense.

Only the Burmese have announced their sanctions; the Burmese Act allows three potentially cumulative penalties: imprisonment, confiscatory measures, and fines [53]. Imprisonment of both crew and masters is standard and commonly extends from one to two years, with ten the legal limit. Although Thais have reported that a confession of guilt can reduce a sentence to six months [54]. Thais also report that the Burmese cooperate in negotiating over imprisoned crew [55], which indicates the Burmese system is somewhat flexible. The fact that Thailand has not protested imprisonment might be interpreted as acquiescence to this sanction, as the Thai government, discussing the Burmese practice of imprisoning Thai fishermen, has said it will protest to the Burmese if and when it feels they are acting against international practice [56]. Confiscation is regularly imposed on all vessels, except warships, and their equipment, instruments and cargo. The Bangkok Nation Review reported Burmese authorities held 344 Thai vessels in mid-1977 [57]. If fines are commonly levied, the press has not noted this, although one account indicated a Thai vessel master was fined kyat 2,000 (U.S. $300.00) in lieu of six months imprisonment in July, 1977 [58].

Cambodian and Vietnamese practices are inferred entirely from press accounts. The Cambodian approach to sanctions appears to be the least circumscribed. Deaths at sea in the course of apprehension may be deliberate which would effectively incorporate potential execution into the Cambodian enforcement process. Rumors of imprisoned Thai fishermen and confiscated Thai vessels will probably go unverified until Thailand and Cambodia establish diplomatic relations [59]. Vietnamese practice is inferred from statements by the Thai Fisheries Association which reports that prior to creation of the Vietnamese 200 MEZ, captured crews were released but that since 1977 imprisonment of crew members for at least one year has been standard [60].

The implications of national practice are alarming. First, since nearly all violations generate the same sanction, the enforcement process is escalated further. Second, the practice could be said to present a disincentive to comply with national 200 MEZ regimes; if the penalties for a minor and major offense are identical, foreign fishermen may as well attempt to evade detection while committing a major offense. Third, as deterrent to continued Thai distant-water fishing, harsh sanctions do not appear to be effective. Finally, harsh sanctions introduce an extremist element into the enforcement process and underwrite a punitive philosophy of ocean enforcement.

Southeast Asian enforcement practice is summarized in the matrix below. The I.C.N.T. Rev. 1 provisions which apply to fisheries enforcement are compared too.

ELEMENTS OF PROCESS	VIETNAM	CAMBODIA	BURMA	I.C.N.T.
Surveillance	yes; naval & civilian units	yes; naval & civilian units	yes; naval & civilian units	yes; on-board observers[61]
Boarding	no evidence	no evidence	yes	yes[62]
Apprehension				
Frequent Gunfire	yes	yes	yes	
Deaths/Serious Injury	yes	yes	occasional	
Trial	yes	no evidence	yes, prior approval	yes[63]
Charge	trespass	no	encroach-ment; poaching	no prescribed

Penalties	no evidence	no evidence	yes	yes[64]
Confiscation	yes	unverified	yes	no (security)
Imprisonment	yes 1-2 yrs.	unverified	yes, up to 10 yr.	flag state must agree[65]

It is speculated that the lack of detail in the Burmese Act and Vietnamese and Cambodian Statement contributes to the dynamics of Southeast Asian enforcement efforts. To the extent that national legislation fails to provide for judicious containment of the enforcement process, it introduces into the process a measure of flexibility which can border on overkill.

B. Characteristics of the Southeast Asian Enforcement Process

Vietnam, Cambodia, and Burma have marked ocean enforcement in Southeast Asia as a process which operates ineffectively and which escalates rapidly, standing out as unique in the world community.

1. General Ineffectiveness

The Southeast Asian enforcement process appears generally ineffective in that it incurs great losses in terms of life and property, yet does not appear to have either deterred foreign fishing efforts in local 200 MEZs or led to demonstrably better conservation and management of living marine resources. This ineffectiveness may be attributable in part to the inadequacy of the infrastructure on which the process depends. Such ineffectiveness greatly misallocates human resources. The inadequacy and allocation problems are discussed in turn.

a. Inadequacy of Infrastructure: Indicia

In terms of material and administrative institutions, the Southeast Asian process has rather insubstantial support.

i. Military Hardware. Material is discussed in terms of the hardware available to a nation as this is a critical determinant of the effectiveness of any enforcement effort. Unless both visible and adequate hardware accompanies extended jurisdiction, enforcement efforts are likely to be futile.

Description of the extent and kind of hardware Southeast Asian nations have made or could make available for ocean enforcement is one way to assess the adequacy of the enforcement

infrastructure. It also helps to evaluate the enforcement priorities of individual nations and to measure the deterrent value of each nation's enforcement system, although absent knowledge of actual deployment patterns, this is only a partial measure.

This paper identifies the air and naval craft available to Southeast Asian nations to ascertain the general scope and nature of their potential or actual ocean enforcement capabilities. This paper does not purport to evaluate regional hardware systems in any but the least sophisticated terms. Aircraft are evaluated in terms of range and ability to orbit on station, characteristics necessary for reconnaissance work. This standard eliminates many aircraft such as helicopters from consideration. Air or naval craft capable of conversion to ocean enforcement work are considered available [66].

Although several sources carry estimated data on air and naval craft nations possess, the estimates do not indicate actual deployment; this limits their descriptive value. However, information of this sort would be of limited utility anyway; deployment patterns are subject to the vagaries of regional politics and needs and craft used this year in ocean enforcement might not be available for other purposes next year.

* Vietnam. The Vietnamese navy, estimated to have approximately 3,000 men, has vessels suitable for enforcement: 3 coastal escorts, 25 motorized gunboats, 20 torpedo boats, 30 patrol boats, and 15 armed junks [67]. The capacity of at least some of the gunboats, reported to have mounted machine guns, is great enough to attack successfully a fleet of Thai trawlers [68]. Few reconnaissance aircraft are available [69].

Vietnam may also produce hardware. The nation currently manufactures some military aircraft under foreign license and is said to have a shipbuilding industry capable of producing warships, again under foreign license [70].

Press accounts describe the Vietnamese navy as so limited in materials, technical reserves, and equipment as to be confined to inshore operations [71]. This description may be accurate, but it fails to recognize Vietnam's strong enforcement capability relative to other nations of the region. It also fails to acknowledge the contribution to enforcement made by all state-owned fishing vessels which are required to participate actively in surveillance and apprehension capacities [72].

The current extent of the state commercial fleet is not known. The government operated 35 trawlers in 1975 at which time plans called for all private trawlers to be organized in state companies [73]. It can be assumed that this is occurring or has occurred. Press accounts indicate at least four

commerical units operate as paramilitary units: Quanh Ninh Fishing Enterprise, Van Don Defense Sea Fleet, Min Hai Sea Patrol, and the Hai Ninh Junk Team [74]. The state fishing fleet may be a rather primitive defense unit; remarks of Vo Nguen Giap at a Marine Science Conference (Nha Trang, August 1977) indicate that few components of the fleet are mechanized, although mechanization was mentioned as a goal for the marine sector of the economy [75].

Vietnam also inherited a very developed physical shore infrastructure from the Americans. An estimated U.S. $2 billion worth of facilities including piers and docks was left behind in 1975 [76]. Additionally, the Soviet Union is reported to be building a naval base on Cat Ba Island outside Haiphong Harbor which will presumably be utilized by the Vietnamese, too [77].

The government is committed to development of the marine sector under a Fourth Party Congress Resolution [78]. The government's determination to invest more capital in trawler construction has been noted at other times. Under current policy, the expanded commercial fleet would be available for enforcement work, too.

Vietnam may also produce hardware. The nation manufactures some military aircraft of foreign craft under license and is said to be shipbuilding industry capable of producing warships of foreign design.

* Cambodia. The Cambodian ocean enforcement system is limited in terms of hardware. The nation appears to have acquired much of its ocean hardware in the course of international hostilities. Phnom Penh domestic news service in the past reported that the government was recycling former warships, motor boats, and fishing vessels as naval patrol craft [79]. These crafts were reported to be well-armed [80].

The total inventory reportedly includes 20 inshore patrol crafts, 2 patrol vessels, 50 support gunboats, and 6 seaward patrol crafts. It is possible that Cambodia can use 8 DeHavilland Otters and 8 C-123s for aerial reconnaissance [81]. It is not known how many men and/or women currently serve in the Cambodian naval forces.

* Burma. Burma has a modest hardware system. The Burmese navy employs 6,300 men. Their principal equipment for enforcement work consists of 20 motor gunboats, 1 frigate, 3 patrol boats, 5 motor torpedo boats, 2 patrol vessels and 4 support gunboats. Burmese aircraft are used primarily for internal security, but if political concern shifts from land to ocean borders, the following aircraft could be utilized for surveillance: 2 Bristols, 6 C-45s, 20 C-47s, and 2 DeHavilland Otters [82]. Current information indicates Burma does not have

any additional hardware on order. Burma does have some domestic manufacturing capacity, namely warships of domestic design and foreign design under license [83].

News accounts suggest Burma deploys two active enforcement modules. The first of these consists of 4 gunboats, described as "sophisticated", which patrol in the Indian Ocean regularly. The second module, 3 armed fast patrol boats and 1 frigate received from Japan in 1977, operates out of a Burmese naval base near Thai territorial waters [84].

Burma probably lacks the capacity to enforce its extensive 200 MEZ. The government claimed to have seized U.S. $500,000 worth of fish and U.S. $1.5 million worth of smuggled goods in Burmese waters in 1976, prior to creation of the Burmese 200 MEZ. Department of State comments suggest this represented only a fraction of the illicit activity which occurred within the Burmese 12 mile limit [85]. Extended jurisdiction will only have further strained national enforcement resources.

ii. Administrative Institutions. The system used to administer the 200 MEZ can determine whether adoption of the legal concept will amount to more than a stance of territorial bravado. As enforcement is the determinant of this, reference in this discussion is only to the administrative system designed for the enforcement process.

Most Southeast Asian nations recognize the need to coordinate their various agencies charged with 200 MEZ enforcement [86] but faced with severe budget and personnel constraints, and perhaps a low priority on ocean issues, they opt to maintain the bureaucratic status quo. The little information available indicates that Vietnam, Cambodia and Burma rely on the organizational units already in place in their 200 MEZs, rather than any discrete ocean enforcement agency such as a Coast Guard.

To illustrate the administrative chaos such reliance can encourage, reference is made to a South Asian incident [87]. Apprehension of a Taiwanese vessel in Sri Lankan waters in 1977 demonstrates how diffused enforcement activities can be. Acting on information delivered by local fishermen, Sri Lankan naval authorities sent a gunboat after three vessels alleged to be fishing illegally. Two vessels escaped; the other was apprehended after what was referred to as a "mid-sea fracas" in which at least one crewman was injured. Naval authorities searched the apprehended vessel; fisheries officials seized the catch; customs officials took custody of the vessel; the "assistant collector, baggage and prevention officer", an official of indeterminate origin, assumed responsibility for an investigation; and the sixteen-man crew was detained, most likely in the custody of the immigration department [88]. Thus, prior to trial and assessment of penalties, at least five

separate groups handled one incident: civilians, the navy, a fishery agency, customs and immigration.

This sort of situation, presumed to prevail to a greater or lesser degree in Vietnam, Cambodia and Burma, has several weaknesses. First, each group involved in the process will interpret the law differently. These interpretations may coincide but are equally likely to conflict, making future compliance with the law more difficult. Second, since each agency involved has non-ocean-related duties, available enforcement resources may often be allocated to competing uses. Since enforcement efforts then cannot be relied upon to be constant or continuous, this robs the effort of some of its deterrent value. Third, it is unlikely any one agency will develop real expertise in ocean enforcement. Finally, inter-agency and service rivalries may create unrealistic or purely political goals for the process.

In combination these weaknesses mean the enforcement process will be administered inefficiently. Resources may not be allocated when and where needed or may be directed toward ends better served by other means. Dispersion of enforcement responsibilities also means that material is not concentrated for rapid and easy deployment.

iii. Inadequacy of Infrastructure Explanations. Measured by these most obvious indicia, material and administrative institutions, Vietnam, Cambodia and Burma have failed to invest heavily in ocean enforcement. Three explanations are offered which might account for this.

First, the huge price tag which military hardware carries may be the major obstacle to development of the enforcement infrastructure. Additionally, allocation of human resources from one administrative slot to another involves large costs, which may account for maintenance of the bureaucratic status quo.

Second, investment may be proportionally related to the amount of benefits a nation expects to realize in a 200 MEZ [89]. A regional perception of limited benefits from 200 MEZ resources may account for low investment in ocean enforcement. This perception could stem from two factors. In the first place, knowledge about regional fisheries, at least in Southeast Asia, is seriously inadequate. Acquisition of this knowledge, which might lead to greater expectations and a correspondingly greater investment to protect may not come easily. In the second place, it is difficult to develop selective, high-valued fisheries in Southeast Asia. Almost all regional fisheries are multispecies which creates management problems and makes investment less attractive. Additionally, multispecies fisheries attract less extra-regional interest, requiring less need for enforcement than in other areas [90].

On the other hand, the foregoing analysis depends on a perception of investment in terms of capital. Vietnam, Cambodia and Burma may have incurred very large shadow costs by making their enforcement efforts labor rather than capital intensive. This is supported by one theory of enforcement which holds that the amount of investment required will depend on the degree and kind of behavior perceived to deviate from prescribed standards [91]. It has been remarked throughout this paper that these nations refuse to tolerate even trivial violations which suggest that large investments have been made, even if not visibly quantifiable.

b. Inefficient Allocation of Human Resources

The Southeast Asian enforcement process appears hugely inefficient in terms of resources spent and unsatisfied needs. Vietnam, Cambodia and Burma control resources valuable to the region in general and Thailand in particular. Only Thailand has developed commercial fishing expertise and equipment, without which the regional resources may not be utilized effectively. Thailand has expressed a strong interest in negotiating with Vietnam, Cambodia and Burma for access to their 200 MEZs [92]. If the 1978 Thai-Bangladesh joint venture agreement is representative, Thailand would probably be willing to share a great deal of its expertise in return for fishing privileges [93]. But faced with this ready market, Vietnam, Cambodia and Burma have refused to sell, their only response being intensive enforcement efforts applied to Thai fishermen. Even acknowledging that the persistent appearance of Thai trawlers must be a great irritant to these nations, the situation seems puzzling. Time, money and people are allocated to intensive enforcement efforts which a bilateral agreement could eliminate, while achieving large advantages.

Three possible explanations for this seemingly unreasonable and inefficient behavior are offered. First, Vietnam, Cambodia and Burma may expect other allies to develop their fisheries and thus have no need to negotiate with Thailand. This is especially likely in the case of Vietnam which signed one fishery cooperation agreement with Cuba in May 1978 [94], and another with the Soviet Union in December 1978 [95]. Second, the possibility exists that the clashes in Southeast Asian 200 MEZs are not part of any ocean enforcement process but are rather a form of surrogate or proxy warfare between inimical nations. Third, the system as it now operates may be greatly advantageous to unknown players. This is not meant to suggest that the process is thoroughly corrupt, but among authorities responsible for designing enforcement policies in the region, general consensus is that corruption jeopardizes successful enforcement [96]. At the least the opportunities for bribery are probably significant enough to have a severe effect on any contemplated management plan [97]. The victims of corruption may be responsible in part for perpetrating the system. Foreign

fishermen, apprehended by corrupt enforcement officials, may be willing to pay baksheesh, exorbitant or not. Their alternative is to become enmeshed in a foreign judicial system, facing an uncertain outcome with the strong possibility of imprisonment. It is worth speculating that the continued Thai distant-water fishing efforts in Southeast Asian 200 MEZs suggest hidden rewards accrue to both sides at some point in the enforcement process.

2. Escalation of Enforcement Process

Southeast Asian enforcement efforts have a strong tendency to escalate 200 MEZ interchanges into major confrontations. This appears throughout the enforcement process: intensive surveillance, apprehension prior to verification of violations, treatment of all violations as major, apparent presumption of illegality, and imposition of severe sanctions. Vietnam, Cambodia and Burma may deliberately tune their enforcement efforts to an intense pitch for deterrence purposes. In the process, however, an atmosphere is created in which nations expect to encounter or extend heavyhanded enforcement efforts. Such a mind-set while perhaps prudent, may heighten international sensitivities to an undesireable degree.

This projected increase in international sensitivity in ocean space may manifest itself in the frequency with which violence intrudes upon the Southeast Asian enforcement process. The violence is disturbing from several perspectives; to the extent it produces such an effect, it can be said to contribute to as well as manifest the escalation factor. First, on a currently academic level, the violence marks the regional process as departing measurably in the direction of harsher conduct from arrangements negotiated internationally. Second, on a practical level, the common appearance of armed encounters creates apprehensions about national behavior in non-ocean spheres as it exacerbates or creates tense international relations or jeopardizes stable ones. Also on a practical level, it is unsettling perhaps to observe nations without a naval or maritime tradition, suddenly playing in the major leagues as they impose their national will on areas of the ocean with strategic and commercial importance. It is unlikely that the international community will welcome regimes such as the recent one of Pol Pot deploying and commanding fast patrol boats in the South China Sea. By creating geopolitical uneasiness, the regional enforcement process contributes to global instability. Third, enforcement of ocean law in this region is disturbing in a jurisprudential sense to the extent the process indicates that resort to armed violence as a problem-solving device is preferred to legal decision making processes.

NOTES

1. "Statement of Area of Special Economic Rights," May 12, 1977, Vietnam (hereinafter cited as Vietnamese Statement), Translations on Law of the Sea (hereinafter cited as Vietnamese Statement).

2. "Statement on the 200 MILE Exclusive Economic Zone," January 15, 1978, Kampuchea, U.N. Doc ST/LEG/SER.B/19 at 37 (hereinafter cited as Cambodian Statement). At this time, the Pol Pot regime was in place, acting in a governmental capacity.

3. "Territorial Sea and Maritime Zones Law," Pyithu Hluttaw L. No. 3 (1977), U.N. Doc. ST/LEG/SER.B/19 37 (hereinafter cited as "Maritime Zones Law, Burma").

4. W.T. Burke, R. Legatski, W. Woodhead, National and International Law Enforcement in the Ocean (1975) (hereinafter cited as Ocean Enforcement).

5. Id.

6. Vietnamese Statement, * 6.

7. Cambodian Statement, ** 5, 6.

8. Maritime Zones Law, Burma ** 22, 24.

9. Translations on Law of the Sea, No. 69, of 47 (hereinafter cited as LOS).

10. Id.

11. LOS.

12. Translations; LOS, No. 55, at 16; the following islands, referred to as part of the "Cambodian Fatherland," are involved: Kony, Sovy, Wai, Buon, Smach, Kandal, Aknue, Makprang, Tang, Pring, Angkrang, Pou, Thmei, Ses, Ta Tiev, Samit, Rong Santem, Preach, Tonsay (sic).

13. LOS NO. 55, at 16.

14. Thai officials believe their fishermen have been targeted by Burmese enforcement authorities for harassment. The Governor of Ranong Province of Thailand declared four been assigned specifically to chase Thai trawlers when they were en route from Bangladesh waters with legitimate catches worth several million baht. This problem does not arise when the Thai trawlers travel toward Bangladesh. See, e.g., Id., No. 50 at 29.

15. Id., No. 58, at 16; No. 62, at 10.

16. 172. See, e.g., Id., No. 67 at 14. In the case of Indian fishing vessels, Sri Lanka's practice for a time was to issue a warning and then release the boats because of the close relationship between the two countries. Id., No. 42, at 31. That fishing incidents can lead to deterioration of such a relationship is evident. Violations of a 1976 agreement designed to phase out Indian operations in Sri Lanka waters led the government of Sri Lanka to warn India that fighting would result between the two nations absent Indian action to curb poaching by Indian nationals. At this time, the Deputy Minister of Defense and Foreign Affairs reported Sri Lanka naval patrol boats were seizing Indian trawlers at the rate of one per day. Id. Hostilities did develop. The Columbo Sun reported on January 3, 1978, that a fracas in the Polk Strait had taken place between the fishermen of the two nations. The Sri Lankan group, angered over perceived Indian poaching, attacked the latter, effecting the loss of 625 pounds of fish, the engine of the Indian vessel and the gear. Id., No. 69 at 39.

17. Id., No. 71 at 47.

18. Id., No. 38 at 15; No. 87 at 36.

19. See, e.g., Id., No. 39 at 17.

20. E.g., Vietnamese gunboats attacked a fleet of Thai trawlers 30 miles off the coast of Vietnam, leaving 3 Thais dead, 18 feared drowned and 18 captured, Id., No. 50 at 25; a converted Vietnamese gunboat without warning opened submarine fire on a Hong Kong shrimp trawler west of Hainan Island in the Gulf of Tonkin, Far Eastern Econ. Rev., June 17, 1977, at 25; a naval battle erupted between two heavily armed Kampuchean trawlers and a Royal Thai navy gunboat in January, 1977, LOS, No. 39 at 17; Kampuchean gunboats hijacked a Thai trawler off the Kampuchean coast, taking 12 to 14 Thais hostage, Id., No. 42 at 32; two Kampuchean gunboats fired machine guns at a convoy of Thai trawlers, killing two Thais, Id., No. 51 at 16; a Kampuchean attack on a Thai trawler in October, 1977, left one Thai dead, three wounded and several missing, Id., No. 61 at 7; three armed Kampuchean patrol craft fired at a fleet of Thai trawlers, despite protests by the Thais that they were unarmed and willing to comply with any demands of the Kampucheans; the Thais reported 11 killed, Id., No. 81 at 25; a Burmese gunboat in June, 1977 ordered four Thai fishing vessels to proceed with it to Burma; when the Thais tried to flee, the Burmese opened up fire and rammed one of the Thai ships with the Burmese gunboat. Two Thais drowned, Id., No. 49 at 12.

21. Id., No. 51 at 16.

22. LOS.

24. J. Marr, Fishery and Resource Management in Southeast Asia (1976) (hereinafter cited at Marr).

25. Interview with legal advisor to Thai Department of Fisheries (April 1979).

26. Id., see also Marr at 36; Thai fishermen continued to use purse seiners for Andaman Sea mackerel (Rastrelliger).

27. Thailand today ranks 10th in world fish production. Fishing News International, March 1979 at 18.

28. Interview with legal advisor to Thai Department of Fisheries.

29. Id.

30. Id.

31. "Agreement between Thailand and Bangladesh on Cooperation in Fisheries."

32. Thailand's public stance toward the Cambodian 200 MEZ probably does nothing to improve the situation. Thailand has assumed deliberately a policy of non-recognition of neighboring 200 MEZs. E.g., LOS No. 61 at 8, 13. See also Id., No. 41 at 38.

33. See, e.g., Letter from Gulamoydeen Mohd Hanifta, Ministry of Law, Kuala Lampur, Malaysia (February 2, 1979).

34. 4 Mar. Policy & Management 313, 316 (1977).

35. See n. 20.

36. LOS. No. 39 at 17.

37. Id., No. 58 at 14.

38. 4 Mar. Policy & Management at 322.

39. See Park, "The South China Sea Disputes," 5 Ocean Dev. & Int'l Law 27 (1978). Discussion of this issue, although of great significance to nations of the South China Sea regime, is omitted since it appears to be unrelated to violence as an aspect of 200 MEZ enforcement, although capable of generating violence in and of itself.

40. Valencia, "Southeast Asia: National Marine Interests and Marine Regionalism," 5 Ocean Dev. & Int'l Law 421, 459 (1978) (hereinafter cited as Valencia).

41. LOS No. 49 at 14.

42. Id., No. 58 at 14.

43. Far Eastern Economic Review. June 17, 1977.

44. LOS No. 55 at 16. Thai fishermen who survived a Kampuchean gunboat attack near Ko Kut island corroborated this, reporting their assailants used a converted Thai fishing boat. Id., No. 61 at 7.

45. Id., No. 50 at 49.

46. Id., No. 69 at 39.

47. E.g., Id., No. 69 at 39. Some vessels are on occasion released. For example, one Thai trawler was released under Soviet escort, Id., No. 79 at 51; some Japanese coral collecting boats were released following a request by the Japanese foreign ministry, Id., No. 46, at 29; an American registered yacht enroute from Thailand to the United States was released after the crew spent three months in jail on drug charges, Id., No. 69 at 37.

48. Id., No. 79 at 51.

49. Maritime Zones Law, Burma Paragraph 23.

50. Id., No. 50 at 27.

51. LOS.

52. See supra. at 9.

53. Maritime Zones Law, Burma, Paragraphs 21, 22.

54. LOS.

55. Id., No. 79 at 50.

56. Id., No. 42 at 37.

57. Id., No. 79 at 50.

58. Id., No. 50 at 27.

59. Id., No. 39 at 18.

60. Id., at 38.

61. UNCLOS III, Informal Composite Negotiating Text, Rev.1.

62. Id.

63. Id.

64. Id.

65. Id.

66. John Bosma, Business Development Section of The Boeing Company, Seattle, Washington, was helpful in providing his informed opinions for use in this discussion.

67. Armed Forces of the World (4th ed. 1977) (hereinafter cited as Armed Forces).

68. LOS, No. 50 at 25.

69. Armed Forces.

70. Stockholm Int'l Peace Research Institute, World Armaments and Disarmaments (1978) (hereinafter cited as SIPRI).

71. LOS, No. 69 at 60.

72. LOS.

73. E.g., Id., Quang Ninh has nine trawlers, each with 2,340 horsepower. It should be noted that international perception of Vietnam's dual purpose commercial fleet differs from that of Vietnam. Kampuchea news sources report that Vietnam is planning to mobilize and arm all state ships and boats and to disguise them as trawlers, see No. 71 at 53, in which this idea is articulated in the recorded confession of a captured Vietnamese coast guard private.

74. 235. Id., No. 69 at 47.

75. LOS

76. Armed Forces.

77. LOS

78. Id., No. 69.

79. See n. 44.

80. E.g., LOS, No. 81, at 25 ("equipped with machine guns and other sophisticated weapons"); Id., No. 39, at 17 (heavily armed").

81. Armed Forces.

82. Id.

83. SIPRI

84. E.g., LOS, No. 50 at 27. Burma and Japan entered into a fisheries agreement in 1977 by the terms of which Burma was to sell 300 tons of fish per month to Japan. The consideration for this was said to be in part the donated friage. Id., at 29.

85. Airgram from United States Embassy, Rangoon, Burma, to Department of State, Washington, D.C. (1977).

86. J. Marr, "Memorandum", ICLARM Law of the Sea Workshop, (November, 1978, Manila, Philippines) (hereinafter cited as ICLARM Workshop).

87. LOS, No. 67 at 14.

88. When an Indian trawler was apprehended in January, 1978, for illegal fishing, the crew members were arrested as illegal aliens and released to immigration officials. Id., No. 69 at 39.

89. Aderman, "Opening Address," Proceedings of International Symposium on Coastal and Fisheries Protection (Sydney, Australia, June 21-24, 1978; ed. Hawker de Havilland, Australia) (hereinafter Australian Symposium).

90. F. Christy, Changes on Law of the Sea and the Effects on Fisheries Management: With Particular Reference to Southeast Asia and the Southwest Pacific at 121 (July 27, 1978) (unpublished draft) (hereinafter cited as Christy, Draft).

91. Ocean Enforcement.

92. LOS.

93. See, n. 31.

94. LOS, No. 79 at 16.

95. Id., No. 91 at 22.

96. J. Marr, "Memorandum", ICLARM Workshop.

97. J. Marr, "Memorandum", ICLARM Workshop. Christy suggests bribery might be controlled by (1) determining regulations and agreements with regard to their enforceability and effect on opportunities for bribery and (2) increase the incentives for compliance by educating and giving a resource right to the fishermen. Christy, Draft. Recorded instances of bribery and corruption in ocean enforcement in this region range from allegations of abusive officials to bizarre episodes. Illustrations are drawn from throughout the region, not only the nations with 200 MEZs, since interactions occur among all regional nations, e.g., a trade union official from Singapore charged that Indonesians in customs and naval crafts had mobbed Singaporean fishermen. It is not clear whether the Indonesian assailants were bona fide officials or imposters, Far Eastern Econ Rev.,February 17, 1978, at 58; Mr. Khoo Khay Huat of University Sains Malaysia accused Malaysian officials of being susceptible to bribes, ICLARM Workshop; an arrangement was reported whereby Thai fishermen were granted access to Burmese waters in exchange for payment of a portion of the value of the catch. To insure compliance, Burmese observers were used aboard the Thai vessels. The observers allegedly accept bribes to report lower catches, Christy, Draft.

COMMENTARY

Dr. Ann Hollick
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Let me begin by noting that Terrin's paper was extremely useful and informative to me. The paper moves us into the world of bilateral political confrontation over ocean resources and away from the protracted, nuanced Law of the Sea Conference. It, therefore, stimulated some thoughts on what is actually happening with the process of creating 200-mile zones.

My perspective is that of a political scientist and necessarily differs from those of oceans lawyers and economists. From a political perspective, the application of the concept of enforcement to the problem in the Southeast Asian area has built-in limitations. Enforcement is a legal concept. It involves two components, policing and punishment. Policing, of course, includes surveillance, search and arrest. It presupposes a reasonably well defined set of prohibited activities and reasonably well defined sanctions.

What's interesting about the situation described in the paper is that in these countries, apart from Burma, neither the prohibited activities nor the sanctions are very well defined. In a sense, the situation is "prelegal".

On the basis of the data that is available in the paper, I would suggest that what we are talking about is the political use of force between traditional enemies. And, of course, in the case of Cambodia we have a very unique situation -- a government that is in jeopardy and directly threatened by its neighbors. A close look at the conflict suggests the analogy of street gangs drawing a line (in this case a line in the ocean) and daring others to cross the line. The line provides an opportunity for political conflict and violence. In this case it is very difficult to apply a legal framework like enforcement to the situation. Terrin did an admirable job in doing so and in extracting what was available in terms of legal generalizations about the enforcement problem.

Similarly, to argue economic rationality in this case, such as "these are inefficient uses of force," once again suggests a poor framework to apply to this fisheries situation. It is indeed clear that all of the countries involved would benefit from joint arrangements with Thailand which could transfer technology, set up joint ventures, or whatever. It is particularly ironic that, in an area where you have multiple species, it has proven impossible to work out satisfactory bilateral and regional arrangements. Multi-species fishing

areas are among those that specially need coordinated or cooperative management. The fact that Thailand could reach an agreement of mutual benefit with a remote neighbor, namely Bangladesh, that provides benefits for both parties indicates that political factors are at work rather than economic good sense.

Although economic benefits are neglected, the governments are extracting political benefits from the situation. The expansion of jurisdiction to 200 miles has served to exclude Thai fishermen. Moreover, the expansion has been competitive. Competitive jurisdictional claims are common. Chile, Ecuador and Peru, for example, expanded their offshore jurisdiction in a competitive fashion. Competition may be more important than the exclusion of the Thais. Indeed, a conclusive case has not been made that Thai fishing activity harms the fishing industries of Cambodia or Vietnam or Burma. It would be interesting to find out if it does harm the littoral states to determine the time basis for the offshore claims.

The political utility of drawing these boundaries in the sea and moving the national jurisdictions outward is that these countries succeed in moving conflict away from land areas into sea areas. Apart from the Thai fishermen, this allows fewer innocent civilians to be killed or injured as compared to border conflicts or incursions across national borders.

In addition to allowing conflict to occur in a realm where fewer people are injured, there is also a symbolic value that accrues from establishing a certain type of conflict with your foreign enemies. The goal of political solidarity can always be promoted by drawing attention to external enemies and to threats to your national territory or waters. Finally, as Terrin has pointed out, there is always the perennial political opportunity for bribes to officials who are responsible for the military activities involved. So on a number of political grounds you can make a case for the seeming irrationality of this situation.

Stepping back and looking at the broader implications of the paper, a number of thoughts come to mind. In the first place, it is interesting to recall that the 200-mile zone is clearly a Western Hemisphere legal concept. It evolved out of the hemispheric defense zones of 1939 that were intended to insulate the Americas from the conflict in Europe and was then developed by Chile, Ecuador and Peru. Obviously, most of the countries in the Western Hemisphere are coastal and most of them front on open ocean. What is intriguing is that the nations in the Southeast Asian area are using the concept and size of the 200-mile zone to apply to their offshore situation without adapting it to their special circumstances or their special situation.

What is also interesting is that with the exception of Burma, these Southeast Asian nations have not adopted the content of the ICNT. This raises the question of what such actions mean for the validity and future of the ICNT. Does this regional situation give us any clues as to whether or not the ICNT will or will not be widely adopted, assuming that it is finalized in a treaty?

My response to these questions is that we must be very circumspect about generalizing from this situation -- not only because of the unique political factors at work in the area but also because Vietnam and Cambodia have not been regularly represented at the Third Law of the Sea Conference. Burma, on the other hand, has participated at the Conference with some regularity. And Thailand has participated in UNCLOS III but is not going to adopt the provisions of the ICNT until it has to because they would be detrimental to its distant water fishing interests. This suggests that the application or the use of the text emerging from the Law of the Sea Conference reflects nonparticipation in two cases, participation in one case, and particular interest in the case of Thailand.

You could generalize from the foregoing and say that where a state has participated in the Law of the Sea Conference and where it is compatible with its particular interests, its local situation and its international interests, a state may be expected to accept part or all of the ICNT. Where there is a dependence on international commerce, on global shipping or on tourism (namely where a state has developed significant international interests), we might conclude that a state is more likely to adopt part or all of the ICNT. Drawing this conclusion from the one case of Burma is a very slim statistical reed to rely on. So I reiterate that it is very hard to generalize from this unique situation.

In conclusion I might mention my overall reaction that emerged from the paper's description of the situation in Southeast Asia. Although the governments of the area may be deriving political benefits from the conflict over offshore claims, these are outweighed by significant economic costs. A better approach would be a bilateral or regional effort to harmonize national claims as a basis for better management of offshore resources. Such an approach could be based on the ICNT before or after it is formalized.

Thank you.

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I thought the paper was an excellent treatment in identifying specific conditions affecting enforcement in a very important region of the world. And what I wanted to try to do was to ask what one would learn from this, trying to generalize about other areas. And I found out there's probably not much one can say, which is probably just as well.

It does seem to me -- it's very clear, as Ann has emphasized -- that the general political relationships among the states concerned have had a great deal to do with enforcement practice in that region. I doubt if that's really very unusual either. That is, that this is a rather specific instance or a particular instance of a broader point. The broader point is that enforcement practices are affected everywhere by a great many different variables. So that it is really difficult to learn an awful lot that can be applied in other regions.

It's clear, for example, that the skills, the training, and the resources that can be brought to bear for enforcement are going to vary by nation around the world. And we had, in fact, one suggestion earlier in the week in a commentary from the floor about the problems of the island states of the South Pacific which are quite formidable when it comes to enforcement and pose for them difficulties that, while they may be shared by some states with long coastlines, are very particular to them.

Among the factors that seem to me to influence the capacity to enforce and the national policies and practices that are adopted, the size of the ocean area involved is a major factor. But there are a number of others. And as I say, they seem to me to differ so much around the world it's very difficult to make any generalizations about the experience that Dr. Hanson has described.

We haven't talked at all, for example, about what's being enforced. And quite clearly, that's a very important factor. There are a range of ocean activities involved. We've addressed this morning only the question of fisheries enforcement. The kinds of resources that are needed for other types of enforcement activities may be quite different from those needed for enforcement with respect to fisheries.

The assets that are available to coastal nations for enforcement plainly are different from one nation to another.

Some nations have infrastructures that can be adapted to the addition of a very large region for their law enforcement practices. Some have none and have a difficulty in creating such an infrastructure, and in some instances have not been very successful at doing it.

The resources that are involved, the kinds of fishery resources for example, may have great importance for the type of enforcement effort that has to be mounted and the kinds of resources that have to be employed. Some nations have a history of enforcement at sea. Other nations do not, and they're going to have to acquire it rather quickly. The proximity of other areas of national jurisdiction is also a key element in enforcement in terms of the practices that will have to be adopted.

Now it seems to me that once it is said that all these variables are involved, what difference does it make? And my conclusion again is that it's very hard to reach any generalizations about the matter. And that suggests something that may be a little provocative, namely, how do we move from a treaty which purports to prescribe principles that have to be followed by everybody to practice? The Bach fugue that Bernie Oxman talked about the other day may be a little bit out of tune when we try to make that transition, if the resulting practice even resembles the Bach fugue at all. But if we want to know what state practice is generally, I think what's obviously required is to look at every state to see what it does. We're not going to learn it by specifying conditions in one part of the world.

One generalization I think that can be made from the description Dr. Hanson has given and also from what we know generally, and that is that not very many states are complying, at this stage at any rate, with the requirements of the ICNT for fisheries enforcement. I would be a great deal surprised if there's one state in the world that complies with those requirements. There are some people who have said that a lot of the 200 mile zone legislation generally comports with the understandings that are being embodied in the the ICNT and in the ultimate treaty. And I think that, with respect at least to fisheries enforcement, we've seen from this paper that in that part of the world they depart very substantially from the ICNT principles.

But I think it's far more generally true, if, for example, you take the country I'm from, the United States, that the ICNT requirements are not satisfied by our legislation. The Fishery Conservation and Management Act not only provides for criminal penalties by imprisonment for fishing violations but it does so in an openly discriminatory manner by limiting the imprisonment for fishing violations to foreign fishermen only. I don't know whether any have actually been imprisoned yet,

but according to the legislation at least, they're the only ones who can be imprisoned for a fishing violation.

That is interesting because in U.S. experience the big difficulties have come not with enforcement of fisheries legislation vis-a-vis foreign fishermen but against domestic fishermen. Indeed, in some parts of the ocean around the United States, there appears to be virtually no effort to enforce because there are such wide-spread violations of the law. I know in the part of the world I come from that was true for about a year.

I doubt that one can conclude from this that threatening imprisonment accounts for the general pattern of foreign compliance with U.S. fishing legislation, or that you can conclude failing to threaten imprisonment accounts for the lack of compliance by domestic fishermen.

I wanted to make one other comment. We've heard here several times, if my recollection is correct, about the utility of the 200 mile economic zone, and seeing that we're sitting here in the Center for the Economic and Social Studies of the Third World, that the economic zone serves Third World aspirations. And I guess I'd like to be corrected, but my understanding of the way the negotiations have resulted in the creation of the 200 mile economic zone at the Law of the Sea Conference is that, insofar as it relates to remedying maldistribution of wealth, it has signally failed. It is now generally believed that the creation of 200 mile economic zones most benefits the richer portion of the nations and that among the Third World countries, while some of them (notably Mexico) have benefited from the creation of 200 mile economic zone, many of them do not.

And I suppose one of the things that suggests is, if such generalization is so, that one of the needed research efforts is to look at how we remedy the increased disparity in wealth distribution that is resulting from a 200 mile economic zone. How do we make the arrangements so that there is a better distribution coming out of this long, involved process that we've been going through for the last decade?

Incidentally, what I've said about wealth can also be applied to knowledge and information. These also are going to be poorly distributed, or more poorly distributed as a result of the restrictions placed on scientific research in the economic zone. Whether or not that was the intent, it's at least my expectation, as I think it is of other people, that will be the result of the creation of these zones. So the calculus of cost and benefit may well be to the disadvantage of the Third World resulting from these negotiations. I'd like to see that point debated further if anybody wants to do so.

GUILIO PONTECORVO: I think that you put your finger on a most crucial and important point. There is a major research task in the area of economics, and that is to add up the results of the conference. The conference has been in session for ten years. Who are the winners and who are the losers? And this is by no means obvious, and it's by no means obvious what is won and what is lost. And we have precious little information about that at this point and time. Hopefully, it will be a pursuit for a number of scholars in the years to come, and hopefully there will be generous government grants to support such work.

WILLIAM BURKE: Well, I don't have a study in my hip pocket which documents the impact of the 200 mile zone in remedying what I assume we will agree is an existing maldistribution of wealth around the world. The assumption underlying what I said was that the areas involved that are being distributed in terms of size proportionally benefit a considerable number of rich, developed states and do not provide, in terms of area now, benefits to Third World states.

Now that doesn't get one very far. Really, I guess the question is, what are the resources that are found within those areas and how will they be shared among states in practice? And I don't have any study indicating what the future is likely to be with that.

I do believe that in terms of what we now know a very large part of the economic zone goes to developed states, and that they're expected to reap the benefits from those areas. I don't believe a number of developing states, a considerably large number of them, have areas that are either very large or expected to contain resources that will be beneficial to them.

Now that's totally apart from the cost of using this. And this was one of the interesting conclusions that I thought Dr. Hanson's paper dealt with -- the costs involved in Southeast Asia. Given the political context involved, they are very high, one assumes -- very high. We're talking about a lot of people being killed.

I have doubts with respect to living resources that the United States is getting any really great net benefit from the 200 mile economic zone even though we have very large and valuable living resources in the 200 mile zone off our coasts. Professor Pontecorvo might comment on that.

But I think I raised the question because I asked to be corrected in the conclusions that I expressed. And I'd still like to hear the arguments on the other side.

LEONARD LEGAULT: I'd like to congratulate the main speaker and the commentators for the very interesting discussion on the potential for conflict which the new Law of the Sea offers in those particular areas of the world where land hostilities are being transported out to sea, so to speak. I think that is a very important area requiring study. But I would like also for this group and perhaps for academics and bureaucrats in the future to devote particular study to the problems of enforcement from the perspective of the benefits or lack of benefits which coastal states are obtaining from their extended jurisdiction.

I say that because I have just returned from two years in West Africa. And I was struck there by the fact that even those West African states with relatively rich living resources off their coasts are, so far at least, obtaining very little in the way of benefit. And unfortunately also, it's only too apparent that many foreign states are violating the zones of some of these West African coastal states with virtual impunity.

I think we're going to need to develop new approaches to the problems of enforcement. And in that context, I think it's very interesting that in the recent COFI meeting, an initiative was put forward which I think will lead to a system of international reporting of violations of coastal zones and coastal regulation. I think that this points the way towards various forms of international cooperation which ought to be explored and which could do a great deal to bring under better control those problems of enforcement from the point of view of efficiency, of cost, and of nature of enforcement action to be taken. And, of course, the paper this morning dwelt a great deal on the question of the nature of enforcement action which was taken, a very unhappy subject in that area of the world, at least at the moment.

I think that Professor Burke was very wise in pointing out that different problems of enforcement arise with different types of fisheries. To think of only two outstanding examples, you have salmon on the one hand which poses some very special enforcement problems, and you have, of course, tuna.

Tuna gives rise to special enforcement problems for two reasons. One, of course, is that it seems a subject that we thought was closed is being reopened, namely, the jurisdiction of the coastal state over tuna in its 200 mile zone, which, of course, is balanced on the other hand with the requirement under the ICNT for international cooperation in the management and conservation of tuna stocks both within and beyond the 200 mile zone.

Another very special kind of enforcement problem arises for states like Canada, Argentina and others, which have continental margins extending beyond 200 miles. Now it's a

very simple process for a foreign fishing vessel to park just outside the 200 mile zone and fish in an unregulated manner, to overfish in fact, and to do a great deal to undo the conservation and management effort of the coastal state within its 200 mile zone because the stocks being fished are, of course, the very same ones -- the so-called straddling stocks. And this is an area which I think is going to require a great deal of further study nationally and internationlly and perhaps will have to be re-examined in keeping with the proposal made by Argentina at the next session of the Law of the Sea Conference.

I would like to close then by saying there is perhaps an overriding consideration to be brought to bear in looking at these problems of enforcement and fisheries relations between states generally. To do a balance sheet of benefits and gains and costs of the 200 mile zone will be a complicated task and one which, in keeping with suggestions already made this morning, I think certainly will have to be done. In doing that, I think we're going to have to take political cost into account as well.

I think it would be a great tragedy if in areas of the world, quite unlike the area being discussed this morning, we were to find that all the years of effort to bring the resources (the living resources) of the sea under rational management for the greater good of the coastal population, we were to find that bilateral or regional relations were to deteriorate to a point which I can only anticipate as being very nearly disastrous. I think that this is perhaps the overriding factor that will have to be taken into account in drawing up the balance sheet. And I think it's a factor which all of us ought to bear in mind at all times before we reach that point. Thank you very much.

WILLIAM BURKE: I wouldn't want to reach the conclusion that the whole continent of Africa has benefited from a 200 mile economic zone either, and I don't think I suggested that. What I'm suggesting is that there's a fairly considerable importance attached to the empirical question of what the effect of the creation of the economic zone is on distribution of resources. I don't think that question's been answered, and I don't think it will be answered by making declarations about it. I didn't propose to make any. I think it ought to be a subject of considerable study.

And I think that the purpose of that is to reach conclusions, which I think what Len Legault was suggesting: was the need to develop the kind of international arrangements to make the most beneficial use of the area because it exists or is going to exist, and that that needs to be done.

AMBASSADOR HASJIM DJALAL: Thank you. My name is Hasjim Djalal. I'm from Indonesia. It seems that I'm probably the only one from Southeast Asia in this room, and that's why I'm very much interested in the discussion this morning, especially with the paper read by Ms. Hanson.

The paper picked up the fisheries problem in Southeast Asia and the picture painted, in my mind, is somewhat blacker than what it really is. There may have been difficulty between Thailand and Vietnam or Indochina with regard to this particular issue. But I think one should not forget that the issues between Thailand and Vietnam or Cambodia are also very much political, and maybe because of this political colour that exists in Southeast Asia the problems between Indochinese countries and Thailand have become somewhat black in the picture that is being painted by Terrin (Hanson).

Now I think the problems there are actually threefold. Aside from the political problems that do exist between Vietnam and Cambodia on the one hand (among themselves they have problems also), with the other countries in the region, especially with Thailand, there is also the problem of resources themselves.

I think we all know that the fisheries resources in the south China Seas is the problem that Ann Hollick was mentioning. It's a multispecies stock. It is a stock which is not generally usable in the international market like tuna and so forth, but various stocks that affect the local population. I think one of the experts has made a calculation that there are more than 200 species of stocks in that water which are not attractive to international fish markets but of concern to the local population.

Here are the big issues -- the issues of resources. I think Terrin Hanson was right in saying that Thailand was one of the most advanced fishing nations in the area. As far as we are concerned, we don't call it a distant water fishing nation. We call it our neighbor. We have somebody else in mind when we talk of far distant fishing nations.

(Laughter)

Now this neighbor of ours, it is much more developed in fishing. But unfortunately, the technology and the equipment they have developed are for the type of fisheries resources that affect other local people. You're certainly right in saying that within the last ten years at least -- I think it must have been since 1963 or 1964 -- in cooperation with the Federal Republic of Germany, (they have developed a tremendous fishing capacity. Now, I don't want to blame the Federal Republic) for this. But one thing is true -- their development,

for instance, is in trawlers. These trawlers affect coastal fishermen because they trawl fish along the coast.

Now, I can say, for instance, Indonesia has strict rules on trawling fisheries. Some categories of trawlers are prohibited within a certain distance from the coast. Some of them are allowed, depending on their size.

Thailand, as a result of this cooperation, has made a great stride in the development of a tremendous amount of trawlers. They create problems with their neighbors because they fish by trawlers along the coastlines of the neighbors, while the use of trawlers in those particular countries has been prohibited or limited. How can you cooperate in such a situation?

I can use that example very clearly with Indonesia. You didn't refer to Indonesia so I can say something about it. We have had long negotiations with Thailand on fishing cooperation; and I think this will probably answer your puzzle when you say, why is it not possible to cooperate?

We have had a couple of surveys. The Indonesian Thai fishing surveys have surveyed practically all Indonesian archipelagic waters together to find the resources, and to cooperate on the resources. The finding was very striking in a way, in the sense that the Thais, because they have surplus in the technology of trawlers and in trawler fishing, always insisted on and proposed cooperation with trawler fishermen along the Indonesian coast, which we are not interested in because we have prohibited them. We are offering cooperation in other types of fisheries, such as longline tuna, which we have not yet developed but in which there are so many possibilities for doing so. But they are not interested because that is not the direction of the development of their fishing industries within the last ten or fifteen years.

So it is not the lack of desire to cooperate. It is not the lack of desire to make the maximum use of the resources available. But it is in many cases that the coastal situation does not permit such cooperation because the fact is that the direction that the Thai fishermen have been taking within the last ten to fifteen years is more or less concentrated on how to catch fish around their neighbors rather than how to catch fish in a much more grandiose manner which is important for the world market.

So we are trying to do our best still on that one. And perhaps, if I can say it now, that is one of the reasons why Indonesia at this particular moment has not yet made an announcement of its economic zone because of various neighborly considerations. I wouldn't say that distant water fishing nations are not important; both of them are important to us.

in the ASEAN. And we should take into account their interests and vice versa. And we are maintaining the closest possible discussions on those particular issues.

The second thing I would like to comment on is the question of enforcement. I think you're certainly right and I think Professor Burke is right -- that enforcement is an expensive one. We have always been told, how could you enforce that, et cetera. Jokingly, I can also say that when we declared independence, people outside were asking us, how can you defend your independence? -- you have no means.

Now if you start thinking like that, in the sense "how can you defend something -- you have no means," we would never do anything. Just like we will never be independent. We would never had declared independence, for instance, if we had to think of the means and the capacity to defend the independence. If you compare, for instance, the capacity of the newly struggling countries declaring their independence facing the big colonial powers at the time, they would be finished in a couple of days. But that was not the issue. The issue here is, what do we think is important for us?

So while recognizing the enforcement measure, I think it is appropriate also for us to see that we should not be concentrating the enforcement simply on the material things that we have. I can say, for instance, that we have made a study in Indonesia with regard to enforcement.

If we follow the Western system of management, we study the requirements of the 5M, -- money, men, material, methods, and management for the enforcement. Those are the things that are required for enforcing something. And if we study each one of them -- how much money we need; how much material (such as planes) we need; how many new men are needed; what kind of methodology is required; what kind of management system is needed; and so forth -- and we have to have all those before we start doing something, then we really will never declare our own economic zone. When we start counting how many ships are required for a square mile of waters, I can say that our study indicates, for the Indonesian archipelagic waters, we would require about 28 airplanes with a radius of 1,000 miles each. And when we increase our men, we increase our ships, we increase everything, it will come up to almost a billion dollars.

Now that is not the way we go about it. I guess only the rich country will benefit in the enforcement and in the whole system if we begin to think like that.

Now how do we do it? There are three things here which may not have been observed.

First, we settle the boundary problems with the neighbors. We try to do that as much as possible. A boundary problem is, of course, very much a regional matter. Once we establish the border, at least we might reduce the need of having to create monstrously big enforcement mechanisms.

The second, we develop cooperation. This we are trying to do with the fisheries agreement, and with all regional problems that might require cooperation in environmental protection, and so forth. We are trying to do it, and I think it is helpful in many ways.

And third, of course, we use the existing available enforcement agencies. Terrin Hanson mentioned that there are some setbacks in multiplication of the agencies involved here. I think that is true. It's important to coordinate various agencies. But we have calculated that it is much cheaper for us to coordinate the various enforcement agencies than to create new ones.

It is a lot cheaper. We calculate that by so doing, it will cost us much less; and I think it would only cost us about $14 million if we coordinate the various agencies for the protection of the zones which we are now claiming or over which we are now exercising our own jurisdiction.

So to come to the end of this, I think here I would like to say that Ann Hollick is certainly right in saying that there are needs for countries, especially in Southeast Asia, to try to coordinate as much as possible their marine and ocean polices for the purpose of making enforcement easier and cheaper. I only wish that that could as easily be done as said in view of the fact that, as you know, Southeast Asia involves two basically different social and political systems, which makes it somewhat difficult for us to cooperate.

CHRIS PROPOSIVOLOW: I have a question in my mind, and I hope to be within the province of the discussion now. The question is broader. Coastal states introduce legislation to affect their rights within their zones of jurisdiction. Part of that legislation is criminal law, which means that the coastal states declare many activities, acts or ommissions, to be criminal offenses.

Now the question has three points. Point one: is it in conformity with international law for a state to differentiate penalties between nationals and nonnationals? To say, "I have penalty A for the nationals and penalty B I use for foreigners."

Point two: is that in conformity with international law to differentiate between foreigners themselves -- for neighbors

to have penalty A, for other nationals, far away, further away, another penalty?

And point three: is any penalty in conformity with international law? Say that a state would introduce a law to the effect that the death penalty is to be imposed on some activities of over-fishing. Is that in conformity with public international law, and I refer only to customary law of course. Thank you.

WILLIAM BREWER: My comments are personal and based mostly on some experience as a government lawyer in enforcement activities prior to the law of the sea experience.

I thought both Dr. Hanson's paper and the comments of the panel were extremely useful in pointing out some of the unique problems of law enforcement in this area, problems which vary enormously from one country to another and from one fishery to another. But there is one aspect of this problem of enforcement that I'd like to comment on.

In the experience of the United States and in my own view, it is not a problem of enforcement against nations. It's a problem of enforcement against individuals. Nations, by and large, can be expected to cooperate, in my judgment, with the conservation programs of coastal states, perhaps not in the short run. And there are going to be aberrations arising from political factors such as we have in Southeast Asia leading to a deterioration of the situation. But in the long run, it's to the advantage of the distant water fishing nations to cooperate with the coastal state. And you can see that at work.

I believe that these distant water nations are attempting to enforce the coastal state's rules against their fishing skippers who violate them. But even a cursory knowledge of fishermen will lead you to the understanding that fishing skippers are somewhat alike all over the world and do not like to abide by regulations, whether they be of their own flag or of the coastal state, or anyone else. Catching fish is what they're out there for. And if the fish happen to be in a prohibited area or of a prohibited species, they are still going to be tempting to the skipper; and fishing skippers are going to succumb to that temptation. You're going to have the normal sort of law enforcement problems that you have on land complicated only by distance and the problems of apprehension.

The national issues about what stocks can be fished for will in the long run be settled by difficult diplomatic and technical negotiations leading to bilateral and perhaps a few small multilateral fishing agreements between the coastal states and the distant water fishing states. Now what all that means is that the problem of enforcement is a problem of individual

rights -- individuals who are accused in either criminal or administrative proceedings of some violations of law. And those are going to vary widely from state to state. And you have the same problems that international lawyers are familiar with with respect to international rights involved, and it's going to be very hard to expect complete uniformity in that area regardless of what we find in any future Law of the Sea convention.

The point, of course, arising from that is that enforcement is going to be accomplished most effectively with the cooperation of the flag state and of the distant water fishing state. And that means things like observers. It means special equipment and so forth on board the fishing vessels.

My advice to everyone who's thinking about this problem over the long run, be they political scientists or lawyers, is to assume that enforcement is going to be effective. And in this I agree with Dr. Djalal that every state must make that assumption and must make the rules that they feel are appropriate even though enforcement at this time is going to be difficult. But the technical progress is such that within a relatively small space of years, even a relatively poor coastal state is going to find ways to enforce its regulations against the fishing vessels.

If anyone here who's involved with the law of the sea is concerned that his employment is going to diminish or terminate if and when we get a convention, I'd only say that in my judgment we're going to have more work than ever. And negotiating bilateral agreements in the fishing area in the future is going to be very difficult. These are going to have to be different not only with each nation but with each fishery. As Mr. Legault pointed out, even in negotiations between Canada and the United States you have a wholly different problem between the fisheries of each coast and between different species.

So I guess I'd sum up by saying that for once I think that the scientific problems in this area are more difficult than the legal problems. As always, we like to say that the scientists are doing all these things that are racing ahead of the legal framework in which they exist. But I think in this area we're going to find the problems of managing stocks, the scientific and technical problems, are more difficult than the enforcement problems in the long run.

So I'm optimistic for once on the legal end of enforcement. I think it's going to be a problem of human rights. The real problem is to preserve the resource base out of which these problems arise.

CHOON-HO PARK: I have a specific question to Dr. Hanson with respect to piracy in Southeast Asian waters. We occasionally hear about the problem of piracy in that region, particularly in the Gulf of Thailand. Reports on pirates come up more frequently at election times when politicians with fishing constituencies pledge that if elected they will eliminate pirates. I think it's difficult to do so because one of the most effective ways to eliminate pirates is to set fellow pirates, not politicians against them. We haven't heard about pirates looting oil tankers. It's probably difficult to drink oil, and crude oil in the hands of pirates would be difficult to convert into cash.

But my question is, to what extent could the acts of violence or looting fishermen by other fishermen fall under the traditional definition of piracy? Or is it simply a case of some pirates being more legal or powerful or official than others?

EDWARD MILES: I wish to make both a general comment and a spcific comment on Dr. Hanson's paper.

It's undeniable that the change in the world ocean regime is one of the major transformations of our time. And there are, it seems to me, two sets of policy questions that are generated by the change of regime. One set has been referred to by a number of people -- first Bill Burke and then Giulio and others -- on the implications for the distribution of wealth. The other set has been raised by Dr. Hanson's paper and has been alluded to by Len Legault in his comments. And these have to do with the world order implications of the change of the ocean regime. And I really want to deal primarily with those -- the world order implications. It's possible to discuss the enforcement problem in both contexts, and so I want to discuss the enforcement problem with respect to the likelihood that enforcement inside and outside the economic zone will generate more or less conflict over ocean issues than we have seen in the past.

It seems to me that world order connections between the new regime and ocean use come out of several dimensions. One dimension has to do with the resource policies that are actually implemented by coastal states and other states using living and non-living resources in the world ocean. And the resource question has to do both with the economic zone per se and the area of the ocean and the seabed beyond national jurisdiction.

With respect to the economic zone, it seems to me that we will be initially in a period of transition that will be particularly critical especially with respect to fisheries. We're seeing around the world, in terms of adjustment to the changes in the practice of fisheries, a large number of attempts

to find accommodation between developed distant water states and developing coastal states which happen to have significant fisheries resources off their coasts. Whether or not the developed distant water states realize it at this point, the nature of the agreement and the utility of the agreement as it appears to the developing coastal state will very largely determine the nature of the relationship in the next phase and whether or not the relationship creates more conflict or decreases it.

If the developing coastal state, after a period of time, finds that it, in effect, has been had, if the relationship created is not a fair one and cannot demonstrably be shown to have been a fair one, then I think we will have very severe problems. This is particularly the case for coastal states which are primarily dependent upon certain stocks of fish off their coast and which have few or no alternatives for generating income for national development.

At the same time, it does seem to me that the obligation doesn't rest simply with the developed distant water states, but it rests as well with the developing coastal states which must produce the national will and necessary resources to make use of the opportunities that it now has. In some parts of the world, there are striking examples that this in fact is being done. In other parts of the world, there are equally striking examples that it is not being done. And it seems to me that seeds of difficulty lie in those places as well.

There's another dimension in which fisheries may generate conflicts in the future, and this is between developing coastal states in different parts of the world. I have in mind developing coastal states with significant living resources off their coasts and developing coastal states which see themselves as being geographically disadvantaged and which also rely upon fisheries resources or have relied upon fisheries resources both for protein consumption and for the generation of foreign exchange.

In the case where a developing coastal state is faced with the possibility of agreements between itself and developed distant water fishing states or between itself and developing distant water fishing states, obviously the clearer choice is for being with the developed, because benefits can more easily be maximized in that direction. But this leaves the developing disadvantaged coastal state with a significant problem which, it seems to me, demands a certain kind of sensitivity on the part of the developing coastal state to handle it. Otherwise, its entire foreign relations with the disadvantaged coastal state are likely to be affected.

The second set of problems has to do with delimitation. And I'm not going to deal with these in any detail because

they've already been dealt with. But it seems to me that where boundary conflicts exist in a situation that is already touched by major hostilities, as in the eastern Mediterranean or the South China Sea or certain parts of East Asia, then the likelihood that delimitation of the economic zone and the continental shelf would lead to conflict seems to me to be high.

The other dimension in which new policy is likely to generate conflict has to do with pollution, it seems to me, and ship generated pollution in particular. Ed Gold's paper of a couple of days ago reflected very well the demands within certain coastal states -- notice I did not say of certain states (and these demands exist in the United States as well as elsewhere). But they reflect a tendency to extend coastal state control over ship generated pollution further and further from one's shores.

If in fact these tendencies proliferate around the world and in terms of state practice overturn the very delicate practice formulated by Ambassador Vallarta, then it seems to me we have a more dangerous world than we had prior to that. So, I do not see that it is in the interest of the global community to facilitate the extension of these kinds of demands.

Now my last comment has to do with the specific point in Dr. Hanson's paper and she already knows we have a disagreement on this because we have discussed it before. And that relates to her generalization about navies. I'm not now and never have been a member of any naval establishment and cannot be looked upon as a protector of navies. But it does seem to me that it is not correct to suggest that once navies are committed, one suddenly goes almost automatically up the ladder of escalation.

There are two variables at work here. One is the nature of the relationship in the region in question and whether or not the enforcement relationship over living resources in effect reflects surrogate warfare between the players. And Dr. Hanson, in effect, mentioned this point, which I think invalidates her conclusion.

I think the other critical variable is the level of professionalization in the navy. In fact, most of the evidence we have around the world on enforcement involves navies. And most naval officers, whether they come from developed or developing countries, tend to dislike having responsibilities for enforcement over ocean resources just because these responsibilities aren't the normal kinds of responsibilities one gives to navies.

And so I think that in cases where one does not have highly trained naval components, then committing them may increase

the danger of armed conflict. But I don't think the problem lies with committing navies, per se.

HIDEO TAKABAYASHI: I agree with the former speaker that enforcement is treated on an individual basis. And when we speak about the enforcement problem, we should pay attention not only to the problem of civil or criminal penalty but also to the problem of administrative actions toward foreign fishermen.

For instance, in some countries foreign fishermen are required to pay extra charges, cut off their quota, but judicial review is not assured to such kind of administrative actions even if they are fishing within the jurisdiction of that state.

LEONARD LEGAULT: I have to apoligize for speaking twice this morning; but I was struck by some of the concluding remarks of Ed Miles, whose remarks generally I thought were some of the wisest I've heard in the conference as a whole. Ed mentioned Canadian initiatives in the field of enforcement of marine pollution regulations and I'm beginning to wonder whether there may not have been some misunderstanding about the Canadian position on the enforcement of marine pollution regulations. And I think I can clarify it very quickly and very simply by saying that that position is reflected in the provisions of the ICNT and that we are examining our legislation in Canada at this time to insure that it will be in conformity with the provisions of the ICNT when the ICNT becomes the new law of the sea convention.

Now within that perspective, within that framework, of course, we believe there can be room for novel approaches that would be completely consistent with the basic legal foundation set down by the new law of the sea convention. We believe that there will be room for cooperative enforcement initiatives, for instance, with the United States as our neighbor. There are many possibilities that can offer themselves for novel approaches to the enforcement of marine pollution regulations while remaining completely within the letter and the spirit of the ICNT. And if there are any misapprehensions here on that question, I'd like to lay them to rest.

TERRY CHILD: I'm going to speak very briefly and very slowly. I appreciated all your comments. I think I learned something from all of you, particularly of course, Ambassador Djalal. I have just a few scattered notes here.

Dr. Vallarta, I agree with you that we will have (all these countries have) the right to declare a 200 mile zone, and it's not necessary to have the power to enforce that right

in order to have the right. But philosophically it's my belief that without the power of enforcement, there is no law whatsoever. And that's just my personal jurisprudential bent. That was one point.

Another point, and I'm not sure to whom this one is directed. Thailand is at least one Third World country which has not benefited by the extension of jurisdiction to 200 miles.

For Ambassador Djalal, I should mention that I have written another paper in which I use Indonesia as a counter example to the situation on mainland Southeast Asia. Certainly Indonesia has been the most active of South Asian nations in working on delimiting the boundaries in the ocean for everybody's benefit and also has worked to coordinate enforcement agencies. I would like to predict that perhaps Thailand will be cooperating more in the future. Certainly historically Thailand has a history of cooperating with whomever when it's been to the advantage of that nation in non-ocean realms.

And for Mr. Brewer, I agree with you that the problem of enforcement is, of course, one against individuals. But it seems to me that individuals' actions can be helped along greatly by national policy, and I'm thinking of two things perhaps. One, if the Thai government is in fact subsidizing illegal fishing; and two, national legislation which, for example, provides for reimbursement of flag state vessels when they've been seized by other coastal nations. That certainly is a national policy which can influence individual actions.

I agree with both Mr. Brewer and Ed Miles that this is a transition period. And what we may be seeing in Southeast Asia is heavy-handed enforcement in order to show that these nations mean business. I know that both Australia and New Zealand in another part of the world have made this official enforcement policy at this time.

For Dr. Park, I'm not certain to what extent... if I understood your question correctly. It would be impossible for me to say to what extent the violence we're witnessing now in Southeast Asia is just traditional piracy under cover. But I do think that some of the main targets of piracy in that area have been interisland traders and not fishing boats. I just don't know, I'd have to say. But thank you for raising the issue. It's an interesting one.

I guess for Ed, I know we disagree on the use of the navy. But I do know that at least India and New Zealand have tried using the navy for resource regulations, and both those nations found the use of naval forces for that reason highly unsatisfactory. Perhaps not for the reasons which I suggest, maybe just deployment of resources problems, but both of them have backed off of doing that.

ANN HOLLICK: A couple of things Mr. Legault said I found particularly interesting, and I just wanted to say something about them. One was a comment that he made about the importance of rational management for the good of coastal populations. And I think that that is indeed the basis for the 200 mile claims and I think that it does raise rather starkly the distributional issues that Professor Burke flagged at the beginning. We are talking about benefiting the particular populations with areas that were formerly international.

There was an additional problem that you pointed out. Leonard, namely the problem of over-fishing beyond 200 miles. What I find intriguing about a 200 mile claim or 100 mile claim or 300 mile claim is that whatever the size of the area, activities beyond or next to that area are always going to affect the management of resources in that area. And I think inherent in that situation, of course, is the tendency for coastal states to then want to move their jurisdiction further and further out. And it's interesting that Argentina and Peru are other countries that have pointed most cogently to this problem -- all countries that front on open ocean that have the possibility of extending their jurisdiction further outward for some purposes or in some fashion.

And I think that this prospect of further extensions highlights even more the distributional consequences of national extensions of jurisdiction. If there are inequities built into a 200 mile zone situation, then we can anticipate that those of us who are located in the Western Hemisphere will be particularly fortunate as contrasted to the rest of the world and that the distributional problems will be worsened by further efforts to push national jurisdiction out in one form or another.

The only other point I wanted to make was with regard to something that both Ambassadors Vallarta and Djalal had mentioned, namely that they are often told that it's important to be able to enforce before you make claims and there's an implication that somehow there's a condescension in that point. I would argue that in a way it's a statement of fact rather than anything else that unless other countries agree with your particular claim and accept it, they are going to be enforcing what they consider, or exercising what they consider to be their international rights. And they will be operating according to their understanding of international law, and the coastal state will be operating according to their understanding of the law that they have just created. And in a sense, it puts the coastal state in a very difficult position because if the coastal state can't enforce its claim against other states that are exercising what they consider to be their rights, then there are certainly political costs, certain embarrassments that are inherent in that situation.

So I would just point out that obviously it's costly, but it would be desirable, and I suspect it has something to do with the delay of the Indonesian efforts to proceed with their claims and the process of dealing with the Thais, that it usually is desirable to have some capability to enforce unless you have the agreement of all the relevant states to cooperate with the claim that you're going to be making. Ideally, it would be preferable to have the support of other countries, but in the world we're existing in, until the ICNT or something like it is established, you won't have that kind of agreement.

WILLIAM BURKE: I just have two short comments. One dealt with the same question that Ann Hollick just mentioned. I didn't bring up the question about capacities and force to make any jurisprudential point about the existence of rights but rather about the calculus of costs and benefits. It is not a trivial matter and there will be some development of an enforcement capacity almost everywhere. I suppose it will be done on a calculus of trade-offs on how much you want to spend and how much you lose by not developing it further. But it seemed to me that that's a part of the calculus if you're going to try to make measurements about the implications of 200 mile zone for wealth distribution. I think that's one of the major policy problems that still remains.

I assume the existence of the zone -- now what are you going to get out of it? To try maximize the distribution of benefits, the enforcement costs are one element that deserve to be taken into account including the very substantial political costs that are sometimes at stake and that Len Legault mentioned. It seems to me that if you've got a pattern of absolutely no enforcement capability at all over time, then, of course, the existence of the right would be in question. I don't thing that's what's going to happen in any event.

With respect to the questions about criminal behavior, my only comment dealt with the ICNT which puts specific prohibitions on criminal penalties, not with international law generally. I doubt if one could construct limitations similar to those found in the ICNT out of customary international law. I don't believe it at any rate. I don't know how far I'd go on the death penalty for fishery violations.

But the ICNT has a specific prohibition. And my point was that as far as I was aware, most state legislation does not comply with that. And I would assume the implications of that would be that it's probably in compliance with international law at the moment to impose criminal penalties. Most states do. They will be out of compliance with the ICNT if I read it correctly once it comes into effect.

PART VIII

CUSTOMARY INTERNATIONAL LAW

CUSTOMARY INTERNATIONAL LAW AND THE LAW OF THE SEA: A NEW DYNAMIC

Brian Flemming, Q.C.

> "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do ... . Speak what you think to-day in words as hard as cannonballs, and to-morrow speak what to-morrow thinks in hard words again, though it contradict everything you said today".
>
> Emerson, Self-Reliance

Customary International Law theory has the Zen quality of becoming more chimerical and less real as one intensifies the attempt to clarify it. The very word custom is evocative of totems and jujus; it is redolent of cultural anthropology, of long-gone societies and of the dead past. For more than one hundred years, many international law scholars and jurists have treated customary international law as a primitive vestige of the dark past in a modern and increasingly sophisticated legal system -- something to be disposed of at the earliest possible moment, just as private law had disposed of custom in the course of its progressive development [1]. This attitude is reflected in Article 13 of the Charter of the United Nations where the General Assembly is given the responsibility to

> " ... initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification." (Italics added)

There is a constant obligato in the international law literature of the 20th Century which equates codification and treaty-making with certainty and therefore worthiness and progress. Scant attention is paid to the ossifying aspects of written law or codes.

In the post-World War Two period customary international law has been looked upon with deep distrust by the Second and Third Worlds as being, at worst, an imperialist/colonialist device to keep socialist or emerging state in subjection [2] or at best an old-fashioned and outmoded method of law creation. The combination of cultural prejudice against custom in the First World together with distrust of custom in the Second and Third Worlds has led to the attempt to develop written law through methods such as the Third United Nations

Conference on the Law of the Sea (UNCLOS III). Surprisingly, and contrary to the wishes of those involved, what has occurred as a result is that customary law has now been given new life and has been revivified or transubstantiated so that its impact as a creative force in future law-making must now be re-assessed.

The purpose of this essay is to take a hard look at the theory of customary international law in the late 20th Century and to ask some fundamental questions. Is the theory adequate to explain what is happening in international law today because if it is not adequate then traditional theory may not only be doing no good but may actually be misleading us and causing positive harm? Has UNCLOS III breathed new life into customary international law? Have we finally gone beyond the excessive positivism which has been so much a feature of international law of the past one hundred and fifty years? Has customary international law in the last decade become more acceptable to a broad spectrum of states in the modern world? Have we stumbled onto a new technique for law creation through UNCLOS III?

Like Gaul, this paper is divided into three parts. Part I will recapitulate or restate the theory of customary international law and its development. Part II will examine the law of the sea in the modern era and the impact particularly of UNCLOS III on customary international law. Part III will draw some conclusions.

I. The Theory of Customary International Law - A Recapitulation

> "Twice makes a custom"
> -13th Century Common Law saying.

An examination of writings on the theory of customary international law reveals a landscape with confusing metaphor, incomplete or imperfect analogy and hair-splitting definitions. Most of the significant writing on the theory has emerged in the past few decades. Indeed, prior to the 19th Century, no jurist attempted to outline in detail how custom was formed. Much of the intervening discussion has emerged from a private law context thus leading to tortured reasoning from analogy much of which in retrospect appears to have been more misleading than helpful.3 Some of the discussions have been positively theological in nature. During the past few decades, the search for a satisfactory and complete theory of customary international law at times has appeared as difficult as Einstein's quest for unified field theory in physics. As sometimes happens in the international law, there have been

more difficulties in the formulation of the theory than in the practical application of the theory in day-to-day state practice.

Standard discussions of customary international law usually start with definitions which look something like this:

- "A customary rule grows out of general practice (consuetudo) in which that rule is recognized and observed (opinio juris)."[4]

- "[Customary international law] has two constitutive elements: (a) a general practice of States and (b) the acceptance by States of this general practice as law."[5]

- "A customary norm of international law arises in consequence of the repeated actions of states ... [combined with] recognition or opinio juris ... ."[6]

- " ... there are two basic elements to custom, first a generalised repetition of similar acts by competent State authorities, and secondly a sentiment that such acts are juridically necessary to maintain and develop international relations. The first element is mere usage, which by itself does not make law; the second is an intellectual conviction according to which identical situations of fact should lead to similar reciprocal behaviour patterns. Looked at in this way the law is dependent, not upon unanimity, but only upon generality of will. The dissenting minority of States are as much bound by the formulated rule as those who actively participated in its creation, the source of their obligation residing in the moral necessity which underlies observance of all law."[7]

The most famous definition of the post-Second World War era is that of Judge Manley O. Hudson who was asked to study the question at the request of the International Law Commission. The formula which he put forward in 1950 consisted of the elements required for the emergence of a principle or rule of customary international law:

> "(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
>
> (b) continuation or repetition of the practice over a considerable period of time;

(c) conception that the practice is required by, or consistent with, prevailing international law; and

(d) general acquiescence in the practice by other States."[8]

In addition, Judge Hudson suggested that the establishment of the presence of each of these elements should be made by a competent international authority.

In his excellent analysis of this definition, d'Amato [9] quite properly states that these criteria appear to raise more questions than they resolve because, for example, criterion (a) does not resolve the problem of practice in areas which one group of States may claim to be domestic problems and another group may claim to be international problems; nor does criterion (a) answer the question of how many States constitute "a number of States"; criterion (b) makes no attempt to grapple with the meaning of "considerable period" nor does it cover abstention from action or the possibility that a practice could be inconsistent with prevailing international law but still legal in the sense that it was changing the law; criterion (c) is too rigid and does not contemplate the possibility of legitimate change; criterion (d) still leaves unanswered the question of non-acts and the meaning of words such as "general" and "other States". In the end, the problem in formulating a general theory lies not with definitions but with the analysis of the meaning of the elements of the definition, which is a complicated way of saying that the definitions are inadequate.

In the search for an appropriate theory, some writers from time to time have doubted that both the subjective and objective elements in the formation of customary international law have to be present in order to create the law. Kelsen and Guggenheim both thought, once the practice has been proven, that ipso facto the opinio juris had also been proven and that a search to discover the interior thinking or intention of national decision makers was a fruitless task. Fewer writers, notably Bin Cheng, have argued that the objective elements are not necessary.

Sustained argument has raged around the question of the length of time over which custom has to be formed. The more traditional writers require longer periods of formation of custom while some say customary international law can be created "instantly".[10] Too much of the discussion has revolved around temporal rather than textural or qualitative questions. The writers who have looked to "density" of usage or qualitative questions have been generally more accepted by the international law community [11].

Quibbles occur over the degree of universality required or over the kind of proof required of the practice or custom. Do you have to show an "act" by a state or is a mere "claim" sufficient? Is acquiescence enough? Does estoppel exist in international law? Certainly, despite the great amount of disagreement among international law scholars over the formation of customary international law, a positive act is usually much easier to prove and is a much more serious and unambiguous event than is a non-act or an abstention from acting. An act crystalizes policy. Accordingly, it is tempting to set up a gradation or scale of importance for factors which may play a part in the formation of customary international law. A possible gradation might look like the following:

Customary International Law Norm

-
-
-

MOST IMPORTANT

Treaty on a particular subject

-
-
-

Numerous Acts combined with clearly stated claims

-
-
-

One Act together with an ill-defined claim

-
-
-

A clearly defined claim or unilateral assertion without an act

-
-
-

An ill-defined claim or unilateral assertion

-
-
-

The existence of other treaties of a multilateral nature on the subject

-
-
-

The existence of other treaties of a bilateral nature on the same subject

-
-
-

Noting another's act without taking a position

-

-

-

No action or acquiescence

LEAST IMPORTANT

One could then ask at what point an estoppel would occur in this formulation or gradation of factual events.

Some writers, possibly whistling past the intellectual graveyard, tend to downgrade the importance of getting a complete theory [12]. If you believe, as I do, that this is an unacceptable intellectual position then you must press on. A consistent or complete theory of customary international law, requires the following elements to be present [13]:

1. Internal consistency;

2. Generality without vagueness;

3. A basis which accords with real-life practice;

4. Simplicity;

5. The possibility of being objectively determined;

6. Claim-orientation.

The heart of the theoretical problem which we face today is to be found in the relationship of treaties to custom because, if the revival or renewal of customary international law is to have any meaning at all, there must be consistent theoretical relationship of one principal form of law creation to the other. They can neither travel in watertight compartments nor can they necessarily always be sequential in the relationship of one to the other. The relationship must be viewed as an organic one and a dynamic one or else one can wind up having a theory which has no meaning whatever in the real world.

A good starting point in examining the relationship of treaties to custom today is Article 38 of the Vienna Convention on the Law of Treaties of 1969 which, after dealing with the pacta tertiis problem in Articles 34 to 37, states that

> "Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such."

Admittedly, this Article merely permits the possibility that this process might occur rather than urging upon states that they should attempt to create customary international law in a positive fashion from this sort of treaty base. The Article is misleading as well in the use of the word "binding" because it is not the treaty that will become binding on a third state but the custom which has flowed from it. Accordingly,

> "Not only do treaties carve out law for the immediate parties, but they also have a profound impact upon general customary law for nonparties."[14]

This assertion has been amply upheld in the North Sea Continental Shelf Cases in the International Court of Justice where the court clearly divided the 1958 Geneva Convention on the Continental Shelf into the Articles of a "norm creating character" and all of the other articles. In doing this, the court basically divided the treaty, as had been intended by its drafters, into two different levels of obligation. At the first level, there were general law creating or codifying norms to which everyone was to be subject. Then there was a secondary level of law creation which was to be applicable only to the parties. Article 6 on delimitation of the Continental Shelf was deemed by the court to be such an Article. The court in effect said that a person could at one point be a party to the convention and then could withdraw but that in withdrawing it was not avoiding obligation under the norm creating articles of 1 to 3 but only under the detailed obligations at the secondary level which related to parties who were still part of the convention system. In his analysis of this case and other cases before the International Court of Justice or the Permanent Court of International Justice, d'Amato concludes that all of the cases

> "... point with clarity to the proposition that provisions in treaties, whether bilateral or multilateral, may generate international customary law."[15]

D'Amato claims that the main stumbling block to acceptance of the importance of treaties in creation of customary international law for some writers is their propensity to make treaties analogous to contracts in domestic law and to stress that Third Parties cannot either be bound or take benefits under contract in most, if not all, private law systems. I am not sure that the theory of privity of contract is as secure in private law today as some public lawyers think but even if it is, surely, international law has matured sufficiently at this stage of its history that we are able to see the fruitlessness of private law analogies in this area; we must treat international law as a mature, separate system which can stand theoretically on its own feet without the necessity of artificial or incomplete analogies.

Because treaties are acts, as opposed to claims or notes of protest, and are formally and solemnly concluded, they are among the best evidence of the practice of states. Furthermore, being quantifiable more readily than notes or letters, treaties are readily more able to form the core of evidence of creation of customary international law in the future. All treaties by their very nature are susceptible to cybernetic technology and are therefore capable of becoming a modern, written and satisfying way of fostering organic growth in customary international law. Treaties of all kinds permit us to build certain principles to a critical mass of acceptance and to observe carefully deviations from the norm which might carry the seeds of new customary law.

Indeed, I believe that as more anthropological study is conducted during periods of man's existence when writing was available that more evidence will be found for the proposition that treaties probably arose at the earliest stage of legal history and that treaties were neither more nor less "primitive" elements in the development of modern international law than were customs.

Being in Latin America, I mention that no outline of the theory of customary international law would be complete without making particular reference to the contribution of the Latin American States and lawyers to the development of international law. When I was a student of International law it was commonplace for international lawyers in many parts of the world to scorn and ridicule a number of ideas which were being put forward by Latin Americans in the late 1940's and the 1950's. For example, the idea of a regional customary international law was not generally accepted by most. The idea of the creation of a 200-mile patrimonial sea was a cause for smirking and winking by "sophisticated" western international lawyers.

Most theoretical arguments were biased in favor of one, single, unified, general customary international law existing on a world-wide basis. Even though multilateral treaties could and did exist on a regional basis, for some reason customary international law was not permitted to exist on the same basis. Now, however, the Judgments of the International Court of Justice in the Asylum Case, the Right of Passage Case, and the Anglo-Norwegian Fisheries Case will have to be read more closely by international lawyers because one of the unforeseen results of current developments in the law of the sea is going to be the tendency of regional customary international law more and more to become a feature of our lives internationally.

II. UNCLOS III and the New Dynamic

> "We shall not cease from exploration
> And the end of our exploring

Will be to arrive where we started
And know the place for the first time."
T. S. Eliot

The paradox which we are facing -- and I'll discuss this again in more detail when I come specifically to my discussion of UNCLOS III -- is that the generality of what we are trying to do in the Law of the Sea today is leading us to more diversity. And that diversity will occur regardless of the sort of closely reasoned analysis given by Mr. Bernard Oxman at Monday's session, for example. Laws are like children who may grow up or be interpreted in ways much different than the parents or the drafters ever intended. And anyone who thinks that that process is not going to occur isn't living in the real world.

Historically, the law of the sea has been created primarily through customary international law. It has also been one of the most settled areas of international law. Those two statements alone should tell us something. Freedom of the high seas was enshrined by writers like Schwarzenberger as one of the nearly immutable principles of international law. Three mile territorial seas until recently were stable and generally accepted. Fisheries on the high seas were free. Pollution was practiced without restraint and, beyond the narrow band of territorial seas, countries came and went without much hindrance.

Yet, at times when international law was growing and expanding, the law of the sea had traditionally been at the cutting edge or at the frontier. For example, in the 17th Century in the well-documented struggles between the British and Dutch empires, there was no doubt that law of the sea was one of the more creative areas of this developing law. So too, in the 19th Century development of stable territorial seas and rights over fisheries, rights relating to neutrality of ships and laws of war at sea, the law of the sea has been creative. Today, again, we are in one of those creative periods and must examine it closely.

The motivating force for change today has been a combination of the advance of technology and the emergence of new States on the world stage. Following World War Two it suddenly became possible to "fence the commons" and individual States began to do it. UNCLOS I started as an attempt to regulate shelf jurisdiction but, despite its achievements, it left the main question of the delimitation of the shelf an open-ended one. UNCLOS II moved to the superadjacent waters and failed, thereby keeping the questions of the territorial sea and contiguous zone well within the realm of customary international law. Now we have UNCLOS III.

We must realize that UNCLOS III has created a "cosmic legal soup" which has fertilized and stimulated the growth of customary international law in a way not seen for centuries. For purposes of this discussion today, I would like simply to take two developments of UNCLOS III and examine them in detail and to test these developments against the theoretical portions of this paper. The first area of examination will be the continental shelf and the second the Exclusive Economic Zone (EEZ).

When Venezuela and Great Britain entered into the Gulf of Paria Treaty in 1942 and President Truman made his continental shelf declaration in 1945, the process of changing the law relating to the continental shelf began. When did we reach the point where we had enough acts or acceptances to say that shelf claims had passed from unilateral or bilateral or multilateral declarations or treaty-based claims to customary international law? Which actors carried the weight or did all carry weight equally? How many acts were needed? Who protested and why? Where were the protests registered?

When one looks at the development of the law relating to the continental shelf one has a pre-1942 or pre-1945 position which simply did not allow the taking of sea bed beneath the high seas. Then, treaties and state practice of a definitive kind led to a sufficient network of claims, acts and acquiescences that it was deemed necessary to codify the emerging principles in the 1958 Geneva Convention on the Continental Shelf. Thus the problem moved from unilateralism and bilateralism to multilateralism and codification. More acts, claims and acquiescences followed following 1958 as did ratification until the convention came into force. Technology continued to permit the extension of shelf jurisdiction until the process leading up to UNCLOS III was begun in the late 1960's. Thus far, despite the general agreement at UNCLOS III on the Continental Shelf, nothing more exists other than a draft treaty although further acts, treaty-making and claims have been made or entered into by states based on the development at UNCLOS III.

Clearly, then, in the past 40 years there has been a continung creative tension between treaty law and customary international law but there is no doubt that customary international law has always been at the leading edge of the development in this area.

Then there is the EEZ where a similar pattern has occurred. Prior to the Second World War it was not possible for States to make claims to the sea bed beneath the high seas. That was generally accepted as being illegal. The series of treaties, claims and State acts which led to the development of the continental shelf theory started the process of development of the EEZ in motion. However, it was the Santiago

Declaration of 1954 made by Peru, Ecuador and Chile which separated the development of shelf doctrine from the EEZ doctrine. At first, the only multilateral treaty arrangements and strong, clear acts of state were carried out off the west coast of South America. However, pressures for contiguous fishing, sanitary and customs zones were felt in the Geneva negotiations of 1958 but no agreement emerged on the right of states to have fishing zones of no more than nine miles in width extending beyond a territorial sea of 3 miles in width. The attempt to change the basic formula to a six and six one in 1960 at UNCLOS II failed.

Pressures intensified with the Icelandic claim and the so-called "Cod War" between Iceland and the United Kingdom. However, despite the 50-mile claim and the various strong acts in support of it, the international community did not recognize it. In 1970, Canada created its Arctic anti-pollution zones of 100 miles in width; the controversy continued. Finally, the depredation of fishing resources which became apparent and acute between 1970 and 1975, together with the desire of the Third World states to have new economic resources clearly allocated to them by the international community, caused the 200-mile EEZ to be generally accepted at UNCLOS III meetings. Thus far, about half of the world's coastal states have legislated or made clear claims to their 200-mile EEZ's. And I can do nothing but refer you to the excellent paper by my good friends and colleagues, Professors Edgar Gold and Doug Johnston, given earlier this week, for the best study up to date on that particular subject.

Because international lawyers, like all good lawyers, try to avoid uncertainty as much as possible, the national legislation which states have passed and acts which they have carried out respectively regarding their EEZ's have usually been supported by bilateral or multilateral treaties with the states affected by the new zones. This has certainly been the case in the northwest Atlantic off the east coast of Canada where Canada carefully and systematically ensured prior acceptance of its fishing zone declaration of 1977 by entering into bilateral treaties with each and every country having any historic fishing rights in the new zone.

So, today, we have what no one would deny to be a new principle of international law which has no written base whatsoever other than a few bilateral treaties, national legislation and a draft treaty document still theoretically undergoing negotiation at UNCLOS III. If and when an UNCLOS III treaty is signed on this subject, there is no doubt that the treaty will not "freeze" the development of the EEZ on a general international or regional basis for all time. Witness the attempts by Canada to negotiate new arrangements in the zone beyond the 200-mile zone but within the biological zone needed to manage the groundfish stocks on the east coast shelf.

Will a new kind of mini-EEZ or beyond 200 miles or contiguous zone theory emerge from this initiative? It is becoming clear that the best the general international community will be able to do is to create a general framework or structure of law or authority for the world community and that regional arrangements will have to be made for the management and exploitation of the EEZ's and contiguous zones beyond in different parts of the world.

Obviously this will be the case where the geographically disadvantaged have to deal with neighbouring states with EEZs. The kinds of arrangements which will be made between the geographically disadvantaged and neighbouring states will be quite different than the arrangements made between 4 or 5 contiguous states with EEZ's that overlap or join one another. It is clear even at this early stage that the general theory of customary international law will have to allow for the development of many regional variations and differences. Thus, we will have the paradox of the most systematic and broadly-based attempt to create consistent written international law on a particular point giving rise to many widely differing and varying regional subsystems which will not allow of any generalization other than to say that regional subsystems exist and are permitted by customary international law. We in International law should learn from nature where diversification, not consolidation, is the end product of evolution.

If UNCLOS III should fail to produce a treaty which is generally signed and ratified by the majority of states in the world then the development of international law will continue without the worldwide multilateral written base which everyone had intended should emerge from the process. This will constitute failure of a sort but really it is not failure at all. There has been a unique and fruitful development at UNCLOS III in the continuing conference context which has been created on a functional basis for the law of the sea. The very existence of this continuing conference context has made orderly and placed limits upon state practice in a situation where chaos could very easily have occurred.

Because of great benefits for the world emerging from UNCLOS III, we should ask ourselves why we should not have UNCLOS IV or UNCLOS V beginning and continuing close on the heels of UNCLOS III regardless of the outcome of the conference in order to provide this functional legislative assembly which can meet on a regular annual basis in order to advance the law without the necessity ever of reaching the extensive and all-encompassing goals which were sought at UNCLOS III. This continuing conference context or functional legislative assembly would allow for reconciliation on a constant basis between written law and custom, between politics and law, and between economics and ideology and would be a less linear solution than

most were looking for at the beginning of the 1970's. And how linear we tend to be! Is there anything more linear than drawing 200-mile zones around the coasts of the world regardless of the biological or scientific sense which may or may not accompany this process? Perhaps only in a continuing conference context will we be able to become more logical and sophisticated by establishing more complex scientific and geographical criteria for the new EEZ, the new contiguous zone and the related shelf.

In moving in this direction, we would be admitting that a final and complete determination of the law of the sea in any particular area is probably never possible; indeed, it is probably not desirable. While certainty and stability must always be the end of law, we do not in public law need as much stability and certainty as is required, say, in private commercial law. Indeed one state's "uncertainty" may be another state's "flexibility".

In other words, returning to the theoretical base of this paper, the continuing conference and the draft materials which would emerge from it would, along with treaties based upon it, form the clearest sort of opinio juris for those seeking the new customary international law. Writers for centuries have complained about the lack of an international legislature but perhaps we have been making the mistake in this area too of seeking private law analogies in situations where they are inappropriate or misleading. Perhaps the international community requires a different kind of legislative assembly of the kind which accidentally has been created for the law of the sea.

Similar types of legislative assemblies have been created on a functional basis in world disarmament, in north-south trading problems and in other areas. Between the superpowers, SALT I and SALT II negotiations have been carried out in a continuing conference context so that when SALT II is completed and ratified then SALT III will pick up and go on from there. And SALT IV and so on. The arguments which have been made for and against creation of customary international law through resolutions or declarations of the United Nations would have to be examined again with the probable result that the pro-creation theory would gain strength.

One of the features of UNCLOS III is that participation in the consensus approach paradoxically enough may limit the extent of any state's post-conference options, especially if a treaty emerges. What are the range of values which may be set upon participation at the conference and post-conference activity?

The highest value in deciding whether a state was to be affected by the customary international law arising at UNCLOS III would be established for those states which participated

at the conference, which voted for the treaty, which signed the treaty, and which ratified the treaty; in other words, states which were "on-side" in the process all the way.

The next highest value would be attributed to those states which has participated, voted for, signed, but did not ratify the treaty. Somewhere off to the side you will have to examine those who ratified with reservations, but again that creates another enormous problem that I will not address in making my very simplistic list of values.

The next place on the scale of values is for those states which participated at the conference, voted for, but did not sign, did not ratify. The next place is for those states which participated, voted against the treaty and obviously will not sign or ratify. And, finally, there is the obvious lowest value which is attributed to those who did not participate, did not vote, did not sign and did not ratify.

Looking at that range of values in the creation of customary international law in this new context, one will have to decide at what point a convergence occurred or at what level on this scale of values agreement took place. And it's a two dimensional process because you have the scale of values based on what states are actually doing plus numerical values which can be cross-referenced against what every other state is doing; again, we find here a possible application for cybernetic technology to international law.

III. Conclusions

In my opinion, there has been a decline in recent years in writing by great theorists or generalists in international law. This decline of the theoritician has not been peculiar to international law. It has been happening in many other social sciences or humanities where the general theoriticians of economics or political science or history are not as much in evidence now as formerly. Scholars do not tend to want to do general theory today. The result of this decline shows up when we regard a conference like UNCLOS III where many scholars have been taking slices of a subject or doing descriptive analyses of what the conference has been doing. Few scholars have stood back from the melee and asked the question, "What are we doing?", "What is the theoretical base for the procedures which we are now engaged in?". That having been said, my specific conclusions are as follows:

1. Customary international law has been enveloped for too long in inappropriate rhetoric and must be re-examined in the light of our experience at UNCLOS III. Far from being an untrustworthy and primitive method of law creation, it will probably continue to be the most important method in law of the sea.

2. Most theoretical discussions on the creation of international law have grown too much out of private law analogies which were inappropriate to the public law system. Much of the theory which we all grew up with was an attempt to reconcile the unreconcilable and to explain the inexplicable.

3. In particular, the theoretical relationship between treaty law and customary international law has never been satisfactorily resolved but is more capable of being reconciled now in the light of modern law of the sea negotiations and the resulting customary international law which has emerged from these negotiations.

4. The creation of customary international law as well as treaty law must be seen as a dynamic, organic system operating in a continuing conference context or functional legislative assemblies created by the world community in order to ensure stability as new principles of international law emerge.

5. If the continuing conference context technique of law creation continues to be used by the international community then we must prepare ourselves for a system which permits the setting of large, broad-brush theory or principles but which at the same time allows the emergence of widely varying regional subsystems of law which must be recognized as being as valid and legitimate as the generalized principles or systems.

6. While the world community must never cease to strive for greater and greater certainty at all levels of this new system and for the resolution of as many potential dispute creating problems as it can, it must be admitted that this is no more possible than it is possible for national legislatures to reform <u>all</u> of the laws of a country and keep its laws completely abreast of modern developments. There will be gains and failures but, overall, the system must provide for order and stability in the face of radical changes and restructuring of existing law.

7. The flexibility of the continuing conference context form of law creation will better allow for reconciliation of differing economic systems, different ideological positions and different regional requirements on a broad variety of topics relating to the development of ocean space and perhaps other important areas of international law.

Brian Flemming, Q.C.*

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NOTES

1. See, among others, the following writers: Friedmann, The Changing Structure of International Law (1964) p. 121; Oppenheim, International Law, Vol. I (8th ed., Lauterpacht, 1955) pp. 17 et seq.; Schwarzenberger, A Manual of International Law, Vol. I (4th ed., 1960) pp. 23 et seq.; Bokor-Szego, The Role of the United Nations in International Legislation.

2. Anand, New States and International Law (1972) pp. 11 et seq.; Academy of Sciences of the USSR, International Law (1961) pp. 19 et seq. Compare the views of these two books with Verzyl's "Western European Influence on the Foundations of International Law," in his International Law in Historical Perspective (1968) p. 435. And see the statements of delegates from the Group of 77 in the opening phases of UNCLOS III. See also Ferrers, "The Latin American Position on Legal Aspects of Maritime Jurisdiction and Ocean Research" and Fraussen, "Developing Country Views of Sea Law and Marine Science" in Wooster, Freedom of Oceanic Research (1973).

3. See, for example, Lauterpacht's flawed masterpiece, Private Law Analogies and International Law.

4. Reuter, International Institutions, (1958) p. 115.

5. Schwarzenberger, fn. 1, p. 27.

6. Tunkin, Theory of International Law (1974) pp. 114 and 119.

7. O'Connell, International Law, Vol. I (2nd ed., 1970) p. 15.

8. 2 Int'l Law Comm., Yearbook (1950) p. 26.

9. The Concept of Custom in International Law (1971) p. 7 et seq.

10. Cheng, "United Nations Resolutions on Outerspace: 'Instant' International Customary Law?" 5 Ind. J. Int'l L. (1965) p. 23.

11. See Waldock, "General Course on Public International Law" 106 Recueil des Cours (1962).

12. See Kunz, "The Nature of Customary International Law," 47 A.J.I.L. 662 (1953) and d'Amato, fn. 10, p. 5 et seq.

13. d'Amato, fn. 10, p. 13 et seq.

14. d'Amato, fn. 10, p. 104.

15. d'Amato, fn. 9, p. 121.

COMMENTARY

Professor William E. Butler
University College London

It's perhaps appropriate to begin these remarks by reminding those present who are not international lawyers -- and one of the enduring qualities of this meeting over the years has been its interdisciplinary character -- that the nature of customary international law of the sea is one of those absolutely core issues whose basic elements ought to be mastered by the maritime specialist irrespective of his disciplinary orientation. And indeed you will see, I think, from Brian's lucid presentation that it cuts across everything that's been discussed at this conference plus the totality of international law itself.

My remarks, I should add, are addressed to the paper and not to the subject of the panel at large. I've construed my mandate as one of critic. And so what I hope to do is take issue with some of the things that Brian has said and also to leave with you some other issues that I think are germane to this discussion.

I should say at the outset I'm not in sympathy with some of Brian's characterizations of the place of customary international law in the modern international legal order. To my mind customary international law does not convey images of redolent societies, as it may do in some municipal legal societies of a very primitive nature. Nor do I see elements of revival or renewal in customary international law as a consequence of UNCLOS III. On the contrary, I think that customary international legal order is still groping toward more sophisticated and more certain methods of norm creation or law creation, methods of which UNCLOS III perhaps is or will become a model.

The hostility of new states (new states in the sense of post-World War II) toward pre-existing customary rules of international law has, on the whole I think, been more a reaction against a system in which they had no prior role in norm formation rather than an objection to the process of customary norm formation in principle. Customary international law is founded, as is treaty law, on the principle of consent. And I think essentially what the new states were arguing so strenuously for was a right to have had a role in the consensual process and objecting to some elements of the pre-existing order which were anathema to them. I suspect by and large we're beyond that stage now.

So I would say UNCLOS III has not put new life into customary international law but it rather has in all likelihood,

or at least is, introducing new substance and, one hopes, greater clarity into customary international law.

The essential elements required by doctrinal writers for the emergence of a rule of customary international law, Brian has introduced very succinctly, as he has also the principle difficulties that may arise in applying these elements to specific situations. It should come as no surprise, especially to those involved in the law of the sea negotiations, that difficulties may be encountered here, especially in weighing the evidence, because these difficulties are precisely why codification is by most people, I think, the preferred method of norm formation.

But it is surprising -- and I detect elements of this both in the present paper and in other presentations and remarks made earlier in this conference -- that there seems to be apprehension felt in some quarters about the ultimate prospects for achieving an UNCLOS text acceptable to the participant states and, therefore, is representing a codification and progressive development of the law of the sea unparalleled in history, and that this is causing them to reassess the advisability perhaps of falling back on a less certain technique of law creation. And I'm bound to say I think this is no time to shrink back from the remaining challenges of the text itself.

Part two of Brian's presentation on the new dynamic of state claims raises another issue of the theory of customary international law, which he didn't treat, and doubtless within the framework of UNCLOS III is matter of exceptional delicacy. In weighing the evidentiary dimension of customary international legal rules, this element can't be ignored in my view. I have in mind not merely the tension between customary international law and treaty, which Brian has treated very well and very skillfully, but also the tension between, if you will, the progressive development of international law and customary international law. To put it more finely perhaps, the line between claims asserted in a law-creating sense and claims which constitute a violation of the existing international rules.

UNCLOS III has perhaps created a temporary diplomatic climate in which the extent of admissible claims is somewhat enlarged. But the post-conference period above all, if that period should be one in which there is no treaty, will necessarily see an excruciating re-examination of the nature and the content of claims now being asserted and recently asserted.

Whether, as Brian suggests, these developments are reasons to change the theory of customary international law, I confess I'm very skeptical. Rather it seems to me these developments must come to grips with the existing framework of the international legal order, such as it is, and either survive or fall accordingly.

The notion of a regional customary international law is a difficult and challenging issue. And again I confess I have conceptual difficulties with it, mostly ones familiar to you. On what grounds, for example, can regional variations be acceptable? Must they be variations that are wholly consistent with general customary international law (and who is to judge whether they are or they are not)? Or may they constitute local exceptions so to speak, which in certain circumstances one might well classify as violations? Again, it raises in part the issue of the tension between progressive development, on one hand, and breach of the international legal order, on the other. Those of you who have followed any aspect of the emergence of a socialist international law in other contexts may well want to ponder the implications of a regional international system in this domain.

But I accept the general thesis of Brian's argument that UNCLOS III and the concomitant developments outside the con ference are placing new demands upon the concept and the role of customary international law, and that these deserve serious re-examination. And it occurs to me in looking over this that it may well be time to consider a different approach to customary international law in this respect.

Nobody, I note, to my knowledge at least, has proposed that we undertake to codify the constituent elements of a rule of customary international law. That may be too ambitious an undertaking at this stage. But I wouldn't hesitate to suggest the very serious consideration of the possibility of something on the nature of a restatement of what the constituent elements of customary international legal rules are, possibly a body like the International Law Commission or other international legal body of standing and repute, would be an appropriate institution to undertake to clarify that subject. At the moment, by and large (and when you have the text of Brian's paper, you'll see what he's been obliged to rely upon), its essentially a matter of doctrinal exegesis.

I'm also struck in Brian's characterization of UNCLOS itself -- the conference technique, the function of legislative assembly -- by another dimension of that which one may well want to consider in this connection: the extent to which the consensual techniques being used within UNCLOS III themselves approximate those consensual techniques that we use when talking about customary international law. We may be misled by the fact that one is attempting within the conference to codify law and hence very prone to draw analogies with the legislative situation. But the consensual techniques, of course, in and of themselves also bear analogy to the processes of forming customary rules. I leave that as an issue for further exploration.

I've been asked to say some words about Soviet attitudes toward customary international law. Soviet international legal doctrine has been and remains absolutely unequivocal in preferring the international treaty as a source of international law to international custom for all of the obvious reasons, above all, the explicit consent of states recorded in a written document to a concrete set of legal obligations negotiated by the parties concerned. But having said that, one of the more noteworthy developments in my view in recent years has been the appearance of a somewhat greater receptivity in Soviet international legal doctrine toward the role of custom in international law, principally I believe because the Soviet Union, as a revolutionary state in the 20th century, and other socialist countries, have come to the view that in the past 60 years or so they have had a demonstrable impact upon the nature and substance of the international legal order. They are an integral part of the system. And to the extent that the existing system now contains customary international legal rules, either of long standing to which they can acquiesce or indeed support affirmatively, and of recent origin in which they have had a share in shaping, then they are content to live with that legal order. Those in the Soviet Union of whom I'm aware who have written about law of the sea matters in the past decade or so have been very circumspect in commenting upon specific rules of customary international law that have either been introduced or altered as a consequence of the law of the sea negotiations.

The interesting question I think in the post-conference situation, whatever that happens to be, will be perhaps not merely the attitudes of socialist jurists toward customary international law itself but very possibly toward other methods of norm formation other than custom. The extent to which they will be prepared, for example, to innovate or rest upon other techniques of norm formation other than treaty or custom may be an indicator of the extent to which they are either enthusiastic or not enthusiastic about the ultimate text that emerges from the conference.

COMMENTARY

Ambassador Hasjim Djalal
Indonesian Embassy
Washington, D.C.

When one is talking about customary international law, one is generally talking about two things, or of either of them: the contents of the rule itself and the manner or the procedure of its creation. As far as I can see, most of the developing countries are using these two basic criteria in determining their basic positions with regard to particular or specific rules claimed to have been established as rules of customary international law. Dr. Flemming is, therefore, essentially right when he says that "In the post World War II period customary law has been looked upon with deep distrust by the Second and Third World -- as being, at worst, an imperialist/colonialist device to keep socialist or emerging states [well, again I don't know about socialist states] in subjection [thus the contents of the rule] or at least an old-fashioned and outmoded method of law creation [thus the procedure of its creation]."

I would say that this assessment is essentially true. Before the Second World War, what was generally regarded as the modern international law of the sea, evolved from, and since, Grotius' Mare Liberum in the early 17th century. We all know that Grotius wrote his Mare Liberum at the request of the Dutch East India Companies to justify their voyage to the East, namely to the present Indonesia, in order to challenge the already established power of the Portuguese in the present Indian Ocean, in the Strait of Malacca, and in the waterways of the present Indonesia. Incidentally, as we all know, Christopher Columbus had wanted to come to our Indies in order to get to our spices, but by luck he arrived at your Indies and discovered America. Anyway, the result of Grotius' Mare Liberum, of freedom of the sea, which later on was claimed to be the basic tenet of the customary international law of the sea was, as far as we are concerned, the continuous conflict between the non-native powers, primarily European, in the East Indies, and between the local peoples and the foreign powers. The local peoples were simply used or manipulated by those outside powers to further their respective interests, and if and when necessary they incited one local people against another. The local peoples had had no part in the making of such rules, and it was also true that most of the rules had been devised to subjugate them. We all know that the principles of the freedom of the sea, as devised by Grotius to enable the Dutch East India Companies to sail to the East, has resulted as far as we are concerned in the continuous flow to our region of outside powers who then divided and dominated us for more than 300 years. Even after the Dutch East Indies, or Indonesia,

regained unity and independence after the Second World War, the so-called rules of customary international law with regard to the freedom of the sea continued to create problems for us in maintaining the national unity of the country, which unlike many of the European countries, is geographically archipelagic. The fact that the waterways between the island of an archipelagic country like Indonesia were, under customary international law, considered as part of the high seas, had brought "provincialism" or "islandism" to Indonesia, thus disseminating the seeds of national disunity. This fact was later used by the outside powers to subvert the Government they did not like, by using the so-called high seas and the freedoms of the sea as the means for subversion. In addition to that, the resources, especially the living resources of the sea around and between the islands of the archipelago, were exploited more to the advantage of far distant countries than to the benefit of the local peoples themselves. From my point of view, the application of the principles of the freedom of the sea prior to the Second World War benefited only those States which has the means, the capacity, and the technology to use and to exploit the sea. In essence, such freedom of the sea, in practical though not in legal sense, was tantamount to appropriation of the sea by those who had the means of appropriating it.

What I am saying should not, however, be interpreted that I am against all the rules of customary international law. There may well be a lot of the rules of customary international law which had developed in the past without us being able to participate in their creation, but which may still be useful and applicable today. Some of the rules regarding diplomatic practices, for instance, I believe are generally acceptable. Also, there are many aspects of the customary rules on the law of the sea which are acceptable or adaptable to modern conditions with some modifications. There is no reason to change these rules simply because the developing countries did not participate in their making. What I am saying is that the rules of customary international law which the developing countries did not participate in creating must be looked into case by case in order to determine whether their contents had in the past been used to subjugate or work to the detriment of the present developing countries or not. If they did, they must be adapted to the present situation. If they did not, they thus remain acceptable and could continue to apply and be codified or reaffirmed in the new Convention of the Law of the Sea. As far as I can see, in reality this is one of the functions of the Law of the Sea Conference. And as we know there are a lot of the existing customary rules of international law which either had found their way into the previous conventions or continue to be adopted by the provisions of the latest texts of the Law of the Sea Conference (ICNT and Revised ICNT). And there are also many rules which had been formulated in order to adjust the rules of customary international law

to the new situation of the modern world in which the role of the developing countries could no longer be underrated or underestimated.

The other function of the Law of the Sea negotiation is, of course, to devise new rules for the new problems created by the new development in technology for which the customary international law had not been developed. This is certainly the case, for instance, with regard to the issues of deep seabed mining, the protection of the marine environment, and others.

On the basis of this analysis, unlike Dr. Flemming, I am not surprised that "customary law has now been given new life and has been revivified or transubstantiated" into the UNCLOS III text.

On this matter of mutation from customary international law into conventional or treaty law, or vice versa, I do wish to make a brief observation. It seems to me, there is a general feeling that customary international law and conventional international law are two separate things. Perhaps this impression was created as the result of Article 36 of the Statute of the ICG which mentions both of them separately as the sources of international law. In my view, although both of them are separate, they could compliment each other in the sense that customary rules of international law may grow into and be modified by the conventional international law, thus making the rules stronger, or treaty law of conventional law may be accepted as customary rules of international law if their contents are broadly acceptable to the general community of states. In both these cases, namely in the rules of customary or conventional international law, the predominant criteria to make them rules of international law, in my mind, is their acceptance by the international community, whether or not they have been evolved through long practices or through general conventions ratified by all states.

One of the most intriguing questions today in the mind of some of the Law of the Sea negotiations is: What will happen if the Law of the Sea negotiations fail to produce a Convention, at least before a specified time? I am not saying that we will fail; as a matter of fact, I am optimistic that we will produce the Convention in 1980 or early 1980's. I raise this subject only to clarify the position of the rules of customary international law with regard to the existing provision of the ICNT or revised ICNT. Is it possible to assume that the ICNT in its final revised formal stage could be evolving into the customary rules of international law? If so, is it really necessary to strive for a signed and ratified Convention? I consider this question very important because we have seen lately that many practices of states are being worked out through the existing provisions of the ICNT, at least through those which are considered to be broadly acceptable to the world

community. I would point, for instance, to the growing practices of states with regard to the EEZ and to a lesser degree with regard to the continental margin.

In attempting to answer this question, I can see immediately that the matter would involve value judgment. But at least several points seem to be clear in my mind. First of all, there are certainly a lot of articles in the ICNT text which are simply reflections of the customary international law which are broadly acceptable to the world community. For these types of ICNT and Revised ICNT provisions, I would think that they will continue to be part of the rules of international law, should the Conference fail to produce a Convention. For this type of rules, the Conference has functioned simply to codify them. Their entrance into the ICNT or Revised ICNT texts would make the rules clearer and stronger and would be applicable as part of the rules of international law.

Secondly, there are provisions in the ICNT or in the Revised ICNT which, arguably, were not derived from the clearly established rules of customary international law. In fact, one could argue one way or another whether rules of international law, either customary or conventional, exist on the matter. I believe that, for these matters, the ICNT or Revised ICNT provisions could be considered to have evolved into the rules of customary international law if the provisions have been the result of long negotiations in the Conference and, as formulated in the text, seem to have gained general recognition or acceptance by the Conference participants. Certainly, the ICNT or Revised ICNT provisions regarding the archipelagic States fall within this category. It seems that the ICNT or Revised ICNT provisions on the Exclusive Economic Zone could also be considered in this category. With the increasing consensus in the Law of the Sea negotiations on other issues the ICNT or Revised ICNT provisions on these issues could also be included in this second category, such as the principle that the coastal state jurisdiction on the seabed extends to the outer edge of the continental margin, although the margin itself would still need definition.

Thirdly, there are provisions in the ICNT or Revised ICNT which are still vigorously being debated and contested. In the absence of the Law of the Sea Convention, it would be difficult to assume that the provisions of the ICNT or Revised ICNT on those matters have reached the stage of being adopted by the world community, much less as rules of customary international law. The provisions of the ICNT or Revised ICNT dealing with delimitation of maritime boundaries between opposite or adjacent states may be some of those falling within this category. Also, the various articles dealing with the deep seabed mining could be included in this category.

Should there be no Law of the Sea Convention, what would then be the rules of international law regarding the third category of issues I just mentioned? In my view, since we could not look to the the ICNT or Revised ICNT for answers to those questions, and the rules of customary international law seem to be silent on the matters, the possible answer would seem to be through negotiations between the parties directly affected or through adjudication. Both these alternatives are unsatisfactory since bilateral negotiators or adjudicators would have difficulty in how to proceed and what rules to apply. This fact alone is enough for the Law of the Sea negotiators to continue their negotiations and attempt to reach a comprehensive solution to those problems in a comprehensive Law of the Sea Convention. Dr. Flemming's idea of the need for a "continuing conference" in the form of a Law of the Sea Conference IV for those remaining issues, although worth considering, in my view may cause the Governments, especially in the developing countries, to raise their eyebrows. They could hardly go on with the present Law of the Sea Conference III if it goes on too long, let alone consider at this stage the possibility of "a continuing conference". We should not let the idea of a "continuing conference" undermine the resolve of the Law of the Sea negotiators to seek an agreeable solution during the present Law of the Sea Conference III.

I believe Dr. Flemming was right in saying that "one of the unforeseen results of current developments in the Law of the Sea is going to be the tendency of regional customary international law more and more to become a feature of our lives International". I believe that regionalism in international law is not only inescapable but also important for certain specific issues and matters. In fact, there are so many provisions in the ICNT or Revised ICNT, which refer the solution of specific or particular problems to regional or subregional arrangements. This is only appropriate, because there are so many problems which can only be solved by regional means and standards. Although we should always attempt to reach the solutions of international law problems through global solutions, it is also true that in many cases their solution could be better found in regional cooperation and arrangements. In fact, since the Second World War, the resolution of many re- gional issues through regional arrangements have proven to be useful. A global system of international law could also be built up through the diversity of regional arrangements. In fact, the national motto of my country, Indonesia, is "Bhinneka Tunggal Ika", meaning "Unity in Diversity". This national motto symbolizes that the unity of Indonesia is created and strengthened by safeguarding the variety and the diversity of the various peoples and customs that constitute Indonesia. I believe that, for matters that cannot be regulated internationally, and which affects only particular states or regions,

the variety and the diversity of regional arrangements could and should be developed in order to create and strengthen the fabric of the international law system.

In short, I believe there is no turning point in the LOS Negotiations. We are all looking for the conclusion of the LOS Conference as soon as possible, resulting hopefully in a broadly and generally acceptable Convention. Should the Conference fail to do so, we could not go back to square one. We cannot take the position that unless the Convention is produced, the provisions of the ICNT or the Revised ICNT will not go through the rules of customary international law. That position would be a tremendous set back for the development and codification of international law. In my view, there would be plenty of articles in the present ICNT or Revised ICNT which would evolve into customary international law, whether or not a Convention is produced, simply because they have manifested broad and general recognition and acceptance by the international community. It would seem to be irresponsible if there are people who take the position that those provisions, which are broadly acceptable to the international community, would come to nothing if the LOS Conference fails to produce a Convention, which God forbid should not be the case.

LEWIS ALEXANDER: I have two general comments to make. One has to do with this idea or regional law which was talked about.

As you know, all or practically all of the enclosed and semi-enclosed seas are completely shut off by the overlapping economic zones of the little states. If they're going to make regional law which has to do with management or with development, that's one thing. But they might also start to become restrictive in their regional law, which I think would be a very serious problem, particularly if they started to restrict certain vessels of non-regional states and maybe not the vessels of all countries but of some countries. This would have a tremendous political impact which, as I said, bothers me a bit.

And the other is in terms of the various articles of the ICNT, one to which Ambassador Djalal might add to his list, as that of the geographically disadvantaged states, or they have a new term now -- states with special geographic characteristics, which are noted in the ICNT. Three problems are still being bandied about, and I suspect will be for quite sometime.

One of them is, which countries qualify? A second is, which are more disadvantaged than others? And the third is, what type of compensation will they really end up in getting? At least you can identify a land-locked country, but the GDS question is difficult. I think that's going to be going on for quite some time before that issue gets resolved.

LEONARD LEGAULT: I'd like to thank Brian and the participants in the panel for focusing our attention on this very important and fundamental revolution in the law of the sea and in the very law-making process that we have been observing for at least the last ten years. I think it might be fair to characterize this revolution as a decolonialization of the law of the sea. And I think that helps to explain both the progress we've made and the enormous problems we've had.

I would personally believe that the major problem the developing countries have had with the whole field of customary law has been that in the past it was the state practice of only a few states that provided the foundation for the development of customary law. What they have wished to do and what I believe they have largely succeeded in doing is widening the number of states, bringing themselves within the number of states whose practice contributes to the development of customary law. I think you can describe it this way: that instead of being apprised at the end of the process, the

developing countries have become participants in the process of the development of customary law.

In the treaty making process, I think the emergence of the developing countries on the world scene has also had a profound impact. Professor Butler referred to at least one element of that impact, and that is the very consensus procedure we're following at the Law of the Sea Conference. And I think it was a very wise suggestion on Professor Butler's part that this procedure of consensus is one that requires some very detailed and very serious study.

Another element of the impact the developing countries have had on the treaty making process at the Law of the Sea Conference is, of course, in the fact that we've gone right into the conference without any preparatory work by the ILC. There were those who would have liked us to have such preparatory work before entering the conference, and the Good Lord knows that in some ways it would have been a big help. But the conference was seen from the outset as a political conference as much as a legal conference. And I think that had a great deal to do with the fact that there was no possibility of obtaining agreement on referring these questions to the ILC before proceeding directly to the Law of the Sea Conference.

I would like to thank Brian Flemming for bringing out the very complex interrelationship between the bilateral, the regional, and the multilateral threads to the law-making process. I might say that when he referred to the procedures Canada followed in extending its fisheries jurisdiction by what we called the process of negotiated unilateralism, I think he left out one element. We not only moved on the bilateral plane and on the multilateral plane at the Law of the Sea Conference but also regionally. So that one year before we had extended our fisheries jurisdiction to 200 miles, we had in the International Commission for the Northwest Atlantic Fisheries agreement from all the participants in the fisheries off our Atlantic coast (17 countries, including some of the more conservative, should we say, in the fisheries world) agreeing that the coastal state had management jurisdiction over the fish stocks within 200 miles of its coast. And I think this complex interrelationship between the bilateral, regional, and multilateral threads in the law-making process also deserves a great deal of further study.

I would like to refer very briefly to what Ambassador Djalal said about the Law of the Sea Conference -- its possibility of failure, those parts of the text which he viewed as being parts of customary international law, and those which he did not view as falling within that category. I think it was a very interesting discussion and one that we ought to ponder. I think I share completely his determination that the

conference should succeed. I should say that first of all, I think I share also his view that the conference has already contributed a great deal to the development of customary international law.

I'm perhaps a little more pessimistic than he is with regard to the consequences of failure. I think that those consequences are potentially disastrous. I think chaos and conflict lie ahead if we are not able to succeed. And like Ambassador Djalal and many others here, we are determined that the conference shall succeed.

The problem is, of course, that every country would be a little selective (mine no less than any other) in determining those parts of the ICNT which had become a part of customary international law and those which had not. And I noted with appreciation that Ambassador Djalal included the archipelagic concept among those which were now part of customary international law, as I would include the provisions on ice covered waters as falling within that category.

On Brian's suggestion with regard to continuing conferences, I agree and disagree. I don't believe that we should immediately launch into UNCLOS IV or UNCLOS V. But I think that when UNCLOS III has come to an end, there will be many other conferences, not law of the sea conferences as such, lying ahead of us, very necessary conferences, work with IMCO, work within UNEP, work within various regional fisheries commissions and so on. So I think we're essentially on an identity of views on that.

And I believe too that we will need some mechanism to make sure that the Law of the Sea Conference is not allowed to fall so far behind both technology and political reality in the future as it was allowed to do in the past.

ALBERT W. KOERS: I have a rather theoretical comment. It is certainly true that UNCLOS III has produced new law making processes. That applies to the internal procedures of the conference, the consensus procedures. It also applies to the external effects of the conference -- the fact that the legitimacy of the 200 mile zone really is no longer in doubt even though the ICNT is not even a draft convention.

Now these new developments are being discussed increasingly, not only here but also elsewhere. And I could for example recommend to Brian Flemming the lecture of Professor Jennings at the ILA Conference at Madrid. You perhaps have read it.

My major point is that in these discussions there is a certain tendency to try to fit these new developments into the old categories of, let's say, treaty making, treaty law, or

customary international law. And I really don't know whether that approach is sound. I mean there is a point where you should conclude that the new wine really requires a new bottle and that the old bottle is just no longer appropriate.

If you stress the customary law aspect, you just may overlook that these new developments take place within the framework of international organizations. The focal point of these new developments is that fact that it's not so much action of individual states but action by a collective body of states. So I would suggest that perhaps we do not need so much new theory on, let's say, customary international law but that international law finally requires a theory -- a recognized and accepted theory -- on the law-making processes of international organizations.

RAINER LAGONI: Thank you Mr. Chairman. I am Rainer Lagoni from Kiel University. First, I would like to congratulate the whole panel for having pointed out so clearly the different opinions concerning contemporary customary international law.

I have two observations. The first one refers to Professor Flemming's presentation. I agree with him on many points he made. However, I could not agree with him in the matter of the relationship between general and regional customary law. Speaking of "sub-systems" of regional customary law could easily lead to splitting up the whole body of international law into little boxes of regional customary law. Let me show this by means of three different examples.

The first is the example of diplomatic asylum in Latin America. However, the International Court of Justice mentioned in the Asylum case of 1950 that there was no regional customary law on diplomatic asylum at the time of the judgment. Yet, I would agree with those writers who would presently accept the existence of diplomatic asylum as regional customary law in Latin America. This kind of regional customary law is complementary to general customary law. Therefore, it could also be applied by diplomatic missions of third states in the region.

The second example, which again comes from the Latin American region, refers to the concept of a patrimonial sea meaning a 200 nautical mile territorial sea. Of course, Latin American states could conventionally substitute the concept of the Exclusive Economic Zone by the concept of a patrimonial sea between each other and, in the long run, one could imagine that this would become a concept of regional customary law. However, in relation to third states from outside this region, the regional law concerning the patrimonial sea would not be binding.

The third example refers to the so-called concept of socialist brotherhood which in the socialist doctrine of international law is regarded as part of customary international law between socialist states. This concept served, inter alia, as a legal basis for the intervention in a small Eastern European state in 1968, as you may remember from the legal literature. This example shows that the substitution of general international law by regional customary law may be dangerous for small states which are together in the region with a large and powerful state.

To conclude, I would hesitate to share Professor Flemming's general appraisal of regional customary law. Instead I would distinguish between its complementary and supplementary functions.

My second remark refers to Ambassador Djalal's statement. If I understood him correctly, he distinguished between accepted, acceptable, and disputed articles of the ICNT mentioning delimitation issues and the deep sea issue between the latter. If there is no treaty after UNCLOS III concerning the deep seabed, nobody would be bound because there is a lacuna in the law. I would agree that if UNCLOS III fails to produce a treaty, states could unilaterally proceed to mine the nodules. However, the way they do it would still be regulated by general customary law. That means they have to pay due regard to the interests of other countries in using these deep sea nodules.

BRIAN FLEMMING: I just want to make one very brief remark about the first point that Dr. Lagoni made, namely the relationship between general international law and regional customary international law.

Both he and Bill Butler have said that to acknowledge the development of a regional customary international law is a dangerous or explosive issue. However, I think that what I said in the paper has to be kept in mind very clearly before you enter into a discussion of it, namely that there can only be a development of regional customary international law within a framework already generally established of general public international law, either of a treaty kind or a customary kind, which limits how far you can go. So in the case of the patrimonial sea, for example, if the accepted part of the ICNT or Revised ICNT is that an economic zone can only have certain components in it, then in a regional subsystem you could not go beyond those limits but could change the content of the system according to your needs or wishes in a particular region. So I'm not letting the bogy out of the closet of total regionalism by what I suggest.

Also, I think we worry a little bit about regionalism because, as I said in the paper, multilateral treaties that

are regional in nature exist within a general framework -- why not regional customary international law? Why do we make a differentiation very clearly? And this is done by many writers and texts who do this in national law, if I may resort to private law analogies, which I was telling everyone not to do. We acknowledge we can regionalize various general laws within our countries and still have a basic, stable framework. So I think many of us may be reacting to bogies that don't exist in making comments on this particular subject.

ELIAS KRISPIS: I think the established theory of customary international law should be examined in the light of what happens in the law of the sea nowadays -- not only in the conference, but in practice.

The established theory of customary law has more to do with minds and writings than practice. In one respect, the concepts of customary law and conventional law are the same: the states must give their consent to be bound by a rule. That is the common ground between convention and custom.

Here are the differences: First, as to ways to consent: in customary law consent is expressed at various times, and in conventional law it is expressed at the same time. Those differences create difficulties. Now I give one or two examples.

Take the question of the number of states required to have a customary law. If the states are few but big, then you have a custom. If they are many but small, then you may again have a custom. If a few but big states create a custom, meaning to oblige other states who have expressed either their opposition or their favor, then you have uncertainty in the world.

If we accept the theory that it's enough to have two or three states agree on something, tacitly, informally, without written convention in the traditional form, then the behavior between them is a custom. For whom? For the two parties. Later, others may come to join. But the new states never expressed explicitly in any way their favor of the custom. So there's no question of number of states. Any states may create customs for themselves.

Now what about how long? If it is correct that two or three states may create a custom among themselves, then there is no time required for the custom to be in effect. Why is there big discussion in the law books about how long? Because of the need for evidence. The length of time is a way to prove the custom, not create it.

Take another example -- the abolition of a custom. It is illegal for a state to act against a custom. Can the custom

be abolished? It is impossible for many states to take a different attitude first, so some state must be illegal at some time to set up an opposite practice. Then the other states will come and we have a kind of abolition.

Take the example of the extension of national jurisdiction in the sea. One or two states came first and said, we'd like to have a nice territorial sea. So you raise the question, you are against the law. Come and impose the law if you can, but that's power politics again.

Therefore, I think it's high time in the light of what happens at sea in practice to consider the theory of the whole conception of international custom.

CHOON-HO PARK: I have two specific questions to Professor Butler.

One, would it be possible to give in very brief terms the distinction between the international legal doctrines of the West and of the Socialist blocs. We know something about the difference in the political systems. According to one anecdote it goes like this. The capitalist system is one in which man controls man. The socialist system is just the other way around.

My second question is, where would the Chinese come in, in between or outside? I say this because at international conferences Chinese delegates have occasionally said that the contemporary international law was made by the Western powers to meet their own convenience, so that developing countries have no reason to be bound by a system of law in whose making they didn't take part. Nor have the Chinese said that they like the Soviet doctrine of international law. Of course, we can understand why they didn't say that they liked it. Given the Sino-Soviet relations of the last two decades, it appears to me as if the best Chinese is one who can speak the worst of the Soviet Union.

Now on a number of occasions, China has passed up the opportunity of recommending candidates for the International Court of Justice and the International Law Commission. Now where in your view do the Chinese stand in terms of these international legal documents?

WILLIAM BUTLER: Before responding to those, may I address a comment to this question of regional subsystems. My disagreement is not with Ambassador Djalal at all; it is with Mr. Flemming on this simply because I have no problem whatsoever with regional arrangements as laid down in the ICNT. Those would be structured in pursuance of the treaty and would simply be regional arrangements pursuant thereto. Notwithstanding Brian Flemming's rejoinder on this issue, I still have the

still have the gravest of doubts, and not only within the law of the sea context but in general, about the prospect of regional customary rules of international law or subsystems of international law of a regional character, however you want to define region.

I think in light of Professor Krispis' remarks, which were very much to the point on this, I would stress the universality element. The customary international law has been in principle rules of universal application, whatever the evidentiary problems of identifying precisely what they are. It seems to me once you undermine that premise, then you have nothing left whatsoever. However you define a group of states, customary international law just becomes nonsense at that point in my view.

As far as Dr. Park's questions are concerned, the Chinese, of course, are a puzzle in this not so much because of their peculiar ideological position at the moment but because they haven't produced much by way of doctrinal writing as to what their positions at the moment may be on either customary international law or anything else for that matter. One has Professor Jerome Cohen's and Hungdah Chiu's massive compilation on this matter, but that dates back well in the 1960's. It will be most fascinating to see how they choose in this new era of development to identify and define their relationship with the international community as a whole.

As far as East/West doctrines are concerned, I thought I had in essence responded to that. There is fundamentally still within the socialist world a strong preference for treaty as a principal source of international law. My common law colleagues I think would put the equation by and large the other way around, and that remains a difference. But the amount of space, so to speak, between the two positions in my view has narrowed very considerably in recent years and that's a change of considerable consequence.

WILLIAM BREWER: Bill Brewer of the United States. Those of us who have been working directly at the law of the sea negotiations share one feeling, and that is there's a sort of sword hanging over our heads -- the sword representing the possible failure of what we're doing. Even those of us who are not international law scholars in any real sense keep thinking through this problem we've been discussing today to try to form our own opinions as to what will happen if we should fail. And this has practical consequences because every delegate and every delegation tempers his view of what compromises have to be made and what proposals he makes in the light of the need, the overall need, for a convention.

Now, in listening to Mr. Flemming, I was most interested and got a general feeling that because of the vigorous state

of customary law and perhaps its resurgence at the present time, the lack of a treaty might not be a total disaster because, after all, we would salvage a good deal from the text, which at that time was in existence. I think it's important to mention though that there are some things in the text which simply can't be duplicated in customary law. And there are two things that I think of at once.

One is that there's a level of detail in many parts of the text that we're dealing with now that can't be reproduced. And second, there's some parts of the text which simply aren't suitable in any aspect for customary law. And I speak there, of course, of the creation of international organizations.

Going back to the first point -- the level of detail -- you can, of course, move the right to create an economic zone, for example, into the field of customary international law. But it's very difficult to spell out in that body of law the obligations of states which take advantage of that right. You can, for example, find in customary law perhaps a right to control marine science at some point in the future. But you can't very well spell out in law very clearly the duties of states toward marine scientists, the duties which are necessary if marine science is to flourish in the way that everyone desires.

There is a tendency to create rights in customary law and the kind of customary law that would flow out of the text. But I think it's very difficult to create the corresponding obligations at the level of detail that modern technology requires.

As to the problem of international organizations, I think the whole question of the common heritage is an excellent example of the kind of concept which can perhaps become an accepted doctrine of international law but which would be totally useless without a body of doctrine that spelled out how states could take advantage of this common heritage without conflict in the process. So I'd be interested in Mr. Flemming's comment on this and on the view that the mere existence of a text alone will not achieve any of these changes that everyone feels are needed in the body of international law. If we're going to have a body of law that's suitable for the next century, then we've got to have a signed treaty as well as a text.

EDUARDO FERRERO COSTA:

Quiero hacer un comentario, que en gran parte ya ha sido formulado por el profesor Burke, con quien comparto lo que ha dicho en la primera parte de su exposición, en el sentido de que, si bien el caso presentado es un caso muy interesante y muy bien analizado, definitivamente me parece no puede llevarnos a tomar ninguna clase de conclusiones generales. Es un caso bien especial, y así lo dijo en la ponencia al comienzo, pero también dijo que había algunas cosas que sí podían generalizarse. Yo no creo que haya muchas cosas que se puedan generalizar y, como dice el profesor Burke, habría que estudiar el caso de cada Estado para saber cómo es que cada Estado lleva a la práctica el ejercicio de jurisdicción y soberanía, y el cumplimiento de sus normas legales, en este caso particular, en relación a la pesca.

Pero si hablamos un poco, por lo menos, de la práctica del mundo latinoamericano, yo diría que, en términos generales, al menos, y si hablamos más del caso de la práctica del mundo en el Pacífico Sur, de Perú, Ecuador y Chile y, básicamente del Perú, que es un caso particular, yo creo que allí sí hay una evaluación mucho mayor en relación a la forma en que el Estado peruano hace cumplir y ejerce su soberanía e impone las sanciones.

Obviamente, en el Perú no tiene que reunirse el Consejo de Ministros para sancionar a un buque pesquero que esté pescando sin permiso y, obviamente, nadie va a prisión por eso. Esto puede darse quizás en pueblos que estén pasando por una guerra muy reciente o que están con problemas particulares.

En el caso peruano se captura el buque, hay una sanción y, después, obviamente, el buque y su tripulación sigue adelante, o sea, hay sanciones que el país ejerce de una forma racional.

Yo creo que para los países que tienen experiencia en este campo, de zonas de jurisdicción nacional amplias, como es el caso del Pacífico Sur, ésta puede ser la regla más o menos general para esa zona. Entonces, si vamos a generalizar lo que no se puede, diré que por lo menos la mayor tendencia de aquellos Estados que tienen experiencias, es una tendencia distinta al caso particular que nos ha sido planteado.

De otro lado, me parece interesante comentar otro aspecto dentro del mismo problema del cumplimiento de las normas sobre jurisdicción nacional hasta las 200 millas, y que creo que ha sido el complemento a lo que ha sido expuesto.

Una forma en que el Estado aplica sus normas es imponiendo sanciones a aquellos que las violen. Pero otra forma es haciendo respetar sus normas mediante todos, en este caso, los buques de pesca que piden permiso para pescar en las zonas de jurisdicción nacional. Yo creo que este aspecto es muy importante en la medida en que son solicitados voluntariamente por flotas pesqueras de diversas naciones. Esto implica un reconocimiento de estas flotas de la jurisdicción en favor del Estado costero. Y, por ejemplo, en el caso peruano, es mucho mayor el número de permisos que se otorgan anualmente a flotas de países desarrollados básicamente (Japón, Estados Unidos, Unión Soviética) que a flotas de países en desarrollo. Esto, como digo, implica el reconocimiento de esas flotas, que tienen banderas de Estados determinados e importantes, de las zonas de la jurisdicción y soberanía de los Estados hasta las 200 millas. Esto me parece que es un aspecto complementario que redondea la forma en que puede analizarse, cómo es que los Estados llevan a la práctica su jurisdicción en el caso de las pesquerías.

Por último, el profesor Burke,ha planteado u una conclusión, o una aseveración bien definitiva, y un poco la ha dejado abierta como para que se discuta para el debate, en el sentido de

en su opinión, si mal no lo he entendido, las zonas económicas exclusivas hasta las 200 millas, tal como se están viendo en la actual Conferencia mundial, no benefician, y por el contrario perjudican, a muchos Estados del tercer mundo.

Yo no estoy de acuerdo con el profesor Burke, pero creo que en este momento no me compete a mí decir por qué no estoy de acuerdo. En todo caso, yo le pediría al maestro Burke que sí puede dar los argumentos por los cuales él ha llegado a su conclusión, o sea, a esa afirmación, para después en todo caso, poder exponer los míos.

Quiero también, entonces, dejar claro este comentario y expresar que, en este punto, no me parece, al menos no escuché argumentos distintos, que en general el concepto de la zona económica exclusiva hasta las 200 millas perjudica a los Estados en vías de desarrollo.

EDGAR GOLD: Mr. Chairman, Brian Flemming appeared to touch a very sore spot with at least two very experienced UNCLOS III veterans when he mentioned the conference as a ongoing process -- UNCLOS IV, V, VI, et cetera. What I'm wondering really is he being heretic or is he really mentioning the unmentionable. When UNCLOS III is concluded, hopefully successfully in the early 1980's, can we really in the latter part of the 20th century with all its complexities walk away from the law of the sea for a few years and leave it, or leave it perhaps to a few U.N. regional bodies as it has been suggested to us?

It seems to me that with the greatest respect to the labors and the laborers of UNCLOS III, it would be rather unrealistic as those distinguished colleagues of ours who felt that they have solved the economic problems of the world at UNCTAD I in 1964. I think like UNCTAD, UNCLOS will undoubtedly have to continue although perhaps to say so at this stage may be as heretic as it would have been if someone had enjoined Moses to periodically rework seven or eight of his tablets. We should not forget that those seven or eight tablets have had less than the desired effects and have indeed been reworked continually ever since.

VLADIMIR PISAREV: I would like to begin with a short remark in the direction of some previous statement by Dr. Lagoni and some other participants of this conference. I have in mind also the statement made two years ago in Hawaii. I think that all these statements could contribute only to the aggravation of international relations and only aggravate the possibilities of participation of Soviet scientists in a conference like this one. I don't think that is a good trend for all of us.

Now I have one question for the panelists. I think today's discussions are very interesting and useful. The panelists discussed a lot of problems concerning the development of new international law of the sea, and different points of view are expressed. They reflect different approaches of panelists. But among other factors which are discussed, one I think was missed. I have in mind the assessment of the roles of particular states into the formation of the law of the sea.

So my question isn't incidental. It's partially provoked by the statement of Dr. Burke in the morning session concerning the implementation of the new law of the sea on the distribution of the ocean wealth and its assessment of particular implications for the exclusive economic zone. So my question to the panelists would be to comment on the role of the states' maritime assessment of the possible implications of their and other states' actions that might corrupt the process of the formation of the international law of the sea. Thank you.

HASJIM DJALAL: Thank you, Mr. Chairman. Very briefly, I think Lew Alexander asked which states are disadvantaged.

We all know that this is a subject that has been widely debated. And if I'm not mistaken, the countries or the states that claim themselves to be disadvantaged have submitted a definition. If I recall correctly, one, the states that cannot claim economic zone to the extent permitted by the text of the convention; second, the states that cannot claim at all any maritime jurisdiction which is permitted in the text; and I think the third one is the states for whom the resources of the area of the sea, although they could be claimed within an economic zone, are not sufficient for their own purposes.

I think we can agree that this is a very vague formulation, and perhaps because of that it doesn't go into the text as yet. I would rather leave to those states that consider themselves to be geographically disadvantaged to give comments to this issue.

Secondly, I certainly agree with my dear friend Legault that the article on ice covered area will go into the customary international law.

(Laughter)

If you ask me now, I would say yes.

And thirdly, there was some questions whether the articles on deep seabed mining and the principles of common heritage are passing through the stage of customary international law already or not. I think I said very clearly that as far as I'm concerned the test whether certain provisions have gone into the customary international law or not is their general acceptability by the conference participation, representing the views of the system in the world. Now I didn't say that all articles or all issues relating to the seabed mining have gone through that stage of acceptability. I did say that various articles have not yet reached that stage of acceptability.

I certainly would insist that the principle of common heritage for all the seabed resources and seabed areas has definitely passed that stage; it was already agreed by the U.N. General Assembly resolution. Some countries perhaps abstained in the voting, but they didn't object to it. So from my point of view, it has definitely become part of the customary international law.

But there are articles in the ICNT that deal with the implementation of those basic principles. As Bill Brewer was mentioning, for instance, the organization of the Authority's structure, whether the conference would have 36 or 24 or what amounts of seats in the Council and so forth. Those are the

things that are being debated. And I think in the absence of any convention, one cannot really say which figures would go into customary international law.

But to say that nothing on the seabed issues has gone through the stage of customary international law is saying a little bit too much.

There was Professor Krispis' remark that customs which are regional in nature should bind only those parties concerned and should not bind others. In essence, I think that is also applicable to the treaties, not only to the customs. I think one of the basic principles of the law of treaties is "pacta tertius nec nocent nec prosunt". Treaties bind between the parties and do not bind others.

So if you're saying that customs regionally bind those which are in the region and which they consent or agree to, well, this is true of international law of treaties already. So why are we so scared of having multiplicity of customs because even in treaties, it's the same. In customs, it's like that. I don't see any reason why we should be too over-anxious or too over-cautious on that one. As a matter of fact, from my point of view, maybe this is the difference, Mr. Chairman. We in Southeast Asia are perhaps a little bit relaxed and we like to see varieties -- if you don't carry that too far, of course.

So this variety to answer problems in various regions is something that creates harmony in the end in the life of the international community.

I certainly agree again with Bill Brewer that it is necessary for us to have a signed and ratified convention in order to eliminate all possible ambiguities in the future.

Now there is a question from my dear colleague from Peru whether the 200 miles has already grown into the customary international law. Again, I would say to him, yes, of course.

That's all I wanted to say. Thank you very much.

PROFESSOR KNIGHT: Thank you very much. Professor Butler has advised me that he wishes to reserve his comments and assaults for the cocktail party and is reasonably pleased at this stage. Brian.

BRIAN FLEMMING: Thank you, Mr. Chairman. I'm just going to do a random run through some of the comments that were made that I found very interesting. First of all, to go to Bill Butler's very excellent commentary on the paper, the first criticism that he made, of course, reflects the differences between us, philosophically; and we could probably fight that

out for weeks and months on a private island somewhere. So I won't try to engage the battle here.

But on the second criticism he made, which I won't restate but which will appear in the record, I would say simply that we can't afford to stop the Law of the Sea Conference simply for the reasons expressed in that criticism.

As for the intriguing idea about having a restatement of customary international law, I would refer all of you to last year's proceedings and to the, I think, very brilliant suggestion made by Doug Johnston there of creating a new school of glossators, thereby showing Douglas' civilian background but still a very useful idea which follows in the line of what Bill was saying. And I think I can do no better on that point than to refer you back to last year's proceedings.

Dr. Djalal mentioned that Columbus had set out for Indonesia but "got us". I know it's too late to ask him to comment publicly, but I intend to ask him after this panel is finished who got the best of the bargain.

Dr. Vallarta asked two very interesting and difficult questions. On the first one on the draft text at UNCLOS, part 12, relating to the variation of technology causing agreement to move in concert with technology as it moved, this is very much the same sort of thing that we had in 1958 with the march of technology on the seabed where an open end was left in the UNCLOS I treaty allowing the continental margin to march to the 200 meter isobath or so far as one could "exploit" it. I think in both these cases both in part 12 of the negotiating text and in that case the opinio juris is formed by the basic agreement, the fundamental agreement, and that the movement is not related to a change in that opinio juris. It just is a variation that's already been allowed for in it. And that that is the juridical base for permitting technology to march.

The other question on "instant" international opinio juris without practice is a much more difficult theoretical question. You'll notice I skirted by it very quickly in my paper. I've acknowledged that it existed, that there was controversy, but did not give any opinion. I think that it is possible in certain areas though to have instant customary international law and to find the consuetudo in the actual opinio. If people sit down at a conference and make an agreement on outer space or on some aspect of deep sea mining where physically they've not yet been able to have practice, then until the practice actually, physically takes place, the act of making the agreement can for the time being possibly form the consuetudo in the customary international law. But that's a very tough theoretical point.

Mr. Brewer's points about the level of detail which cannot be reproduced by custom is a very important one. And I think this is why in my paper, in the implied anticipation of the possible failure of UNCLOS III to get a text that actually is agreed upon and that people sign and ratify, it may be that we will find our shelter or our safe harbor in regionalism of some kind or another -- either regionalism in the sense of post-failure meetings by coastal states in order to ratify and complete the existing international law that I think now exists on fishery zones at minimum and exclusive economic zones at maximum, or regionalism in the sense of regionalism in the usual meaning of the word of states sitting around enclosed or semi-enclosed seas and what have you. So that while agreeing that the level of detail cannot be reproduced by custom in all cases, it at least can provide a framework so that if there is failure, then regionalism might be able to fill the gaps until follow-up conferences can do their work.

But I've been very interested, as Edgar Gold said in his comments, with the reaction of many people to even uttering the words "failure of UNCLOS III", or words to those effect. You know, it's been a long process, it's been a difficult process. But I think we really still have to face what the consequences would be, as Lew Alexander and his colleagues did a few years ago in a very good paper on that subject, of what we would have to do following UNCLOS III if it did fail, if it did not produce a treaty that was generally agreed upon.

And that's why I think the only answer if you're going to maintain stability must be not only that you regionalize but also that you call another conference into session immediately. That may be undermining the success of what's happening now to suggest that, but I think as we sit quietly here in this lovely suburb of Mexico City where the press is not present that we have to think about these things, to think the unthinkable in order to be prepared for it or avoid it.

On the other question about creating international organizations by custom, you're obviously right on that. I don't see any way at the moment that we could create international organizations by customary techniques, so we simply might have to do without them. There goes the seabed!

On Professor Ferarro's questions -- I was the one who sat here transfixed when you asked your very precise, exact question. I say, yes, I think there is now a norm of customary international law permitting states to exercise jurisdiction up to 200 miles for the purposes of fisheries.

May I say one final thing. It's been very pleasant to be here as a three year drop-out from international law and Law of the Sea Conferences. But in concluding and since we started off laughing, I'd like to try and end that way. It's

been a very interesting week. Looking at the week reminds me of the story of Lord Birkenhead who was orginally a young lawyer named F. E. Smith at the early stage of his career. One day he was appearing before an appeals court in London, and was making the same argument over and over again. The judge who was getting very annoyed, finally looked down and said, "Now, Mr. Smith, I'm getting very short-tempered with you because, after everything you've said this morning I am none the wiser."

And Smith said, "Ah yes, my Lord, but you're much better informed."

I hope that as a result of this week's sessions and this afternoon in particular that if you're none the wiser that you're at least better informed.

BANQUET ADDRESS

ENTROPY AND THE LAW OF THE SEA

by
Dr. John P. Craven
Director of the Law of the Sea Institute

We all understand why it was not possible for the distinguished invited speaker to be with us this evening. The momentum of the Law of the Sea is such that its leaders are in constant demand to solve the daily crises which arise in increasing number. Those of us who are here have sacrificed other obligations and are fortunate to have found the time for this intellectual banquet. There are many in this audience who are far more distinguished and capable than I, who are more appropriate as banquet speaker, but we all realize that a banquet speech takes a long time to prepare. It must be, in the following order: short, entertaining, and relevant. In general these are incompatible requirements.

Fortunately or unfortunately, the director of the Law of the Sea Institute, like the frustrated singer in the opera chorus, has prepared his version of such a speech in the hopes that the lead tenor and all his replacements are unable to sing. Such a moment has arrived, and though it may be both debut and swan song, you must suffer through it.

In preparing for this speech I spent many hours with Ambassador Chris Pinto of Sri Lanka discussing the vexing problem of organization of International Conferences and the communication processes which make our task protracted and endless. As a result I was motivated to undertake some research on the subject.

The most effective way to do research is to consult an expert who already knows the answers. So, I went to a friend of mine who is an expert in information and communication theory. I asked him if his science had anything to offer to the law of the sea. He said no, it did not. "However," he said, "I will tell you of a strange and wonderful dream that I once had and you may find some lessons in it."

I will now relate to you his dream as he told it to me and I shall relate in in the first person.

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At the start of my dream I found myself alone and far out to sea on some ghost-like ship or platform. There was a dense fog, and because of the incoherence of the dream I could not tell whether I was above the water, in the fog, on the surface of the water, below the water, in the column, or sitting on the seabed. I only knew that I was well out to sea, sea-sick and in need of rescue.

We all know the logic of dreams; most of it is disoriented and disconnected, but some seems to be clear and precise. I thus know that, as an expert on information, I could resolve the dream in a hurry and go back to sleep. There were only two questions I had to answer:

First, what is the probability that I will be found? Or its denial, what is the probability that I will not be found?

And second, what is the probability that, having been found, I will be rescued, or its denial, what is the probability that, having been found, I will be arrested and put in jail?

I quickly recognized the absolute necessity of assuming that I would indeed be found and that the only important question was, what is the probability that I will be arrested?

Now this is a very simple problem for an information specialist. All that he has to do is to enumerate all of the significant assertions which bound the problem. He then determines the probability that each assertion is true. He then takes each probability figure and multiplies it by minus the natural logarithm of the probability. Then he adds all these numbers up and gets a single number which he calls the "informational entropy." (If you in this audience have only a foggy notion of this mathematical process, just remember that this description may be for you as it was for me, a hazy dream.) This number called entropy is a measure of uncertainty; when it is large, then there is a great deal of uncertainty. When it is reduced to zero then there is absolute certainty and the problem is solved. The size or magnitude of the entropy number tells the expert how many questions he must answer before he can solve his problems.

Thus, you see, it was simple to resolve the dream--all that was necessary was to ask all the relevant questions. I will not bore you with a complete recitation, nor do I remember all of them. It was only a dream, you know, but here are a few:

Where am I?

What is the probability that I am in the fog?

on the water?

in the water column?

on the sea bed?

What is the probability that I am

three miles

twelve miles

two hundred miles

more than two hundred miles

from a continent, an archipelago, an island, or a rock?

What am I doing?

What is the probability that I am

fishing

doing ocean mining

doing scientific research

engaged in free transit

engaged in innocent transit

extracting energy from the wind and sea

spying

engaged in a clandestine military operation

engaged in an overt military operation?

What is the probability that I am flying the flag

of a pirate

of a maritime nation

of a Third World nation

of Liberia or Panama?

What is the probability that the people who find me are

friendly

antagonistic?

Given the above, what is the probability that I am violating their law?

What is the probability that they realize I am violating the law, etc. etc.?

The list was in fact much longer but these things are added up rapidly in a dream, and in a flash, I knew exactly the magnitude of the total entropy of the law of the sea and the exact questions that I needed to answer to end the dream. Unfortunately, after I awoke I forgot the exact number and content of most of the questions, but I remember that it was a reasonable number and that I felt that I was going to have a short dream.

I decided that the best way to answer the questions was to dream up some scientists--so, I dreamed up Lew Alexander and Paul Fye. It took some time for them to get there because they had to obtain a large number of coastal state consents. When they arrived I asked them if they could reduce the entropy of the law of the sea.

Now scientists know everything, so they acted as if they knew what entropy was and they said, "Of course, reducing entropy is the most important thing that scientists do. We scientists know everything. We can tell you your latitude and longitude, the temperature of the water, the depth, salinity, location of the thermocline, the location of the phytoplankton, the zooplankton, the foraminifera, etc." This was wonderful, the entropy was dropping at a rapid rate and the dream would soon be over.

"Magnificent," I cried. "Can you tell me what I can do?"

"Oh, no," they said, "you will have to ask the technologists."

"Well," I replied, "am I doing scientific research?"

"Oh, yes," they said, "you can do anything and call it scientific research, but you must distinguish between pure research and research which relates to economic exploitation."

"Well, how do I do that?"

"Ask the lawyers," they replied.

I could now see that the falling entropy was beginning to rise. At that moment a great wave swept the decks and carried Alexander and Fye over the fantail.

Next, I dreamed up a few technologists. This was the biggest mistake of the dream: fishermen of every kind and

description, deep sea miners, oil men wearing three-piece suits, engineers in hard hats, etc. all came swarming on the decks, like so many buccaneers.

"Am I mining?" I cried.

Back came a chorus of questions. "Do you have national legislation? Have you staked a claim? Who gave you the technology? What are your financial arrangements? Are you a joint venture? Do you have permission from all mankind?"

"How do I know?" I shouted back, and they in unison replied, "Ask the lawyers!"

Again I cried, "Am I fishing?"

Back came another chorus, "Are you a long liner? A purse seiner? Are you after demersal species? Are you after pelagic fish? (What's pelagic fish?) Only tuna. Do you have a permit? A license? A weapon on board? Were you spotted by the Coast Guard?

And again I cried, "How do I know?" and they shouted back, "Ask the lawyers!"

I was about to cry, "Am I drilling for oil?" but the words stuck in my throat. I already knew that the oil men would reply, "See my lawyer."

So I dreamed my way to a legal institution that specialized in the law of the sea. I was still at sea, mind you, but in a dream--perhaps I should now call it a nightmare--where it is possible to be in two places at the same time. When I met the first lawyer I said to myself, "Forget this entropy business," and I said to him, "Advise me of my legal rights."

He answered, "There is a forty percent probability that you are in a zone that is sui generis, a ten percent probability that you are in a territorial sea, and a fifty percent probability that you are on the high seas. Of course," he said, "there are some misguided lawyers in other institutions who would say that there is a ninety-five percent probability that you are on the high seas and a five percent probability that you are in territorial waters; but you must not pay any attention to them."

This seemed reasonable, so I listened to the learned lawyer for what seemed hours but in the dream was actually only a few seconds. The entropy was now at a comfortably low level, but I decided to check with other lawyers at the same institution. They all spoke for hours, they all used different words; but I suddenly realized they were all saying the same thing, and I found myself breaking out in a cold sweat.

At first, I could not understand this but then I remembered that I was an information specialist and that what I was experiencing was not an unknown phenomenon. Just because a lot of hot air is being generated does not mean that the entropy is rising--it certainly does not mean it is falling--but if you feel hot and cold at the same time you know that the entropy is neither rising nor falling: this phenomenon is called "isentropic expansion." I explained this to the lawyers and they said I was wrong; the phenomenon is known as--and they used an indelicate expression. I admonished them that if they would use the term "isentropic expansion" in the future they could command higher fees.

The dream was now a nightmare, so I tried to eliminate all the assertions from my mind to observe "the rules of silence" and go back to sleep. I dozed fitfully for a few minutes but soon I had a high fever. I realized that just because one reduces the assertions, it does not mean that the entropy is rising; but if you put your foot in your mouth and you find yourself in hot water, then you know the entropy is neither rising nor falling--this phenomenon is called "isentropic compression."

Well, I now knew that I must reduce the uncertainty, resolve the dilemma, lower the entropy whatever, if the nightmare were ever to end. So, like the "Fliegende Hollande" I sailed from law-of-the-sea center to law-of-the-sea center around the world.

After each visit the entropy kept rising. At each institution I raised the cry, "Is there no hope?" and each institution said, "Yes, there is a conference called UNCLOS and it will soon conclude a treaty which resolves all of the questions of the law of the sea. When the treaty is signed there will be certainty (with a few minor exceptions).

"Magnificent!" I sobbed. "When does this conference meet?"

"It meets all the time," they said. So, I conjured up the UNCLOS and I found myself in a room with a man named Amerasinghe, a man named Engo, a man named Aguilar and a man named Yankov. They were all young, with dark hair and bright eyes, a dynamic and resilient team.

"I hear," said I, "that you are concluding a treaty which will reduce the entropy in the law of the sea to zero."

"Yes, yes," they laughed, "it is one package deal, and we have the Text here." Indeed, each chairman had a thick, neatly bound text in his hand. In all candor, I must say that Engo had three Texts in his hand, but he was shuffling them

so rapidly it was hard to tell.

In unison they firmly stated, "The Text will be completed at the next session." They paused, and they repeated the statement; but this time their eyes were a little dim. They paused again and repeated the statement, and now their hair was gray at the temples and a wrinkle creased their brow. They paused and repeated seven times; the last time their hair was white, their faces furrowed with care, and their voices trembled.

"Stop! I believe you, but I am not willing to wait another year for the dream to end. I am sure that, by now, your Texts are universal customary law, and I am sure that somewhere there is a group that knows the answer."

Amerasinghe then spoke in a kind but weary voice. "Young men," he said (for now all men seemed young), there is a conference in Mexico City sponsored by CEESTEM and the Law of the Sea Institute and it is called "State Practice in Zones of Special Jurisdiction"; perhaps you can find the answer there.

My mind transported me to Mexico City, and there I found a serious and distinguished assembly engaged in profound intellectual enterprise. "Senores y senoritas, por favor, estan ustedes incrementando o disminuyendo la entropia del derecho del Mar?" The distinguished chairman, a Mr. Thomas Clingan, said, "You must be in the wrong conference. We never heard of entropy."

"Well, then, what do you do at this conference?"

"It is rather hard to say, but the best analogy is that we improvise on fugues by Bach and we do not improvise on Frere Jacques."

This was language an information specialist could understand; what they were doing was increasing the entropy in an ordered way in order to decrease the entropy. The way in which they increase entropy is a special form of mini-max. That is, they find the minimum, maximum entropy that is required to include all the relevant assertions, as a basis for finding common principles which would reduce the entropy in a coherent way. They are, in the parlance of the entropy specialists, a collection of Maxwell Demons separating the hot from the cold.

This seemed a sensible thing to do. It also seemed a pleasant thing to do. The surroundings were beautiful, the hosts gracious and hospitable, the arrangements in perfect order, the translators of exceptional quality, the staff hardworking and accommodating, the leaders intelligent and forceful.

"Is this your only meeting?" I asked.

"Oh no! We have met in Rhode Island and Honolulu and The Hague, and we shall meet again in Kiel and the South Pacific and in all the lovely places of the world. There is also another group called Pacem in Maribus and they too have met in Mexico City, and they have met in Malta and Okinawa and Algeria."

This was a dream within a dream and I thought to myself that when I wake up I must join this community. Suddenly the scene faded away, and once more I found myself alone on the grey cold sea. It was obvious that I could not intellectualize myself out of the nightmare, but I knew that I must reduce the entropy to zero. I realized with a chill that the only thing in the world with zero entropy is death and taxes. These are regimes whose jurisdictions I wish to defer. The only alternative was to wake up. This I did, and I immediately took pen in hand to record the dream, but alas, the mere fragment that was recited was but a scrap of a tortured frenzy. All attempts at recall were blocked out by the last lines of Gilbert and Sullivan's Nightmare Song: "The long night has passed and it's daylight at last, and the night has been long [ditto ditto] my song, and thank goodness they're both of them over."

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Here ended the tale of my friend, the information specialist. I, John Craven, for one, could not glean the moral from the story. So I said to him, "My friend, if you were the speaker at the LSI/CEESTEM banquet and you wanted to demonstrate in the simplest way how the principle of entropy reduction could be used in resolving the problems of the Law of the Sea, what would you do?"

He said, "I would sit down."

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