# PART VI

# THE ENVIRONMENTAL REGIME

# INTRODUCTORY REMARKS

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Among the unique features of the Third United Nations Conference on the Law of the Sea was the manner in which it addressed environmental issues. Of course, when one speaks of the environmental issues in the treaty, a tremendously broad range of questions are covered, including the many provisions in the treaty dealing with conservation of resources. It would be impossible here in the time that we have to address all of those issues, even though we have a very distinguished panel and commentators to address them.

Our first speaker is Ms. Jan Schneider. She has been long involved in both law of the sea and matters; she has written an extremely fine book on the environmental law of the sea; and she is one of the most able people I know on issues of this type.

Our second speaker will be Ambassador Helge Vindenes. He is now posted in Santiago. I remember him best, of course, as an outstanding member of the Norwegian delegation during the many years of the Law of the Sea Conference and, I might add, especially as the rapporteur of the now famous Evensen group in 1975. As Ambassador Castaneda pointed out, this was the famous Evensen/Vindenes team that established the procedures which were to set the tone for the way in which the Conference was to proceed from then on. So it gives me great pleasure to introduce an old friend, Helge Vindenes.

Our third speaker is another old friend -- so old in fact that it is difficult for me to summarize all the things that he has been involved in. As you all know, Ambassador Beesley was the Head of the Canadian delegation and in that capacity he was extremely active in all areas of the treaty, environmental matters not the least among them. In referring to informal groups at the Conference and their influence on decision making, one must, of course, always remember the famous Beesley luncheons and the round table that proceeded from them. In addition, I had the pleasure of laboring under Ambassador Beesley's gavel in his capacity as Chairman of the Drafting Committee and I must say that it gives me great pleasure for the first time to insist that he refer to me as Mr. Chairman. I will not say more because you all know his influence upon the Conference.

Our final speaker is a person who is highly qualified to present his particular paper, Mr. Eric Lykke, Director General of the Ministry of Environmental Affairs of Norway. We are very pleased to have him with us today. Mr. Lykke was formerly with the Foreign Ministry and he will address a topic which is considered to be one of the hot issues of ocean environmental law. Of course, that is the question of the disposal of nuclear wastes.

For our commentators, I will call first upon Professor Jesper Grolin of Arhus University. He will be followed by Professor Douglas Johnston from Dalhousie University, where he directs a very fine institute for ocean management which was last year's host for the Law of the Sea Institute's Annual Conference. Doug has been kind enough to step in at the very last minute for Brian Flemming who through forces beyond his control was unable to join us.

# PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT: WHAT IS NEW ABOUT THE LAW OF THE SEA CONVENTION?

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Certain spokesmen against the Law of the Sea Convention in the US have recently been propounding, to those concerned with the protection and preservation of the marine environment, the contention that they should not support the new treaty because its environmental provisions are superfluous. Everything that is contained in the provisions of the Convention on the protection and preservation of the marine environment, so this argument goes, can already be found in pre-existing environmental agreements.

There are, indeed, a number of highly significant precedents. At the multilateral level an impressive array of international agreements springs to mind: the early conventions negotiated under the auspices of the International Maritime Organization (then the Intergovernmental Maritime Consultative Organization), the 1972 London Dumping Convention, the 1973 Pollution from Ships (MARPOL) and the 1974 Safety of Life at Sea (SOLAS) Conventions and their 1978 protocols, etc. And for particular areas or bodies of water one thinks of the series of agreements concluded under the auspices of the United Nations Environment Programme through UNEP's Regional Seas Programme, notably: the 1976 Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution, the 1978 Kuwait Regional Convention, the 1981 West and Central African Regional Convention, and, most recently, the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Area.

In short, treaty critics conclude there is nothing new under the sun or, rather, under the new "umbrella treaty." But, it is submitted, they are wrong.

## ENVIRONMENTALIST AND THE ENVIRONMENTAL PERSPECTIVE

Those concerned with environmental protection should not let themselves be lulled into passivity or submissiveness, by the pro-complacency campaign I just described. The fact is that environmental interests have a great deal to lose through perpetuation of the current anti-treaty stance by the US.

First of all, as Ambassador Yankov demonstrated so eloquently in his remarks in Panel II, the Law of the Sea Convention is truly a comprehensive "umbrella treaty" from the environmental perspective. It provides an overall framework for the interpretation and application of existing international environmental law and for the future progressive development of the law. This framework represents a careful balancing of coastal state interests in the protection and preservation of

the marine environment on the one hand, and the rights and interests of others in preserving navigational freedoms and various shared uses of the world's oceans on the other. Incorporated by reference within it are the environmental rules and standards which have been "generally accepted" by the international community, as well as some important innovations to enhance the comprehensiveness of the new regime. Moreover, the jurisdictional reach of several previous agreements is extended or clarified by the Convention, particularly with the advent of the exclusive economic zone.

Beyond the provisions of the new treaty itself, environmentalists, with their preoccupation with common or shared resources (or "inclusive interests," to adopt some political-economic or "public goods" jargon), are among those with the most to lose from the disintegration or destabilization of the constitutive process whereby international law is made and applied. In short, they have abiding interests both in the treaty provisions on the environment and in the treaty process itself.

Since on this panel we are focusing on the environmental rights and duties of states under the Law of the Sea Convention, I would like to approach this subject in the hopes of demonstrating what is new in the new Convention and why those concerned with the protection and preservation of the marine environment should give it their active support. At the same time, I would also like to offer a few suggestions for the future progressive development of the environmental regime for the oceans.

## ENVIRONMENTAL PROVISIONS OF THE NEW "UMBRELLA TREATY"

To repeat, the Law of the Sea Convention represents a significant advance in international environmental law, both on the general and theoretical and on the more specific and practical levels. As far as its underlying assumptions and basic theory are concerned, the new Convention reorients existing international law so as to lodge the right or power to prescribe and apply environmental rules and standards in those states with the economic, political and other incentives to do so, namely, in coastal and port states. However, one hastens to add, it also sets forth certain basic guidelines for the exercise of such rights and powers, as well as concomitant responsibilities or safeguards to protect the legitimate interests of other states and their nationals in their use of ocean space.

Turning to the specific provisions of the Law of the Sea Convention, it is somewhat difficult to determine at what level of complexity to try to approach an overview. I see in the audience both a number of individuals much more familiar than I with the environmental negotiations at the Third U.N. Conference on the Law of the Sea and some others who may have very little notion about what the new treaty says and does concerning the marine environment.

Suffice it to say -- trying very briefly to encapsulate Ambassador Yankov's excellent remarks the other day -- that the Convention deals comprehensively with environmental subjects, that is, the protection and preservation of the marine environment, leaving aside for purposes of this panel the subject of conservation of living resources, which could also come under the rubric "environmental," primarily, although not exclusively, in Part XII. Part XII contains far-reaching provisions both on law-making or prescription of environmental rules and regulations and on enforcement or application of the law. As Ambassador Yankov stressed, it seeks to deal comprehensively at differing levels of abstraction with all of the various sources of marine pollution: pollution from land-based sources, from sea-bed activities in areas under national jurisdiction, from activities in the International Area, from dumping from vessels, and from or through the atmosphere. As I said before, in accordance with various political-economic theories of "public goods" or "externalities" with regard to each of these sources, the Convention attempts to lodge in those states, with incentives for environmental protection and preservation, the rights and powers necessary to achieve these objectives within a carefully balanced system designed to protect the legitimate interests of other states.

Ambassador Yankov discussed extensively the improvements in the environmental provisions of the new Law of the Sea Convention over those in the four Geneva Conventions on the Law of the Sea, which, as he pointed out, collectively contained only three provisions on the protection and preservation of the marine environment. Here, I will just try to complement that discussion by giving a few examples in various areas of the foundations for the provisions of the Convention, by saying something on what is new in the new Convention, and by indicating what further progressive development of the law may be contemplated.

Vessel-Source Pollution

One thinks first of pollution from ships, as that was the primary focus of attention during the negotiations on marine pollution at UNCLOS III and as the articles on this subject are by far the most detailed of those in Part XII of the new Convention. While ships account for only a relatively small part (perhaps 20 percent or less) of the pollution of the marine environment, preoccupation with this subject was natural in light of the sudden and dramatic nature and often catastrophic results of vessel accidents (the number of jurisdictions typically involved, i.e., the state of the flag or registry, the vessel owners, the cargo owners, the injured state or parties, and sometimes the port of destination), and of the widespread attention attracted by these calamitous events.

Delegates at UNCLOS III had, of course, an impressive body of law to build upon in the area of vessel-source pollution. The litany of important existing agreements is well known: beginning back with the 1954 Convention for the Prevention of

Pollution of the Sea by Oil, through the IMO (formerly IMCO) 1969 Intervention and Civil Liability Conventions and 1971 Fund Conventions, the 1972 Collision Regulations Convention, leading up to the 1973 Pollution from Ships (MARPOL) Convention, the 1974 Safety of Life at Sea (SOLAS) Convention, the 1978 Convention on Training and Certification, and the 1978 MARPOL and SOLAS protocols. These conventions may already be said to have been "generally accepted" by the international community.

But UNCLOS III built upon this foundation. The Convention not only provides the overall framework within which to interpret the jurisdictional provisions of these numerous precedents, but it also contains notable improvements in, or "progressive development" of, the law. As far as prescription or law-making is concerned, article 211 of the new Convention recognizes augmented powers of coastal states to adopt laws and regulations for the prevention, reduction and control of pollution from vessels, conforming and giving effect to generally accepted international rules and standards. And on the enforcement side, probably the most notable development is the acceptance or recognition for the first time in treaty form -- in article 218 -- of the concept of universal port state enforcement jurisdiction: when a vessel is voluntarily within a port or at an offshore terminal of a state, that state may undertake investigations and institute proceedings with respect to any discharge from the vessel in violation of international law, even though the discharge occurred outside its internal waters, territorial sea or even exclusive economic zone.

Pollution From Land-Based Sources

Another area that must be mentioned is pollution from land-based sources, representing 75 percent or more of all pollution of the marine environment. This was probably the most intractable problem facing delegates in the environmental negotiations at UNCLOS III, not only because of the scope and magnitude of the overall problem, but also because of some of the inherent economic and political polemics involved. These included: difficulties in identifying and regulating sources of land-based pollution; the fact that control of land-based sources necessarily involves restriction or reorientation of, or compensation for, certain activities on land, i.e. at home, in the country of origin; and certain inherent or perceived conflicts between the goals of economic development and of environmental protection.

The Conference had some law upon which to build, in the form of regional agreements. The 1974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources relating to the North Atlantic and Arctic Oceans was quite limited in its scope. There was also a rather limited article and annex on land-based sources in the 1974 Helsinki Convention for the Baltic Environment. The most comprehensive regional effort to date is the Protocol on Land-Based Sources to the 1976 Barcelona Convention for the Mediterranean, with efforts underway under UNEP auspices to draft similar protocols for other areas.

Delegates at UNCLOS recognized that their work was a start, but only a start, towards dealing with the problem of land-based sources. Therefore, article 207 of the Convention provides that states "shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures" and that they must take other measures toward these ends. Article 207 also provides that states "shall endeavour to harmonize their policies in this connection at the appropriate regional level." It adds that states "acting especially through competent international organizations or diplomatic conference shall endeavour to establish global and regional rules, standards and recommended practices and procedures... taking into account characteristic features, the economic capacity of developing states and their need for economic development." A lot of this is only hortatory, but it is at least hortatory.

Other Sources of Marine Pollution

Since time is short, I will add only a very few words about other sources of marine pollution dealt with in the Convention. Ocean dumping is really a part of the general problem of land-based sources, but it has proved more amenable to international prophylactic action, perhaps because instances of ocean dumping have become relatively easy to identify and, therefore, the effective enforcement potential is greater than with other land-based sources.

Very briefly to complete the list -- as the much publicized Ixtoc spill in the Gulf of Mexico not long ago and the current little-noted major blowout in the Gulf off Iran forcefully demonstrate -- pollution from sea-bed sources, in particular, offshore drilling, is a subject that has received too little international attention. The potential for environmental harm of deep sea-bed mining activities on the other hand, is a topic about which really very little is known and the environmentalist objective in this area, as seems to be recognized by the Convention, is necessarily to provide for flexibility to prevent unreasonable risks and to deal with new threats as they materialize or are perceived. The last source dealt with specifically in the new Convention, pollution from or through the atmosphere, is a bit obscure, except as it may relate to the pressing problem of acid rain involving air-borne transit of land-based pollutants or to the issue of atmospheric nuclear testing. However, the Convention at least notes the existence of a problem area and commits states to do something about it.

Other Noteworthy Provisions

While the source-specific provisions of the Convention contain a number of progressive developments, equally welcome from the environmental perspective are some innovations in more general, functional provisions. As Ambassador Yankov emphasized in his remarks, of fundamental importance is the fact that the concept of "protection and preservation of the marine environment" is much more comprehensive than just combating pollution.

Moreover, articles 192 and 193 for the first time raise to the level of a binding treaty obligation the responsibility set forth in Principle 21 of the 1972 Stockholm Declaration on the Human Environment: states have "the obligation to protect and preserve the marine environment." As another example, in article 204 states for the first time undertake the positive responsibility to participate in marine pollution monitoring programs. And article 206 contains an environmental assessment procedure modeled on the requirement for Environmental Impact Statement under the US National Environmental Policy Act. Another particularly notable advance in the law is found in article 235 on responsibility and liability, which provides, inter alia, that "States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief" with respect to marine pollution damage caused by natural and juridical persons under their jurisdiction. In addition, there are a number of important environmental provisions outside of Part XII, particularly noteworthy among them the environmental dispute settlement provisions in Part XV and its annexes.

One could give a number of other examples. But the point is, once again, that the Convention is an "umbrella treaty" covering and supplementing provisions scattered in a number of previous instruments and providing guidelines for future legal developments. Just as so much remains to be done to regulate land-based and other sources of marine pollution, so too are there a number of functional areas which suggest themselves for the further concentrated attention of the international legal community. The general subject of liability and compensation for marine pollution is, for example, one such area. For the legal practitioners it might be noted that the procedures for the evaluation of injury and the assessment of compensation could do with a lot of work on international standardization or harmonization. And one would not soon exhaust proposals for a plan of future environmental actions.

## CONCLUSION

To return, however, to the question raised at the outset, I hope that what has already been said is enough to persuade you that the argument by critics of the Law of the Sea Convention that its environmental provisions are superfluous, is sorely misguided. That argument is erroneous for at least three basic reasons.

First, because it is simply not true that the new Convention merely reiterates and knots together a patchwork of provisions from already existing environmental agreements. There are a number of important new elements, in particular, to repeat: the explicit statement of the general obligation of states to protect and preserve the marine environment, the enhanced prescriptive rights of coastal states in offshore areas, the recognition of universal port state enforcement jurisdiction, expanded notions of state responsibility for

environmental protection and for redress of injury, and so forth.

Second, because environmental agreements often have a quite limited number of parties although their terms may still be said to have gained general international acceptance. The new Convention extends its umbrella to cover and incorporate such "generally accepted" rules, standards and recommended practices and procedures, thereby expanding the scope of their application. It was, of course, expected that more states would subscribe to the Convention and its overall "package" than could be persuaded to sign and eventually ratify, or in any case apply, the provisions of particular environmental agreements.

Third and finally, because one comes back to the need for preservation of the constitutive process whereby the law is made and applied. Some of the achievements in the conclusion of previous environmental agreements may be attributed to negotiation of these instruments symbiotically with negotiations at the Third U.N. Conference on the Law of the Sea and with the expectation that what was being agreed to would come within the jurisdictional guidelines of, and would be subject to the balance and safeguards of, the overall "package" emerging from that Conference. Certainly, rejection of the new Convention, which is, at this point, tantamount to rejection of an entire decade of international cooperation towards molding a broadly multilateral consensus, will not result in a future international climate receptive to the progressive development of international environmental law, or perhaps any other kind of international law.

In conclusion, it therefore seems clear that environmentalists should actively support the Convention on the Law of the Sea. They should support it for reasons that are particular to their own cause, including the basic environmental framework and the elements of "progressive development" contained in the new "umbrella treaty." And they should give it their active support for the same basic reason that a number of others with varying interests are counted among its advocates, namely: the preservation of the international law-making system and, ultimately, of the rule of law on the international plane.

# THE ENVIRONMENTAL RIGHTS OF COASTAL STATE AND THE FREEDOM OF NAVIGATION

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## SCOPE OF PAPER AND KEY EXPRESSIONS

The purpose of this paper is to analyze the relationship between the freedom of navigation and the environmental rights of coastal states in the exclusive economic zone. The corresponding issues of the relationship between the environmental rights of the coastal state and, respectively, the right of innocent passage in the territorial sea and the right of transit in straits used for international navigation will not be dealt with. Nor will the paper deal with the jurisdictional rights of the port state.

What is meant by the freedom of navigation? Firstly, the term "freedom" will not here be used in an absolute, but in a relative sense. Thus, the limitations on the freedom of each vessel which flow from particular treaties to which also the flag states are parties, such as IMO treaties, will not be considered limitations on the freedom of navigation. The freedom with which we are concerned here is a freedom of a more limited kind, namely the freedom from unilateral imposition of jurisdictional measures on the part of the coastal state.

Secondly, the term "navigation" obviously covers not only civilian, commercial and non-commercial, but also military traffic. And with regard to ownership it is immaterial whether the vessels are private or state owned. More difficult questions arise with regard to types of activities, the most important being whether the term navigation should be used in a narrow sense, i.e., covering only such activities as are necessary for the completion of the voyage. Related activities, such as anchoring or the carrying-out of naval exercises, would then not be covered by the term. In conformity with what is believed to be the right interpretation of the term navigation as applied in the Convention, this paper will use it in the narrow sense.

Nevertheless, the paper will also, though admittedly this involves going somewhat beyond the language of its title, take up the relationship between the environmental rights of the coastal state and navigation-related activities such as those mentioned above. Furthermore, it will be necessary in this connection to take a look at the fundamental question of whether in the exclusive economic zone the so-called "residual rights," meaning the rights to authorize and control activities other than those dealt with expressly by the Convention, lie with the coastal state or with the international community.

Turning to the term "environmental rights of the coastal state," in the paper this will be limited to those jurisdictional rights of regulation and enforcement which the

coastal state enjoys in the exclusive economic zone for the purpose of protecting the marine environment. One should not forget, however, that in addition to such jurisdictional rights the coastal state also enjoys a whole range of material rights of environmental protection, such as those flowing from IMO conventions and the various conventions on dumping, as well as from many important provisions in the Law of the Sea Convention itself.

## SURVEY OF THE LIMITATIONS ON THE FREEDOM OF NAVIGATION REPRESENTED BY THE ENVIRONMENTAL RIGHTS OF THE COASTAL STATE

Obviously, in dealing with those limitations on the freedom of navigation which are the consequence of the environmental rights of the coastal state, the focus of attention must be on those provisions of the Convention which deal with vessel source pollution.

Here, the salient point is that these provisions do not give the coastal state any general pollution jurisdiction in the exclusive economic zone, neither with regard to the right to regulate nor in terms of the right to enforce applicable regulations. In reading the text of the Convention, it is impossible, at least for the author of this paper, to escape the conclusion that in most essential issues the interests which prevailed in the negotiations were those of the maritime powers.

Firstly, the regulatory capacity of the coastal state (article 211, paragraphs 5 and 6) is confined to laws and regulations "conforming to, and giving effect to, generally accepted international rules and standards established through the competent international organization or general diplomatic conference." Even in the case of particularly vulnerable geographic areas (article 211, paragraph 6), the power of the coastal state to adopt national laws and regulations more stringent than the international ones is contingent upon the "competent international organization" approving such laws and regulations within twelve months. As such laws and regulations do not become applicable to foreign vessels until after fifteen months, there is an inbuilt guarantee against their being applied on a provisional basis. A further condition is that the additional regulations concerned do not apply to "design, construction, manning or equipment."

In sharp contrast to this provision dealing with vulnerable areas generally stands article 234 on ice-covered areas. This article does give a right of unilateral regulatory jurisdiction and enforcement jurisdiction to the coastal state. Only in this particular case did the two major maritime powers, the US and the USSR, find it possible to accommodate the pressure for a general coastal state jurisdiction on vessel source pollution in the EEZ. Thus, the final result of the claims from coastal states in Africa, Latin America and many parts of Asia for a general coastal state jurisdiction on vessel source pollution within 200 miles was limited to a clause giving such jurisdiction to a relatively small number of countries in polar

regions, and restricted to the ice-covered parts of their exclusive economic zones.

Basically, the only regulatory competence which coastal states in accordance with the Convention generally enjoy in the area of vessel source pollution in the EEZ is the right to transform into their legislation such regulations as have met with general international approval. Leaving aside the issue of the criteria for determining when a rule has become generally acceptable internationally, this hardly amounts to the acquisition of significant new coastal state jurisdiction.

Turning then to the enforcement rights of the coastal state, and we are still in the area of vessel source pollution, one might have thought that in order to offset the absence of any real standard-setting competence for the coastal state, the coastal state would at least achieve a general power to enforce internationally agreed rules and regulations. However, also on this point the maritime powers fought a fairly successful battle at UNCLOS III, though not with such complete success as with regard to the question of regulatory competence. Although article 220, paragraph 6, does give a certain right to the coastal state to institute proceedings, including detention of the vessel, this right is so circumscribed as to apply only where the violation has consisted in a discharge, and then only if such discharge has "caused major damage or threat of major damage."

In addition to this highly circumscribed right to arrest and prosecute, there is also a right to stop a vessel and to carry out inspection. As elaborated in the Convention (article 220, paragraph 5), this right is somewhat broader than the right to arrest, the main difference being that in this case it is not necessary that the discharge has caused, or is threatening to cause, "major damage." For a right of inspection to exist, it is sufficient that the discharge is "substantial" and that the pollution which it has caused, or is threatening to cause, is "significant." Nevertheless, it is clear that even in the case of the right to stop and inspect, the competence given to the coastal state falls far short of any general power to enforce even internationally agreed rules. Thus, the coastal state is barred from inspection of any vessel for the purpose of establishing whether it conforms to applicable rules on construction, manning, equipment and design. Only where a significant and illegal discharge has taken place can action be taken and even then only under the conditions mentioned above.

In the case of less serious transgressions, all the coastal state can do is to "require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred" (article 220, paragraph 3).

This strict limitation of the powers of the coastal state with regard to vessel source pollution in its EEZ contrasts sharply with the much broader powers which the Convention extends to it in respect of dumping. Dumping, however, is not

an activity which is part of normal navigation, or a consequence of navigation, and the maritime nations, therefore, found it possible to agree to the coastal state having both regulatory rights (article 210, paragraph 5) and enforcement rights (article 216, paragraph 1a) as far as dumping is concerned.

Such competence as the coastal state has in enforcing applicable environmental regulations on foreign vessels, whether in relation to vessel source pollution or to dumping, is subject to the special safeguards which are set out in the articles 223-233 of the Convention. The content of these safeguards will not be examined here, but in their totality, they amount to a considerable additional weakening of the position of the coastal state. In this connection, reference is also made to the dispute settlements provisions in article 292 on the "prompt release of vessels and crew."

Furthermore, it is necessary to note that warships and other state-owned or state-operated ships on "government non-commercial service" are exempt from the provisions of the Convention dealing with the protection and preservation of the marine environment (article 236). Thus, the Convention applies the principle of sovereign immunity for warships not only in relation to the enforcement powers of the coastal state, but also in relation to its regulatory competence. However, flag states must ensure that such vessels "as far as is reasonable and practicable" act in a manner consistent with the Convention.

The exercise of the sovereign rights which the coastal state enjoys for the purpose of the economic exploitation and exploration of the EEZ will, of course, pose certain problems for the exercise of the freedom of navigation. However, as these sovereign rights are not specifically "environmental" in character, the problem of how they are to be balanced against the right of freedom of navigation falls generally outside the scope of this presentation. One aspect which should be mentioned, however, is the right of the coastal state to establish safety zones around fixed and floating installations (article 60, paragraphs 4 and 5). Here, we have an example of the Convention laying down criteria for the balancing of activities under the jurisdiction of the coastal state against other activities which are not subject to coastal state jurisdiction. Article 60, paragraphs 4 and 5, provides, inter alia, that the coastal state may, where necessary, establish reasonable safety zones and that the breadth of such zones shall be determined by the coastal state. However, this breadth may not exceed 500 meters, except as authorized by generally accepted international standards or as recommended by the competent international organization. Here again, we see how the maritime powers have succeeded in closing what would otherwise have been an opening for the coastal state using environmental concerns at its own discretion for the purpose of regulating navigation in the EEZ.

## THE QUESTION OF GENERAL ENVIRONMENTAL JURISDICTION FOR THE COASTAL STATE

In the above are mentioned the more important of those specific environmental rights of the coastal state which have a bearing on the freedom of navigation in the EEZ. The next question is whether the general environmental jurisdiction as set forth in article 56, paragraph 1 b (iii), adds anything to these specific provisions. The answer clearly is no, as article 56, paragraph 1b (iii), only speaks about jurisdiction "as provided for in the relevant provisions of this Convention."

More difficult is the question of whether paragraph 1a of the same article, conferring on the coastal state sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources of the EEZ, does not establish a general jurisdiction in environmental matters, going beyond that referred to in paragraph b (iii). This certainly is a possible interpretation, although it does give rise to the question of why a separate sub-paragraph on environmental jurisdiction was included if this aspect was to be regarded as covered already.

If such a general coastal state environmental jurisdiction in the EEZ is deemed to exist, covering situations other than those which are dealt with in the specific provisions, we should consider whether there exists a general principle of interpretation offering guidance as to which of the two sets of rights should normally take precedence in case of collision, environmental jurisdiction or the right of freedom of navigation.

It is the contention of this paper that no such general principle of interpretation exists. The Convention does not indicate a general priority as between the specified rights of the coastal state and the specified rights of the international community. On the contrary, it envisages that these two sets of rights are to be regarded as equal in importance. Without the establishment of such equality, consensus at the Conference would not have been possible.

Thus, while in article 56 the coastal state is given sovereign rights for the purpose of economic exploitation and exploration of the EEZ, article 58 establishes, inter alia, that other states will enjoy the freedom of navigation. Although in the latter article there is a phrase to the effect that this freedom "shall be subject to the relevant provisions of this Convention," this should not be read as referring to article 56, but as a reference to the many specific provisions in other articles which, particularly in the area of marine pollution, qualify the freedom of navigation. Otherwise, we would be disturbing that balance of equality between the two sets of rights on which the Convention is based.

This balance of equality is emphasized both by article 55 in its reference to "the rights and jurisdiction of the coastal state and the rights and freedoms of other states" and in the structure of articles 55, 56 and 58. Thus, while article 56 speaks of the rights, jurisdiction and duties of the coastal state, article 58 deals with the rights and duties of other states. Furthermore, both articles include a phrase calling for "due regard to the rights and duties" of the other side (article 56, paragraph 2, and article 58, paragraph 3).

## THE QUESTION OF RESIDUAL RIGHTS

So far the focus has been on situations where the exercise of coastal state environmental jurisdiction would affect the freedom of navigation. The freedom of navigation is important not only from the point of view of commercial shipping, but also, obviously, for military activities. Therefore, to the extent that the provisions of the Convention protect the freedom of navigation, they are of importance to those powers which give paramount weight to the maintenance of their global military freedom of action.

However, navigation is not the only form of military use of the marine environment. There are other actual and potential uses, some of them of great strategic importance. Perhaps the most obvious of these is the use of the marine environment for purposes of monitoring the activities of others through the use of listening devices. There are also military activities which are related to navigation, like the holding of naval exercises and the positioning of warships in readiness for action. Although some of these activities could perhaps be regarded as coming under the term "navigation" in its broadest sense, this is somewhat uncertain and it would anyway clearly not apply to all of them.

From the point of view of the superpowers and their respective allies, it was of great importance during the Conference to ensure that the protection against the exercise of coastal state jurisdiction given to navigation, should extend also to these other forms of military use of the marine environment. To obtain such protection was, however, not an easy negotiating task, particularly as, for obvious reasons, there was no inclination to specify the types of activity concerned.

The central element of the solution to this problem worked out after intensive behind-the-scenes negotiations is to be found in article 58, paragraph 1, of the Convention. This basic provision on the rights and duties of other states in the EEZ mentions, in addition to the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines."

Although this formula obviously went a long way towards meeting the needs of the superpowers and their allies to ensure

that their military freedom of action would not be unduly restricted by the establishment of EEZs, it did not dispose of the problem entirely. A need was felt to protect not only those military uses which exist today, but also the application of such military technology as will be developed in the future. Such future technology might conceivably be of kinds which could not be said to be "related to" the freedoms of navigation, etc., listed in article 58, paragraph 1.

As by its very nature this problem could not be solved through the elaboration of specific clauses for the types of uses concerned, a need was felt for some sweeping formulation which would make clear that all activities not expressly placed by the Convention under coastal state jurisdiction would be "free for all." One way of doing this would be to insert a clause proclaiming that the EEZ retained its character of "high seas." Some delegations insisted for a long time on such a clause, but they met with strong resistance from the members of "the group of coastal states," all of whom were of the opinion that the EEZ must be regarded as a zone sui generis, neither part of the high seas nor of the territorial sea.

It is the latter approach which the Convention reflects (see article 55). With regard to the underlying question of jurisdiction over activities not mentioned in the Convention, the key clause is article 59, "the Castaneda formula." The point of this article, which on the face of it is a clause on the settlement of disputes and which is intentionally vague in its selection of criteria, is to make clear that the Convention does not contain a general answer to the question of jurisdiction over activities other than those referred to in the Convention itself.

## SOME GENERAL OBSERVATIONS

The provisions of the Convention are very detailed and complex. This is the case not least in the chapters with which we have been dealing in this paper. For an understanding of the Convention, it is helpful to recognize that its complexity and length, at least as far as questions of jurisdiction are concerned, is due not to the inherent complexity of the issues as such, but quite simply to the need to reach a solution acceptable to all. In order to reach a consensus solution by building bridges between positions, it became necessary to split those concepts on which opposing positions were adopted into their various constituent parts. Only in this manner could the necessary "building blocks" for a consensus based on compromise be found.

Thus, in the case of coastal state jurisdiction over navigation for the purpose of protecting the marine environment, wanted by some and rejected by others, the term jurisdiction had to be split first into regulatory jurisdiction and enforcement jurisdiction. The hope was that a compromise could then be worked out on the basis of reserving the standard setting rights for flag states and the international community, while allowing

the coastal state to enforce internationally agreed standards.

However, even this proved too simplistic to "fly." It therefore became necessary, as we have seen above, to split also the concept of enforcement jurisdiction into its various component parts (investigation, inspection, detention, etc.) and to do the same with regard to regulatory jurisdiction by working out differentiated solutions for vessel source pollution, dumping, ice-covered areas, etc.

No attempt will be made in this paper to describe any further the evolution of this long process of mutual accommodation. However, it is interesting to note, as already pointed out, that the consensus which eventually emerged does not seem to lie in the centre but is leaning rather heavily in the direction of the positions taken by the maritime powers.

What are the reasons for this? In the view of the author of this paper, the main reason is the difference between the majority of coastal states and the maritime powers with regard to the relative priorities of their respective interests. For the majority of coastal states, the main concern at the Conference was always the need to ensure their sovereign rights with regard to the natural resources in the EEZ. Compared to this overriding need, the desire to obtain environmental jurisdiction over navigation in the EEZ was always an objective of secondary rank, although, obviously, this was rarely admitted.

For the maritime powers, the situation was very different. For them the main concern was to ensure that the resource rights in the EEZ's, which the US had good reasons not to oppose and which the USSR already in 1974 obviously regarded as an unfortunate but inevitable future development, should not in any significant way limit the freedom of navigation or, for that matter, any of the military uses of the sea. They therefore, consistently and successfully, and with the support of most other industrialized countries, opposed the attempt of coastal states in Africa, Latin America, and Asia to win acceptance for a general coastal state environmental jurisdiction over navigation in the EEZ as a desirable corollary to the sovereign rights with regard to its exploitation and exploration.

## THE CONVENTION AND OTHER SOURCES OF INTERNATIONAL LAW

Some of the leading maritime powers have chosen not to sign the Convention, and we must take a look at the question of how this will affect the relationship between the freedom of navigation and the environmental rights of coastal states. Do these rights depend entirely on the Convention? Or will the coastal states be able to argue that the provisions of the Convention on coastal state rights represent no more than a codification of what has evolved already on the basis of other sources of law? Will they perhaps even be able to say that the Convention amounts to a restriction on coastal state powers when compared to already existing rights?

The establishment of 200-mile zones, in which the coastal states claim sovereign rights with regard to the exploration and exploitation of the natural resources, did not await the outcome of the Law of the Sea Conference. In the great majority of cases, such zones were established already in 1976-78 on the basis of an expressed doctrine to the effect that sufficient foundation for such measures already existed in international law. Furthermore, it should be noted that those states which did not find this development to their liking acquiesced nevertheless, in the great majority of cases, and indeed often cooperated with it. Generally speaking, those states whose distant-water fishing interests were affected by the new zones chose the way of acquiescence and bilateral negotiation, rather than the way of protest and conflict.

In the view of the author of this paper, there can therefore be little doubt that already in the second half of the seventies there existed a general international recognition of the coastal states' sovereign rights to the natural resources in a zone extending up to 200 miles from the coastline. A fairly broad international consensus had developed to the effect that the application of these sovereign rights need not await the outcome of the Conference.

However, resource jurisdiction is one thing, environmental jurisdiction affecting navigation quite another. While it is true that a number of the states which during the seventies extended their resource jurisdiction to 200 miles included provisions on environmental powers affecting navigation in their new legislation, the legality of such clauses was being seriously challenged by the maritime powers during the sessions of the Conference. And the maritime powers which themselves extended resource jurisdiction to 200 miles in the years 1976-78, including the US and the USSR, all carefully avoided including coastal state powers over vessel source pollution in their new 200-mile legislation.

Norway for its part chose a middle road. The Act on the Economic Zone of Norway, a zone which was established with effect from January 1, 1977, does contain a clause empowering the government to establish rules and regulations on environmental protection within the zone in accordance with international law. However, the government decided to await the outcome of the Conference before taking action on the basis of this provision. Indeed, as of today, there are still no specific rules establishing Norwegian jurisdiction in the Norwegian economic zone with regard to vessel source pollution.

This paper will not attempt to analyze in more detail the question of whether -- and, if so, to what extent -- other sources of international law give sufficient basis for unilateral coastal state environmental jurisdiction affecting navigation in the EEZ. It should, however, be pointed out that when in the middle seventies so many coastal states established 200-mile zones in which they assumed sovereign rights over the natural resources, they were acting in accordance with what was an "emerging consensus" at the Conference. In considering

whether other sources of law than the Convention, the latter non-existent at the time, were sufficient as a basis for the new zones, a major factor was, obviously, this compatibility with the emerging Conference consensus.

The view of the author of this paper is that also with regard to the element of jurisdiction in respect of vessel source pollution, the test of the legality of the powers assumed by the coastal state should be the compatibility of these powers with the consensus which emerged at the Conference. This consensus is now reflected in the Convention itself.

# AN ACTION PLAN FOR COMPETENT INTERNATIONAL ORGANIZATIONS ON MARINE POLLUTION

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## INTRODUCTION

It is a widely held view that the fate of the 1982 Law of the Sea Convention will have an important effect upon the United Nations itself. This is particularly significant in light of the numerous attacks upon the U.N. emanating from various quarters. Two successive Secretary-Generals of the U.N. have pointed to the Law of the Sea Convention as one of the most successful achievements of the U.N., as have many Heads of State and Heads of Government. By the same token, the fate of the Law of the Sea Convention may raise to some significant degree, when considered in the context of changing attitudes towards the U.N., the question as to whether we wish the U.N. to go the way of the League of Nations. It is well known that the two international institutions created by the Convention, the International Sea-bed Authority and the International Enterprise, are opposed by a handful of powerful states. It is widely recognized that the Convention delegates to a series of other international institutions important standard-setting, law-creating, and conservation and monitoring functions. With the notable exception of the delegation of Portugal, particularly Dr. Mario Ruivo, now Secretary of the I.O.C., insufficient attention has been given to this issue, and it is not overstating the situation to suggest that unless a coordinated action plan is developed to ensure that the "competent international organizations" carry out their assigned tasks, a threat to the success of the Convention will arise from the impatience of the coastal states concerned to cope with urgent pollution problems. This is particularly true in the field of the preservation of the marine environment since the Law of the Sea Convention was deliberately devised as an "umbrella convention" which delegates to various global and regional institutions most of the task of ensuring that the substantive provisions of the Convention designed to protect and preserve the marine environment are implemented.

Much of the international legislative process has been completed, but much still remains to be done. Perhaps more importantly, the implementation and application of the Convention depend upon the development of effective enforcement laws, including in particular liability and compensation, a field which requires much further work. A preliminary but basic question relates to the apportionment of such tasks amongst the existing international intergovernmental organizations. It is the thesis of this paper that what is needed is, in the words of Peter Thatcher, who was a distinguished international public

official serving with UNEP, "a universal forum for the cooperation of states in the preservation of the marine environment," which would ensure the necessary coordination of activities, guard against overlapping functions, and provide the necessary momentum for continuing action on a whole range of uncompleted work.

## THE NATURE OF INTERNATIONAL INSTITUTIONS

It is well known that much of the Convention relating to the marine environment had its origin in the U.N. Conference on the Human Environment, held in Stockholm in 1972. As one of the delegates to that conference and the representative of a country seeking to develop consensus upon a series of legal principles directed to the protection of the marine environment, which might later be translated into technical rules by institutions such as IMCO (now IMO) and new substantive rules of law in the Law of the Sea Conference, I can attest to the widespread satisfaction on the attainment of agreement by consensus on such principles, particularly Principle 21 that "states have the obligation to protect and preserve the marine environment." As a participant in the 1973 London Dumping Conference, I witnessed the agreement, again by consensus, on an effective Dumping Convention based on the innovative "black list/gray list" approach pioneered in the Oslo Convention. However, shortly afterwards on being posted to Vienna as Ambassador to Austria and Canadian Governor on the Board of Governors of the International Atomic Energy Agency, I received some useful lessons on the nature of international institutions, even though I had already worked closely within the U.N. system in New York, Geneva and Paris for over ten years. The lesson is a simple and self-evident one: international institutions are only as effective as their member states permit them to be. I ought not to have been surprised to discover in Vienna that the same states which had expressed varying degrees of opposition to the Stockholm Principles and to the London Dumping Convention were equally active in the IAEA and in the related activities of WHO in seeking to preserve the oceans as a dumping ground for radioactive waste.

I found at my first meeting of the IAEA Board of Governors that a "model" or action plan had been devised for dumping radioactive waste in the ocean which did not, in my layman's view, provide adequate safeguards. I had been under the impression that the decision at the London Dumping Conference to delegate such decisions to the IAEA was of itself an ample safeguard. As a result of a series of questions not only by me, but also by representatives of Sweden, Australia and the Federal Republic of Germany, we found that the Secretariat experts were also unhappy with the dumping plan, but had dutifully prepared it in accordance with the instructions of governments. They welcomed the request to develop a new model providing more stringent safeguards. The eventual decision was in accordance with the highly responsible approach traditionally followed by

the IAEA, both on non-proliferation and on preservation of the marine environment. The point of my anecdote is that it is not enough to delegate important tasks to international institutions, particularly to unnamed "competent international organizations," and assume that everything necessary will be done through some inevitable process. In the field of multilateral diplomacy and particularly in the case of law-making activities, there is no principle of automaticity. I remain of the view that the preservation of the marine environment, more perhaps than any other field of activity covered by the Law of the Sea Convention, requires a very activist multi-disciplinary approach based upon a continuing and determined commitment to the preservation of the environment. It is to the credit of the international community and to the international institutions through which action is taken to protect the marine environment that in the decade since the Stockholm Conference so much has been achieved, particularly through UNEP's Regional Seas Programme.

NEW ENVIRONMENTAL LAW

A little less than ten years ago in an article on the Canadian approach to international environmental law, I expressed the view that international environmental law is inadequate both in scope and substance: in scope in that it is incomplete and in substance in that it is inconsistent, fragmentary and in large part inchoate. The article argued that international environmental law must be developed on the basis of the principle that all states have the duty to preserve the environment and that states must accept responsibility for any damage they cause to the environment of another state or the environment beyond any state's jurisdiction. The article suggested further that both substantive and adjectival law must be developed so as to enable effective application of this principle, either through existing institutions or through new ones, including those established for the purpose of resolving environmental disputes.

It is not necessary for me to reiterate the importance attached by Canada to the 1909 Boundary Waters Treaty between Canada and the US, one of the earliest international agreements prohibiting water pollution, nor to the Trail Smelter Arbitration, in which Canada accepted responsibility for the acts of a private concern which was damaging the environment of a foreign jurisdiction. Suffice it to say that Canada's approach to the Stockholm Conference, the London Dumping and IMCO Conventions and to the Law of the Sea Conference was based on these important early precedents. The environmental provisions of the law of the sea negotiations are, like all of the provisions in the Convention, the result of a series of accomodations and compromises. No state was successful in wholly obtaining its objectives. I doubt, however, if any state takes more satisfaction than does Canada from the whole new chapter of law relating to the preservation of the marine

environment which emerged from the intensive negotiations on the series of controversial and divisive issues which we faced and resolved. For the first time, we now have a clear-cut obligation of states to serve the marine environment: article 192 states categorically that "states have the obligation to protect and preserve the marine environment." Chapter XII of the Convention sets out the detailed and sometimes complex series of compromises between coastal states and flag states, including also the concept of port state jurisdiction, which emerged from our years of negotiations under the capable chairmanship of Alexander Yankov of Bulgaria, who is with us today.

It is not my function to analyze these provisions and other environmental provisions of the Convention, except to refer to those requiring action by international institutions. I would be remiss, however, if I did not express my view that if the Conference had achieved nothing but the creation of this whole new chapter of law, the Conference would have been a worthwhile expenditure of time, action and money, since this chapter constitutes a great achievement of the U.N. system. When it is coupled with the series of innovative provisions for third-party settlements of disputes, the Convention must be regarded as a tremendous accomplishment. Of course, a question arises, although not strictly within my mandate, as to how much of the new environmental law can be deemed to have emerged as settled law through the customary law creation process and whether recourse to third-party settlement procedures can exist for non-parties to the Convention. In another paper, a member of this panel argues that the major maritime powers were the winners in the battle with coastal states over coastal state environmental jurisdiction. One wonders what the eventual outcome of that battle will be if the treaty does not come into force, given the extent to which states have delegated standard-setting powers to international organizations while reserving to themselves certain enforcement powers.

## STATE PRACTICE

Before turning to the question of an action plan for international organizations, it is necessary to consider the rights and duties of states pursuant to the Convention. Even the most cursory reading of the Convention indicates the need for every state, both signatories and non-signatories, to make a detailed analysis of the Convention and to measure its national legislation against the yardstick of the Convention in order to determine what amendments to existing legislation are required and what new legislation is needed. Ideally, a process of global harmonization and legislation is required. The arguments against "picking and choosing" with respect to the provisions of the Convention apply particularly to the need for national environmental legislation. It is said, for example, that the two major powers still have legislation permitting the setting of construction standards for vessels passing through

their territorial seas. Numerous other examples might be cited, but there is no need to belabour the point. It is not enough, however, to argue that the Convention codifies or creates customary law on the preservation of the marine environment. In no other field, except perhaps in the case of the deep sea-bed, is there such a requirement for specific kinds of national legislation to enable states to comply with the Convention or, alternatively, to argue that on the basis of state practice the Convention merely codifies customary law.

## THE HEALTH OF THE OCEANS

There is one further preliminary question which should be addressed before considering the problem of the role of international institutions and the need for a global action plan, namely the present state of the oceans. The subject is too vast to permit anything but the most summary reference to the issue. Fortunately, there is a recent authoritative statement on the subject to which one can turn. I refer to the report entitled "The Health of the Oceans," which is No. 16 of UNEP's Regional Seas Reports and Studies. The study was made by the "Joint Group of Experts on the Scientific Aspects of Marine Pollution," and it took this Group four years to prepare the study. From now on, the GESAMP experts plan to issue every four years an updated review of the state of pollution of the world's oceans. It is of interest that the report was prepared in cooperation with the U.N., FAO, UNESCO, WHO, WMO, IMO and the IAEA.

The report was relatively reassuring with respect to those areas far from land with which few of us come into contact very frequently. Presumably, it will take time to degrade to a dangerous degree the environment of the vast areas of deep ocean space. However, the report makes clear that:

> Pollution is generally most severe in semi-enclosed marginal seas and coastal waters bordering highly populated and industrialized zones. Such areas have substantial concentrations of contaminants from land-based sources. The environmental effects vary from one part of the coastal zone to another, depending on the type and volume of the wastes and the nature of coastal activities. Many pollutants introduced to the coastal zone remain there, at least temporarily.
>
> Effects of oil released into the marine environment depend on the type of oil, the nature of the ecosystem affected, and on a variety of physical, chemical and biological processes that may be operative at the time of release. Oil spill effects on pelagic communities are rarely drastic and recovery is usually a question of weeks or months. Impact on intertidal and subtidal communities may be severe with recovery taking years or decades, particularly in the

shoreline communities where oil penetrates the sediments; oil on beaches can seriously affect their amenity as recreational areas. Birds are particularly at risk, but there is no evidence that oil alone can threaten species survival.

The vast bulk of marine fishery resources, more than 90 percent, is located in continental shelf areas and in the upwelling regions of the oceans. Coastal fisheries are particularly exposed to the effects of pollution, since the highest concentration of metals, halogenated hydrocarbons, petroleum hydrocarbons, suspended solids, and litter are found in these areas. Effects of pollution on fisheries tend as yet to be local or regional.

The use of the coastal zone for sewage disposal is world-wide, and the input is increasing. Incidents have occurred when human health has been severely threatened as a result of the sewage load in the coastal zone, and in places the nature of the habitat has been altered and the species composition of plant and animal populations changed. There are also records of the ecosystem recovering and returning to normal when proper control has been instituted. A proper management of sewage disposal and a re-examination of sewage disposal practice are necessary; otherwise the combined effects of many local disturbances could become serious on a regional and perhaps gradually on a global scale.

The importance of living marine resources as a protein source is increasing. Fisheries management has in recent years prevented the complete destruction of several threatened fish stocks, and it is clear that the practice of management must continue and develop. Adequate management requires an assessment of all pressures on stocks, pollution as well as fishing.

Concerning energy: the extension of oil exploration into extremely hostile ocean areas may give rise to major spills and greater low-level inputs. Production is expected to increase in cold areas where oil degrades more slowly. Nuclear power is being developed in several countries which see this as essential to their energy requirements so that increased discharges of low-level radioactivity and further marine dumping of wastes can be expected. If any of the several attempts to win energy from the sea by unconventional methods is successful, effects of this must also be considered and proper control instituted.

If deep-sea mining becomes economic and if an active industry develops, potential effects should be assessed and, again, any necessary control instituted.

> Many contaminants eventually reach the sea floor where they interact with the marine sediment and biota at the sediment-water interface. As yet, serious damage is known to have occurred only in very localized regions.

The Group noted that although effects of pollution have not so far been detected on a global scale, general trends of increasing contamination can be recognized in some areas, and these trends are warning signals. The signals are mainly in marine areas most intensively used by man, i.e., coastal waters. The oceans are capable of absorbing limited and controlled quantities of wastes and, as such, represent an important resource, but careful control of waste disposal is necessary. Programmes must be maintained for this purpose and initiatives taken to regulate the entry of new contaminants to the oceans. The effects of pollution should be carefully monitored and our understanding of the fate and effects of pollutants in the oceans must be improved. This approach makes for more accurate predictions and assessments and, therefore, provides the most effective means of ensuring that the health of the oceans is maintained.

The conclusion seems inevitable that there is serious cause for concern over the state of the oceans and a continuing and immediate need for a coordinated action plan to prevent their further degradation.

ROLE OF INTERNATIONAL ORGANIZATIONS - THE NEED FOR A MASTER PLAN

The problem of coordination of action by the various international organizations concerned with marine affairs, including the preservation of marine environment, has for some time been recognized by the U.N. A study on the future functions of the Secretary-General under the Convention and on the needs of countries, especially developing countries, for information, advice and assistance under the new legal regime in effect was issued by the U.N. Secretariat on August 18, 1981, under Document No. 62/L.76; it drew attention to the need to ensure an adequate understanding on the part of the U.N. Secretariat and the secretariats of the specialized agencies of the purposes and specific provisions of the Convention. This document constituted a useful preliminary study, dealing with the need for national legislation and regulation, publication or notification, surveillance and enforcement, administration, and organizational requirements in cooperation directly with other states or through international organizations. Part II, chapter 5, paragraph 9, of the study deals with environmental administration and includes the following observations on the need for action by states:

> Adoption of policy, and its implementation through appropriate mechanisms, may entail considerations of its relationship both to more

general environmental policies outside the ambit of the future Convention (e.g. dumping at sea may be viewed as one aspect of a general policy of waste management), and to other aspects of marine policy-making (e.g., development of fisheries and other ocean resources and uses). Administrative mechanisms may be expected to vary according to the source of pollution being dealt with, although important functions associated with the monitoring and assessment of the risks and effects of marine pollution and of activities likely to cause pollution may depend on close cooperation and coordination among many branches of government. Also, the wide range of scientific and technical support needed to identify research needs, study questions of giving effect to international rules, etc., or formulating rules with similar effect, for example, will have important administrative implications. In the case of "vessel-source pollution," administrative mechanisms may depend essentially on whether policies are adopted from the standpoint of a coastal State with major port facilities or of one without them, of a coastal State with port facilities also used by neighbouring States, of a State with merchant marine or important fishing fleets or one without them, of an archipelagic State, of a State bordering a Strait, of a State designating a special area within its EEZ, or of a State coordinating its policies at an appropriate regional level. (For example, a State with a significant merchant marine is more likely to approach pollution prevention as a basic aspect of maritime safety with consequent emphasis on the adoption and enforcement of safety standards and navigational rules, and on the competence of sea-going personnel.)

The report goes on to highlight the need for joint action by states, as required by various provisions of the Convention.

Environmental administration may encompass, as appropriate:

(a) Arrangements for participation in international organizations and conferences establishing or re-examining international rules and standards, etc., and developing appropriate scientific criteria in this connection; formulating programmes of studies, research, education and training, information and data exchange, monitoring; and coordinating or harmonizing policies at appropriate regional levels. Account would have to be taken of participation also in conferences on safety of maritime operations, training and competence of crews, etc., and of needs for consultations with other States (arts. 194, 197, 200, 201, 204, 207, 208, 210, 211, 212);

(b) Arrangements in connection with coordination in enclosed or semi-enclosed seas (art. 123); other arrangements associated with harmonization of policies, particularly at appropriate regional levels (arts. 194, 207, 208);

(c) Arrangements with other States regarding pollution from ships in straits (art.43);

(d) Participation in programmes of scientific and technical assistance to developing States and utilization of results. This requires assessments of available manpower and associated training needs; of the capabilities of exisiting infrastructure for research, education and training, information and data exchange and monitoring; and of equipment needs (art. 202);

(e) Arrangements for making observations, measurements, evaluations and analyses of risks or effects of pollution and preparing reports in this connection; assessing planned activities under national jurisdiction in terms of potential environmental effects, preparing and communicating reports thereon and requesting assistance in preparation of environmental assessments (arts. 202, 204-206);

(f) Arrangements to provide for such coordination as needed between programmes and projects on marine pollution and those concerning marine sciences and fisheries;

(g) Arrangements for response to pollution incidents, particularly with respect to joint development of contingency plans; international assistance to minimize effects of major incidents; arrangements for providing prompt notification in cases of pollution or incidents involving discharges; measures to deal with emergencies created by maritime casualties (arts. 198, 199, 202, 211, 221);

(h) Specific arrangements to deal with dumping, including designation of the competent authorities, issuance of permits, coordination with other waste management authorities and consultations with other States (art. 210);

(i) As a port State, administration of particular requirements established for entry of foreign vessels into ports, internal waters, or offshore terminals; prior evaluation of need for their establishment and of ability to implement; consultations with other port States on harmonization of policies and establishment of cooperative arrangements; communications to the competent international organization and publicity. (Account would need to be taken of other laws and regulations applying to ships navigating the territorial sea, straits, the exclusive economic zone and any specially designated areas of the exclusive

economic zone, and to ships flying its flag or of its registry.) Arrangements for investigation and institution of proceedings against vessels in respect of alleged discharges and violation of international rules, etc., outside its internal waters, territorial sea or exclusive economic zone; similar action at request of flag State or an affected State; transmittal of record of investigation to requesting State or transferral of evidence and records and any bonds posted to that State on suspension of proceedings (art. 218, 228);

(j) Administration of special areas of the exclusive economic zone: prior study of its oceanographical and ecological conditions, questions of utilization and protection of its resources, and of traffic conditions; consultations with other States through the competent international organization regarding establishment of special mandatory measures; submission of evidence in support of measures including information on reception facilities to the competent international organization; publication of limits of area and measures to be applied (taking account of time limits specified); participation in activities developing international rules and standards or navigational practices for such special areas; enforcement (arts. 211, 220, 228);

(k) Administrative implications of adopting environmental laws with respect to ice-covered areas of the exclusive economic zone, including collection and analysis of scientific information and study of navigational requirements (art. 234);

(l) Administrative measures regarding seaworthiness of vessels: ascertaining that a vessel is in violation of applicable international rules; retention in port or at offshore terminal; ensuring rectification of causes of violation (art. 219);

(m) Administrative measures regarding violations of rules applicable to the territorial sea, straits, exclusive economic zone or special area of the exclusive economic zone. These might include, depending on the violation and the area to which the rule in question applies: ascertaining identity, registry and itinerary of vessel; conducting on-board inspection and other investigations associated with institution of proceedings in respect of the violation; detaining and releasing vessels; securing bond or other financial security; imposing monetary penalties. Such measures would need to take account of safeguards on exercise of enforcement powers, e.g., ensuring that proceedings are facilitated, that vessels are not delayed unduly, that flag States are promptly notified of enforcement actions, that proceedings are suspended when corresponding charges

are brought by the flag State, that monetary penalties are appropriately applied, that recourse for liability is allowed for damage or loss arising from enforcement action, etc. (arts. 220, 223-233);

(n) Administrative measures to ensure prompt and adequate compensation for pollution damage; cooperation in implementation of existing international laws, further development of international law, and development of criteria and procedures with respect to compulsory insurance or compensation funds, for example (art.235).

For those who think that the law-making is completed, the foregoing listing of action through international organizations required by the Convention speaks for itself. The implementation program is certainly a vast and comprehensive one.

More recently, in March 1982, the U.N. Environmental Program issued a report reviewing UNEP activities relevant to issues before the U.N. Law of the Sea Conference. It outlined developments in UNEP's highly successful regional seas action plan covering ten separate regional seas agreements and went on to discuss legal aspects of offshore mining and drilling within national jurisdictions and cooperation concerning shared natural resources; it also outlined a list of international environmental conventions. That register has been issued as UNEP/GC/INFORMATION 5/Supplements 1-5 and UNEP/GC.10/5/Add.1. The review paper reported that the UNEP Secretariat has prepared an in-depth review of environmental law, issued as a discussion paper under Symbol A/Conf.62/112, and it referred to the conclusions of the Ad Hoc Committee of senior governmental officials, expert in environmental law.

An even more recent and dramatic study has been released by the Economic and Social Council in a document dated March 15, 1983, No. E/AC.51/1983/2, entitled "Cross-organizational programme analysis of the activities of the United Nations system in marine affairs." The impact of the report is overwhelming in the number, scope and variety of activities and organizations related to marine affairs, including, in particular, the preservation of the marine environment. The report points out that during the biennium 1982-83, some 17 major organizational units of the U.N. and 11 specialized agencies are undertaking 456 distinct marine affairs activities, whose total cost is estimated at a relatively modest $371.3 million. The institutions referred to include: the U.N. Office of the Special Representative for the Law of the Sea (UNCLS), the Office of Legal Affairs, the Department of Political and Security Council Affairs (PSCA), the Department of International Economic and Social Affairs (DIESA), the Department of Technical Cooperation for Development (DTCD), the U.N. Centre on Transnational Corporations (UNCTC), the U.N. Centre for Human Settlements (UNCHS), the Economic Commission for Europe (ECE), the Economic and Social Commission for Asia and the Pacific

(ESCAP), the Economic and Social Commission for Asia and the Pacific (ESCAP), the Economic Commission for Latin American (ECLA), the Economic Commission for Africa (ECA), the U.N. Industrial Development Organization (UNIDO), the United Nations Environment Programme (UNEP), the U.N. Development Programme (UNDP), the U.N. Institute for Training and Research (UNITAR), the U.N. University (UNU), the International Labour Organization (ILO), the Food and Agriculture Organization of the U.N. (FAO), the U.N. Educational, Scientific and Cultural Organization (UNESCO), the Division of Marine Sciences and the Secretariat of the Intergovernmental Oceanographic Commission (IOC), the World Health Organization (WHO), the World Bank, the International Civil Aviation Organization (ICAO), the International Telecommunication Union (ITU), the World Meteorological Organization (WMO), the International Maritime Organization (IMO, formerly IMCO, the Inter-Governmental Maritime Consultative Organization), the International Fund for International Maritime Organization, the International Fund for Agricultural Development (IFAD), and the International Atomic Agency (IAEA).

I am taking the liberty of appending to this paper a copy of Table 2 to the ECOSOC report, outlining the programmes in question. Another table, Table 5, lists issues addressed by organizations in the field of control of pollution. Leaving aside living resources and conservation, the U.N. is addressing 23 issues; IMO (formerly IMCO) 16, UNESCO/IOC 15, FAO 7, IAEA 5, WHO 2, and WMO 1. This information should provide food for thought for all of us. Paragraphs 43 and 44 of the report on the "Control of marine pollution" are also worth noting:

> Some 70 activities address this issue, which ranks sixth in terms of total expenditure committed during the biennium ($37.5 million). Over half are programme activities, and the leading organizations are the United Nations, IMO, UNESCO/IOC and IAEA. Programme activities of the United Nations are undertaken by UNEP, UNIDO, the Department of International Economic and Social Affairs and the regional commissions, with UNEP having the central role. UNEP's regional seas programme, as well as other aspects of its work, addressed this issue. The United Nations (DIESA and UNEP), FAO, UNESCO, WHO, WMO, IMO and IAEA together sponsor the Joint Group of Experts on the Scientific Aspects of Marine Pollution. IMO has 12 programme Experts on the Scientific Aspects of Marine Pollution. IMO has 12 programme activities on marine pollution from ships and from dumping. IAEA is concerned with pollution from marine radioactivity. FAO has a regular programme technical cooperation project on marine pollution and its effects on fishing. WHO work covers recognition and control of marine hazards, especially in the Mediterranean, and WMO has an environmental pollution monitoring

programme. UNESCO/IOC supports the Global Investigation of Pollution in the Marine Environment.

Among technical cooperation activities, IMO has several projects concerned with the prevention and control of marine pollution, and UNESCO supports 12 marine research centers whose programmes include marine pollution. Several projects executed by the United Nations (DTCD) in coastal area development and hydrographic surveying are concerned with pollution problems.

Paragraph 69 of the report reads as follows:

> Following the United Nations Conference on the Human Environment in 1972 when UNEP was given the mandate to serve as a focal point for environmental action within the United Nations system, UNEP developed, in 1974, the regional seas programme, now covering ten regions and involving 120 coastal States, 14 bodies of the United Nations system and other global and regional intergovernmental and non-intergovernmental organizations and national institutions. General cooperation between UNEP and other United Nations agencies on environmental matters is organized through periodic meetings of the Designated Officials for Environmental Matters, as well as through bilateral or thematic joint programming. There have been three inter-agency meetings on the regional seas programme, in 1976, 1978 and 1981, and inter-agency consultations for specific regions are organized by UNEP on an ad_hoc basis whenever necessary.

The report concludes that, since there are no fewer than 28 organizational institutions of the U.N. system active in marine affairs with a multiplicity of mandates, activities and working relationships, "there may be an advantage in keeping the overall consistency and complementarity of the whole range of related activities under review." Even by the standards of the U.N. Secretariat, this is a masterly piece of low-key understatement.

In spite of the comprehensive nature and the high calibre of the ECOSOC report from which I have just quoted, critics of the U.N. system may be surprised to learn that the study was criticized in the subsequent report of the U.N. Committee for Programme and Coordination as being too up-beat in tone and not sufficiently complete in its scope. An interesting comment made in the CPO report, dated June 14, 1983, and numbered A/38/38 (Part 1), is that the Committee noted that the Secretariat had approached the Commission on Human Settlements for its guidance on the preparation of the cross-organizational programme analysis. It further noted that no equivalent inter-governmental body existed which dealt with all aspects of marine affairs. The document also drew attention to problems of

overlap and potential duplication between the work of the U.N. Conference on Trade and Development (UNCTAD) and the International Maritime Organization (IMO) in the area of maritime legislation, as well as the possibility that the work of the U.N Environment Programme (UNEP) in this area was developing beyond its initial mandate and that potential problems existed, especially in relation to the Intergovernmental Oceanographic Commission (IOC) of the U.N Educational, Scientific and Cultural Organization (UNESCO). As regards the problem which had become evident between UNCTAD and IMO, the Committee noted that the optimistic tone of the report stemmed from assurances to the Secretariat that the issue was being satisfactorily resolved. It further noted that one positive side-effect of preparing reports such as this one was to encourage resolution of such problems.

## CONCLUSION

I hope I will be forgiven for not attempting to produce my own master plan concerning the apportionment of activities amongst international institutions pursuant to the provisions of the Law of the Sea Convention. What is clear is that there is a need for an overall coordinating mechanism or process which does not yet exist. For those of us concerned with ensuring the success of the Convention, but even more perhaps for those who hope to operate outside it, it is clear that a coordinating mechanism capable of ensuring the development of an overall plan of action is a necessity, and a necessity that becomes increasingly urgent.

Table 2. Coverage of substantive areas by regular programme and technical cooperation activities of the United Nations system in the biennium 1982-1983

| Substantive area | ORGANIZATIONS REPORTING | | REGULAR PROGRAMME | | TECHNICAL COOPERATION | | TOTAL | |
|---|---|---|---|---|---|---|---|---|
| | Primary emphasis | Secondary emphasis | Number of activities with primary emphasis | Thousands of dollars | Number of activities with primary emphasis | Thousands of dollars | Number of activities with primary emphasis | Thousands of dollars |
| Fisheries | FAO, United Nations, UNESCO/IOC, World Bank, IMO | United Nations, FAO, UNESCO/IOC IMO | 10 | 17 430.0 | 93 | 27 000.5 | 103 | 44 430.6 |
| Shipping | IMO, United Nations, World Bank, ICAO | United Nations, FAO, ITU, IMO | 27 | 7 027.8 | 55 | 8 367.1 | 82 | 15 394.9 |
| Research | UNESCO/IOC, United Nations, FAO, IMO, IAEA | United Nations, FAO, UNESCO/IOC WHO, WMO, IMO, IAEA | 22 | 9 297.0 | 31 | 15 473.6 | 53 | 24 770.6 |
| Ports | United Nations, IMO, ILO, World Bank | United Nations, ILO, FAO, ITU, IMO | 1 | 180.0 | 31 | 4 475.5 | 32 | 4 655.5 |
| Institutional control | United Nations, FAO, IMO | United Nations, ILO, FAO, UNESCO/IOC, WHO, ITU, IMO, IAEA | 19 | 22 606.3 | 10 | 1 741.9 | 29 | 24 348.2 |
| Processing living products | FAO, United Nations | United Nations, FAO | 1 | 2 143.8 | 18 | 3 465.0 | 19 | 5 608.8 |
| Equipment | United Nations, IMO, FAO, ILO | United Nations, FAO | - | - | 15 | 1 592.0 | 15 | 1 592.0 |
| Legislation & regulation | United Nations, FAO, IMO | United Nations, UNESCO/IOC, ILO FAO, WHO, ITU, ICAO, IMO, IAEA | 10 | 6 391.6 | 5 | 280.0 | 15 | 6 671.6 |
| Monitoring | IAEA, UNESCO/IOC, United Nations, FAO, WHO | United Nations, FAO, UNESCO/IOC WHO, IMO | 10 | 4 836.8 | 2 | 969.0 | 12 | 5 805.8 |
| Meteorology | WMO, United Nations | UNESCO/IOC | 10 | 2 098.8 | 2 | 20.0 | 12 | 2 118.8 |
| Communications | ITU, IMO | United Nations, IMO | 4 | 856.4 | 6 | 2 317.0 | 10 | 3 173.4 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Mapping | United Nations, IMO, UNESCO/IOC | United Nations, UNESCO/IOC, FAO | 3 | 492.6 | 5 | 2 562.2 | 8 | 3 054.8 |
| Minerals | United Nations | United Nations, ILO, UNESCO/IOC | 2 | 514.6 | 4 | 1 124.2 | 6 | 1 638.8 |
| Hydrocarbons | United Nations | United Nations, ILO, UNESCO/IOC | - | - | 6 | 314.2 | 6 | 314.2 |
| Conditions of service | ILO | United Nations, ILO, FAO, ITU, IMO | 4 | 2 976.8 | 1 | 105.0 | 5 | 3 081.8 |
| Conservation | United Nations | United Nations, FAO, UNESCO/IOC IMO, IAEA | - | - | 3 | 95.0 | 3 | 95.0 |
| Health | United Nations, WHO, IAEA | United Nations, FAO, UNESCO/IOC WHO, WMO, IMO, IAEA | 3 | 652.9 | - | - | 3 | 652.9 |
| Aviation | ICAO | United Nations | 3 | 68.7 | - | - | 3 | 68.7 |
| Transfer of technology | United Nations | United Nations, FAO, WHO, WMO, IAEA, UNESCO/IOC | 2 | 168.0 | - | - | 2 | 168.0 |
| Political | United Nations | United Nations | 1 | 704.0 | - | - | 1 | 704.0 |
| Navigation and safety | IMO | United Nations, ILO, FAO, ITU, ICAO, WHO, IMO | 1 | 345.0 | - | - | 1 | 345.0 |
| Offshore installations | United Nations | United Nations, ILO, IMO | 1 | 46.7 | - | - | 1 | 46.7 |
| Tourism | - | United Nations | - | - | 1 | 120.0 | 1 | 120.0 |
| Processing of non-living products | United Nations | United Nations, FAO | - | - | 1 | 14.0 | 1 | 14.0 |
| Conciliation | - | United Nations | - | - | - | - | - | - |
| New & renewable sources of energy | - | United Nations, UNESCO/IOC | - | - | - | - | - | - |
| Archaeology | - | United Nations | - | - | - | - | - | - |
| TOTAL | | | 134 | 78 837.9 | 296 | 70 117.8 | 430 | 148 955.7 |

Table 5. Issues addressed by organizations

| Issue area | Organizations involved (number of non-financial assistance activities) | Percentage of activities addressing issues* | | | Means of action used in over 20 per cent of programme activities (number of programme activities) |
|---|---|---|---|---|---|
| | | Total | Program | Technical co-operation | |
| Legal | United Nations (27), FAO (7), IMO (5), ICAO (1), UNESCO/IOC (1), ITU (1) | 9.8 | 19.4 | 5.4 | Co-ordination (13), publications (11), intergovernmental meetings (11), standard-setting (10), expert groups (9), seminars (9), reports (8), advisory services (7), case studies (7), surveys (6), training courses (6) |
| Policy and management | United Nations (43), FAO (41), IMO (9), ILO (3), ITU (3), UNESCO/IOC (2) | 23.7 | 23.9 | 23.6 | Publications (15), co-ordination (15), intergovernmental meetings (14), training courses (12), advisory services (11), backstopping technical cooperation (11), surveys (11), seminars (11), reports (9), standard seminars (11), reports (9), standard-setting (9), expert groups (8), manuals (8), TCDC/ECDC (7) |
| Living resources | FAO (127), United Nations (14), UNESCO/IOC (8), World Bank (1), ILO (1), IMO (1) | 35.6 | 15.7 | 44.6 | Publications (11), advisory services (10), TCDC/ECDC (9), intergovernmental meetings (8), backstopping technical co-operation (8), ongoing research (8), case studies (8), expert groups (7), surveys (7), coordination (7), training courses (6), reports (6), annuals (5), seminars (5) |
| Non-living resources | United Nations (26), UNESCO/IOC (2), ILO (1), FAO (1) | 7.0 | 9.7 | 5.7 | Publications (5), backstopping technical cooperation (5), advisory services (4), coordination (4), intergovernmental meetings (4), expert groups (3), case studies (3), training courses (3), ongoing research(3) |
| Use of ocean space | | | | | |
| Regulation and control | IMO (73), ITU (2), FAO (2) | 17.9 | 17.2 | 18.2 | Co-ordination (19), intergovernmental meetings (18), standard-setting (18), model legislation (17) |
| Other aspects | United Nations (74), FAO (11), ITU (6), WMO (6), ILO (5), World Bank (4), ICAO (4), UNESCO/IOC (1), WHO (1) | 26.7 | 32.1 | 24.3 | Standard-setting (16), publications (15), seminars (14), co-ordination (14), reports (13), advisory services (12), intergovernmental meetings (11), expert groups (10), backstopping technical cooperation (10) |

| | | | | | |
|---|---|---|---|---|---|
| Conservation | FAO (22), United Nations (15), UNESCO/IOC (11), IAEA (1) | 11.4 | 11.9 | 11.1 | Publications (8), co-ordination (8), case studies (8), advisory services (7), manuals (6), expert groups (6), reports (6), seminars (6), surveys (5), intergovernmental meetings (5), standard-setting (5), training courses (4), directories (4), ongoing research (4) |
| Control of pollution | United Nations (23), IMO (16), UNESCO/IOC (15), FAO (7), IAEA (5), WHO (2), WMO (1) | 16.3 | 29.9 | 10.1 | Co-ordination (19), intergovernmental meetings (17), standard-setting (15), publications (2), ongoing research (12), seminars (11), model legislation (10), advisory services (10), case studies (10), reports (9), manuals (8) |
| Knowledge | UNESCO/IOC (42), FAO (27), United Nations (23), WMO (10), IAEA (5) IMO (3), WHO (1) | 26.3 | 41.0 | 19.6 | Expert groups (30), intergovernmental meetings (25), ongoing research (24), publications (22), coordination (22), advisory services (21), case studies (21), reports (18), surveys (17), seminars (16), TCDC/ECDC (15), backstopping technical co-operation (14), establishment of data bases (13), manuals (11) |
| Supporting services | FAO (23), United Nations (12), WMO (11), ITU (9), UNESCO/IOC (6), IMO (2) | 14.7 | 20.1 | 12.2 | Co-ordination (17), expert groups (16), intergovernmental meetings (16), establishment of data bases (13), advisory services (11), publications (10), seminars (9), reports (7), standard-setting (9), ongoing research (8), surveys (7), TCDC/ECDC (7), case studies (7), backstopping technical cooperation (7), networks (7), symposia (6), manuals (6) |
| Industry | FAO (58), United Nations (16), IMO (4) | 18.6 | 4.5 | 25.0 | Publications (4), advisory services (3), reports (2), TCDC/ECDC (2), symposia (1), establishment of data bases (1), seminars (1) |
| Total number of activities | | (430) | (134) | (296) | |

*A given activity can address more than one issue. The figure is the portion of all activities other than financial assistance which address the issue.

# THE LAW OF THE SEA CONVENTION AND DISPOSAL OF NUCLEAR WASTE

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## INTRODUCTION

The present method used to dispose of radioactive wastes in the marine environment is through direct dispersion into coastal waters or through dumping at the international high seas of wastes packed in containers for the purpose of delaying dispersion. A "second-generation" concept is to have radioactive wastes permanently disposed in the sea-bed beyond any limit of national jurisdiction.

This paper reviews the main aspects of international law relevant to dumping and proposed sea-bed activities in the international Area of the marine environment.

## DUMPING

Dumping of high-level radioactive wastes is prohibited by the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, signed in 1972, which at present has some fifty Contracting Parties. The responsibility for defining "high-level radioactive wastes" has been left to the International Atomic Energy Agency (IAEA). In 1973 the IAEA developed "Provisional Definition and Recommendations" and in 1978 "Revised Definition and Recommendations."

Dumping at sea of radioactive wastes insofar as not prohibited by the London Dumping Convention has been carried out by a few countries in the North-East Atlantic Ocean in collaboration with the OECD Nuclear Energy Agency (NEA). Since 1977 these operations have been organized according to the requirements of the "Multilateral Consultation and Surveillance Mechanism for Sea Dumping of Radioactive Waste" approved by the OECD Council. It should be noted, however, that several member countries of the OECD made a reservation to the OECD Decision adopting the NEA mechanism. This reservation was to the effect that they "object in principle to sea dumping operations, and that nothing in this decision shall be interpreted as encouraging the dumping of radioactive waste" [1].

The wastes dumped at sea are packaged by incorporating them into containers, which are designed to remain intact until after they have reached the ocean floor. Dispersal of the radioactive material is expected to begin after a short time. The use of this form of disposal is, therefore, not based upon the integrity of the containment, but is considered acceptable by its supporters because of the dilution capacity of the ocean and the long transportation time back to humans.

A research and surveillance program is being prepared within the OECD Nuclear Energy Agency to develop a better

assessment of the impact of sea disposal practices. Recently, an expert group convened by the Agency has also recommended that an analysis of the risks involved in the sea transport of wastes be carried out and that the principles of any emergency plans which might be found necessary be included in the operational procedures for sea dumping of radioactive wastes.

At the most recent meeting of the Contracting Parties to the London Dumping Convention in February 1983, a resolution was adopted which called for the suspension of all dumping at sea of radioactive materials pending the presentation to the Contracting Parties of the outcome of an expert study on proposals to amend the Convention, banning sea disposal of radioactive wastes [2].

When this matter was considered by the meeting, the Nordic delegations presented a joint statement in support of bringing to a halt all sea disposal of radioactive wastes. They argued that dumping of radioactive matter may have a negative impact on fisheries and other exploitation of marine or sea-bed resources and that no single state should have a right to make parts of international sea areas inaccessible to other states. It was argued further that efficient control of the waste after it has been dumped into the sea is complicated and expensive and that the current trend towards expanded dumping will increase the problem [3].

The February 1983 meeting of the Contracting Parties to the London Dumping Convention also considered and agreed to a proposal to the effect that the Contracting Parties will seek to resolve the circumstances under which sea-bed disposal of radioactive and other hazardous wastes would be contrary to the provisions of the Convention [4]. A similar problem exists in relation to the Convention on the Law of the Sea since some of its relevant language -- definition of dumping -- is only a slightly modified version of that contained in the London Dumping Convention.

A minimum requirement before sub-sea-bed disposal can be considered as outside the prohibitions of the London Dumping Convention would seem to be that it must be conducted in an environmentally safe manner. The "isolation and containment" concept -- recognized, inter alia, in the IAEA "Revised Definition and Recommendations of 1978" -- must be effectively realized [5].

## THE LAW OF THE SEA CONVENTION

The articles of the Law of the Sea Convention which are relevant for the sea-bed disposal issue are those concerning marine environmental protection; marine scientific research; and those regulating the international sea-bed Area [6].

The Convention's marine protection articles refer the states, parties to the Convention, back to existing international marine pollution rules and require measures to be taken to control all sources of marine pollution. However, these articles would not explicitly prohibit the burial of

radioactive wastes within the sea-bed, provided such activities can be conducted in an environmentally safe manner.

Likewise, the marine scientific research articles of the Convention do not present any direct obstacles to any proposed sea-bed disposal of high-level radioactive wastes. The requirements would be that such activities are limited to peaceful purposes, are compatible with the marine protection articles, and do not interfere with other legitimate uses of the marine environment.

However, the articles of Part XI dealing with the "seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction" -- referred to as the "Area" -- would seem to provide the International Sea-bed Authority with some jurisdiction or control over any future sea-bed disposal program.

Under article 147 "other activities in the marine environment" must be conducted "with reasonable regard for activities in the Area." Thus, the Authority could claim a role and require to be consulted concerning risks posed to the marine environment [7]. The other key article is 137, which forbids any nation or juridical person from appropriating any part of the Area.

The authors of a report from the Institute of Marine Studies, University of Washington, are of the opinion that the area in which cannisters containing radioactive wastes are emplaced will ipso facto be appropriated, as others are excluded from using the same area for other purposes [8]. Another author argues that the mere "use" of an area of the ocean floor can be accomplished without the intention to appropriate [9]. A third author has concluded as follows:

> By reason of the special nature of the radioactive waste thus disposed of, such disposal might produce, if not the actual "appropriation" of the burial site, at least a kind of "freezing" of the ... area affected, which would thereby be rendered as unavailable for any other use for an indefinite period. This might be seen as prejudicial to the principle of the common heritage and contrary to the prohibition on States appropriating any part of the Area. The consent of the Authority would therefore seem to be essential ... [10].

The last author has also concluded that the Authority has "implied powers" necessary for the exercise of its functions and which provide the Authority with an "internal momentum" to claim much broader powers of control over any and all activities taking place in the Area than are enumerated in the Convention.

A general conclusion would seem to be that any burial of nuclear waste in the international sea-bed would require the prior approval of the Authority or at least the prior notification of the Authority, which would then be entitled to state its objections or make recommendations [11].

## GENERAL INTERNATIONAL LAW

A review of the legal questions related to the disposal of radioactive wastes in the marine environment would also involve general principles or norms of international law. Various legal researches have already concluded that it is now recognized that high-level wastes cannot be dumped into the oceans since the London Dumping Convention rules have enjoyed wide international practice and observance over a sufficiently long period of time. Principles 21 and 22 adopted during the 1972 United Nations Conference on the Human Environment also evidence generally accepted concepts of international environmental law.

More generally, two developing principles of international environmental law must be considered: first, an environmental standard of care or duty, to be imposed upon all nations when using the world's oceans and, second, a measure of responsibility and liability for any damage that may result from such use. Based upon widely accepted pollution control conventions, international statements of environmental principles, and the practice of states the first general principle would impose a standard or duty or care upon nations not to cause damage to the international marine environment so as to infringe upon the rights of other nations [12].

## A FRAMEWORK FOR SEA-BED DISPOSAL OPERATIONS

In addition to the need for resolving its legality under the London Dumping Convention, a sea-bed disposal option would require a review of -- and possibly amendments to -- existing liability agreements. Also, it may become necessary to revise both the IAEA's Regulations for the Safe Transport of Radioactive Materials and the IMO's International Maritime Dangerous Goods Code [13]. A framework for effective and widely supported international control and management of any sea-bed disposal operations would also be required, since unregulated -- or poorly regulated -- disposal operations would clearly be totally unacceptable to the world community.

## CONCLUDING REMARKS

The scientific, technical and legal uncertainties indicate that sea-bed disposal is at the very least not a realistic option for the near future. Its main attraction compared to other options is probably the distance from humans if something should go wrong. Given the high toxicity and extreme longevity of the relevant wastes, it would appear that this offers little comfort.

It would seem that in particular those nations that generate great quantities of radioactive waste should rather -- and in line with the requirements of international law -- increase their efforts to develop such permanent disposal options as would entail no risk of infringements upon the rights of other nations.

## NOTES

1. OECD/C (77)15, Final.
2. LDC 7/12, Annex 3.
3. LDC 7/INF.19.
4. LDC 7/12, Annex 4.
5. See for instance the preliminary report of the OECD/NEA Ad Hoc Task Group referred to in note 6.
6. This review draws in particular on the following papers: E. Miles, K. Lee and E. Carling, "Sub-seabed Disposal of High-Level Nuclear Waste: An Assessment of Policy Issues for the US," Institute of Marine Studies, University of Washington, Seattle, July 21, 1982; Lawrence H. Eaker, "International Legal and Political Considerations concerning the Seabed Disposal of Nuclear Waste," prepared for the OECD Nuclear Energy Agency, Paris, October 19, 1982; Seabed Working Group, A Preliminary Report by the Legal and Institutional Ad Hoc Task Group, OECD Nuclear Energy Agency, Paris, May 5, 1983.
7. A slightly different interpretation is suggested by Eaker, note 6.
8. Miles, note 6, page 93.
9. Eaker, note 6, page 19.
10. Jean-Pierre Queneudec, "The Effects of Changes in the Law of the Sea on Legal Regimes Relating to the Disposal of Radioactive Waste in the Sea," paper prepared for the OECD Nuclear Energy Agency, Paris, January 28, 1982 (not published).
11. Queneudec, Eaker, Miles, notes 10 and 6.
12. OECD/NEA Task Group, note 6, page 12.
13. Eaker, note 6, page 43.

# THE STABILITY OF THE ENVIRONMENTAL REGIME OF THE 1982 LAW OF THE SEA CONVENTION

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## INTRODUCTION

Standing here today with the finished product of nearly a decade of hard work at UNCLOS III, one may look back and ask why things turned out as they did, or one may look ahead and ask whether the 1982 Convention will provide a stable ocean regime. I intend to focus on the latter question: will the environmental regime of the 1982 Convention be a stable one?

I will seek to raise what I consider to be relevant questions in this connection and thus organize my comments to the four papers of this session around these questions. By "stability" I mean that the regime leads to such results with regard to the protection of the marine environment that states will not feel a strong incentive to break the provisions of the Convention.

I think there are at least three key variables that must be considered in order to evaluate the stability of the future marine environmental regime:

1. Will it be <u>effective</u> in reducing pollution to levels that are politically satisfactory?
2. Will it <u>distribute</u> the costs of pollution abatement in a politically acceptable way?
3. Will it be sufficiently <u>responsive</u> to meet new dangers to the marine environment that are likely to result from future economic or technological changes?

Let me make my basic attitude clear from the beginning. Due to the physical characteristics of the oceans, I believe that an international approach is needed to manage the marine environment properly. Consequently, I believe that a zonal approach is only a second-best solution, which must be supplemented by international agreements either of a regional or a global scope.

## THE EFFECTIVENESS OF THE REGIME

The LOS Convention does not contain any specific technical standards for the reduction of marine pollution. However, it is a constitutional document that specifies who should set such standards and who is to enforce them. Of the many sources of marine pollution dealt with in the Convention, the three major ones are land-based pollution, vessel-source pollution, and dumping. As stated several times in the papers, the distribution of standard-setting and enforcement jurisdiction is

not identical for all three sources of marine pollution. The important question is whether the Convention assigns jurisdiction to actors that have an incentive to limit pollution. I believe Jan Schneider's answer here is a "yes", whereas I am a bit skeptical.

Primary jurisdiction over marine pollution from land-based sources is assigned to the coastal state. Whether a coastal state will have the incentive to limit such pollution will largely depend on whether the coastal state in question will itself feel its full consequences. To the extent that land-based pollution is effectively transported by ocean currents either into the waters of other coastal states or onto the high seas, we may expect the incentive of that coastal state to diminish. Except for states with very long coasts, I am afraid that pollution will rarely stay within the man-made border of a coastal zone. Therefore, in most cases coastal state jurisdiction will be insufficient.

The authors of this section of the Convention are clearly aware of this deficiency since international cooperation and harmonization of standards are strongly recommended. As Jan Schneider points out in her paper, this is only hortatory, but at least the problem is recognized.

The provision on dumping suffers from the same deficiency, although the basis for international regulation seems stronger. Article 210, paragraph 6 states: "National Laws, regulations and measures shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards." But, of course, there is the question of which "rules and standards" are to be considered "global." Are the rules of the London Dumping Convention global?

In his paper Erik Lykke mentions that the International Sea-bed Authority must have "implied" powers to regulate dumping of radioactive waste since such dumping could render the Area unavailable to any other use, including sea-bed mining. I only wish that this had been stipulated explicitly in the Convention.

Finally, with regard to vessel-source pollution, jurisdiction on standard-setting is divided between the coastal state and the IMO, with the IMO being clearly dominant in most cases. And authority as to enforcement is divided between the flag-state, the coastal state and the port-state, with the flag-state in a dominant position, although not as strong as before the Convention.

Seen from the point of view of the initial negotiating positions at UNCLOS III, it is true, as stated by Ambassador Vindenes, that the consensus reached "does not seem to lie in the center, but leans rather heavily in the direction of the positions taken by the maritime powers."

One could fear that this would result in irresponsibly lax standards and lax enforcement. I do not believe this will be the case. Firstly, although the IMO has traditionally been seen as a club of maritime states, coastal states have a potential majority and in recent years third world states have become increasingly active in IMO. Secondly, a unilateral option on

the side of coastal states continues to exist as an ultimate threat. Both the enclosure movement and the more active participation of coastal states in IMO have resulted in a gradual change of power relations between coastal states and maritime states.

However, there is one big problem that is neither dealt with nor recognized in the Convention: the institutional fragmentation of the regime and the consequent lack of coordination in the management of the many sources of marine pollution. For example, IMO takes care of vessel-source pollution and provides the secretariat to the London Dumping Convention, the Oslo Commission and Paris Commission share a secretariat, and UNEP deals with yet other regional Conventions.

Since the self-cleansing capacity of the oceans is limited, it must be important to constantly monitor the total amount of pollution from all sources. Also, while discharges of different materials permitted under different Conventions may be fairly harmless individually, they may become toxic when mixed.

## DISTRIBUTION OF THE COSTS OF POLLUTION ABATEMENT

A stable marine environmental regime also requires a fair distribution of the costs of pollution abatement. Let me just briefly indicate what I believe are two important aspects of this problem.

Firstly, pollution standards must be uniform in order to avoid distortion of competition. It is hardly possible politically for a country to impose high pollution standards on its industry, if that means losing market shares internationally. Secondly, there must be adequate rules on liability so that the polluter pays for the immediate damage he causes.

Both of these problems require international cooperation and agreement and again this is only dealt with more or less adequately in the area of vessel-source pollution.

## THE RESPONSIVENESS OF THE REGIME

The major disadvantage of international pollution regulation is that it may respond very slowly to new developments. This has at least been a widespread and, I should add, justified criticism of IMO. IMO Conventions have in general taken close to a decade to enter into force, which has meant that they were often partially outdated before they became binding.

While this clearly is not conducive to the stability of the regime, I also believe that IMO has taken at least some steps to reduce the problem. In the 1973 MARPOL Convention and the 1978 SOLAS and MARPOL protocols, actual dates were stipulated as to when the provisions on ship construction would apply, i.e., even before the legal entry-into-force of the agreements.

Another method of speeding up ratification has been created by stipulating that contracting parties are to apply the

provisions of a new convention to all vessels regardless of whether or not the flag state itself is a party. This has the effect of putting any non-complying state at a competitive disadvantage vis-a-vis the contracting parties and not the other way around. This method was followed in the 1969 Liability Convention, where a contracting party is obligated to require full insurance of all vessels entering its ports.

Another way of making the system more flexible and responsive is to speed up the process of amending existing Conventions, basically by eliminating the need for ratification of such amendments. The "tacit acceptance" procedure of the MARPOL Convention makes this possible as far as its annexes are concerned. And in the present preparations for revision of the 1969 Civil Liability Convention and 1971 Fund Convention similar provisions for an ongoing adjustment of liability levels are being discussed.

## CONCLUSION

I have pointed out a number of problems in connection with the preservation of the marine environment. Whether these problems will be solved depends ultimately on the political will, interests and incentives of states. Those who benefit economically from pollution or from using the oceans as a sink for wastes must be countered in the political process. Their economic incentives should be met with strong political disincentives.

With regard to vessel-source pollution there seems to be a new and viable balance of power between maritime and coastal states created, inter alia, by geographical factors that give coastal states an unilateral option. However, I am less optimistic as to marine pollution from land-based sources. Here, the victims of pollution do not have a similar threat of unilateral regulation. In this area the preservation of the marine environment depends exclusively on international negotiation and regulation. Since land-based pollution constitutes the largest source of marine pollution, this problem presents a major challenge to the international community and its processes of regulation and regime formation.

COMMENTARY

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Like Mr. Grolin I would like to comment on the environmental regime of the oceans created in UNCLOS III, and perhaps I could start where he left off. Mr. Grolin's emphasis was on the stability of that regime; I would like to focus on its efficacy. In trying to organize my thoughts around that question, I could perhaps proceed under three different headings, albeit very briefly.

First of all, as the environmental regime of the ocean is largely dependent -- not wholly, but largely -- upon the phenomenon of extended jurisdiction, some thoughts about the environmental significance of extended jurisdiction. Ten years ago, environmentalists and ecologists around the world were nervous at the prospect of a proliferation of new man-made limits, not least because it seemed that the limits which were about to be drawn at UNCLOS III owed little -- if anything -- to the ecological patterns of the ocean. So from any environmental perspective there was an artificiality built into the distribution of regimes of national jurisdiction. That was somewhat dismaying, but then perhaps it merely meant that in the future we had to put our faith in transboundary arrangements for environmental protection, as we have heard this week we must do for the effective management of transboundary stocks and other transboundary resources. As Mr. Grolin has just suggested, there also was nervousness about the prospect of national environmental action within these new zones of national jurisdiction. The question was: Is national environmental action within these zones more likely to be efficacious than the kind of action that might have been expected if there had been no such revolution in the law of the sea? I assume the alternative would have been no revolution, no extended jurisdiction, but the maintenance of most of the ocean under the regime of the high seas. And I do not think we could have expected exciting and significant improvements in the protection of the ocean environment under the old regime.

So if we look at these two alternatives, then I think that we have the better prospect in the case of UNCLOS III, although I concede that many -- perhaps even most -- coastal states will not necessarily regard the protection of the environment within their national limits as their top priority. We have to envisage a variable response, a variety of state practices for the protection of the marine environments of the world. There will be different ways of interpreting the balance between coastal state rights and the freedoms of navigation, which have been referred to by Ambassador Vindenes. Obviously, many states will lean to the navigational side, as he has suggested. Others assuredly will not: they are more likely to lean more to the other side of the balance. So there will be a variety of state

responses varying from the maximalist response pole of the spectrum to the minimalist response pole of the spectrum. Those who take action closer to the maximum side will, of course, be challenged by critics on the outside for relying too heavily on coastal state rights and for having not enough regard for navigational rights. Those who lean more on the minimum side of the spectrum will be challenged by critics -- both inside and outside -- presumably for failing to fulfill their environmental responsibilities under the Convention.

One other question that comes up in this connection is, of course, whether from an environmental perspective there is something positive in the compartmentalizing of the ocean. On the positive side it might be that those coastal states that are environmentally concerned and are likely to take environmental action -- states on the maximalist side -- may see in the fact of compartmentalization an encouragement to engage in experiments in zoning of one kind or another, something which they might not otherwise have thought of doing but for the revolution in the law of the sea. There are provisions in the Convention that seem to encourage precisely that kind of approach to effective environmental action. Article 211, the special rules on "ice covered waters," and a number of other provisions are examples of situations where vulnerable areas within the economic zone of certain states could be brought under zoning practices in a way that might not have been thought of by these states but for the zonal approach to the law of the sea generally.

Second, what is there to say about the history of the conservation movement at UNCLOS III and what can we learn from it? A first observation is that the area of environmental concern that was least well served by UNCLOS III is what we might call the conservation area, if we interpret that more narrowly than environmentalism. Conservation I would take to mean the conservation of species in general and endangered species in particular and the protection of ecosystems in general and vulnerable areas in particular. In that definition conservation has not been particularly well served by UNCLOS III nor, I suppose, could it have been well served by UNCLOS III. So what we must hope for now would be a blending of the holistic ecological view of the ocean presented eleven years ago by the Stockholm Conference with the legal framework provided by UNCLOS III. A reconciliation of the two rather different perspectives must now somehow be effected by appropriate coalitions in the appropriate forums.

I think we have to be honest in recognizing that if they had been left to themselves, the delegations at UNCLOS III would have given very low priority indeed to conservation matters in the ocean. But they were not left to themselves -- they were badgered by various kinds of environmental organizations on the outside. We must surely acknowledge the efforts of the non-governmental organizations (NGOs) with environmental concerns to bring some influence to bear -- albeit a modest influence -- on targeted delegates which proved to be more sympathetic than the

majority. As many of us in this room know, this effort went on for ten years or more with a degree of success that should not be exaggerated, but perhaps with sufficient success to give us some hope that that kind of hybrid initiative in the international community is the only one that will finally be very satisfactory. That hybrid approach may be even more satisfactory in a different forum than UNCLOS III was able to provide.

I would like to add a rider before I go on to my conclusion. I have a personal pet theory that if you look at the history of conservation generally -- not just of the ocean -- you find that elites have historically played a rather important role, particularly on land. Of course, it is a terribly unfashionable thing to have to point out, but it is true nonetheless that elitism is chiefly responsible for the conservation movement of the world since the nineteenth century -- not popular pressures, and popular perceptions, but elitist perceptions and elitist pressures. My point is that the elites that have supported the cause of conservation have not been as effective in the world of ocean affairs as they have been on land; this is certainly true for UNCLOS III. It is an interesting question whether now, after UNCLOS III, other forums may wish to make use of these elites.

Finally, where do we go from here? Ambassador Beesley has raised this question and pointed out the range of United Nations agencies involved in marine affairs and in marine environmental issues. It is a long list. Mr. Grolin has also commented on some of the difficulties in advancing international environmental action in the ocean. As mentioned by others, we should note that many initiatives are now about to be taken. For example, GESAMP is at work again, revising the regional seas program of UNEP. However, it may be difficult for environmentalists to penetrate all these types of activities. Environmentalists tend to be officious intermeddlers by nature -- pretty unscrupulous people who are unlikely to be stopped by the normal standards of decency -- but in all these areas it is difficult for them to come in in a useful way and contribute to the shaping and molding of the various programs. So we may have to look beyond activities of that kind.

Of course, there are ad hoc initiatives on dumping, including dumping of nuclear wastes. And certain regions -- like Antarctica -- are very popular and fashionable right now and attracting the attention of environmentalists. However, none of this seems good enough and what we seem to need is -- as mentioned by Ambassador Beesley -- an orchestration and an effort that is systematic. We need something along the lines of the Stockholm Conference with its focus on ocean conservation. Fortunately, UNEP has recently designated certain matters for priority attention and three governments have come forward with the offer to take the initiative on these matters on behalf of UNEP. I believe the Federal Republic of Germany is to take the initiative in the area of the disposal of hazardous wastes, the Netherlands in the area of the transportation of chemicals, and

Canada in the area of land-based marine pollution. I urge all three of these governments to proceed with dispatch in the appropriate forums.

But this is not enough either. I would have thought that we have no alternative but to pursue the kind of action plan that Ambassador Beesley referred to. In this effort all the appropriate United Nations bodies and other governmental bodies must be involved, as well as non-governmental organizations. I hope that I may say here that the International Union for the Conservation of Nature and Natural Resources has been particularly active in recent years in trying to organize the call for international, regional and national action on the conservation of the ocean. Two years ago the IUCN published a major study that made recommendations for such action to governments and agencies around the world and I would like to think that that kind of listing of requirements could now be carried further and taken into the world of official action. Also the IUCN is about to announce its intention to prepare a master chart of the requirements for ocean environmental action within the framework of the Convention on the Law of the Sea. I would hope that this chart would be sent to all the United Nations agencies and other official bodies and that on it they would indicate the action they are taking or planning to take under their particular jurisdiction. When that chart has been filled in, we can see what blanks remain and what needs to be done.

## DISCUSSION AND QUESTIONS

THOMAS CLINGAN: Before taking questions from the floor, I would like to ask if there is anyone on the panel who would like to respond to any of the comments that have been made so far.

ERIC LYKKE: My remarks will be directed towards the presentation of Mr. Vindenes, not to argue with him but to try to add one or two considerations. It could be said that to some extent the sort of general concept which he developed is at variance with the presentation made by the Chairman of the Third Committee on Wednesday. My point is that there is a continuous development of international law in this area, a process which was perhaps started, or else given particular impetus, by the Torrey Canyon accident. Since then we have seen an ever further development of a number of protective measures directed also towards the protection of natural resources. I do perhaps feel that Mr. Vindenes in his reference to what happened in the UNCLOS III negotiations is drawing too fine a distinction between jurisdictional aspects of resources and environmental aspects. Marine pollution is often an important threat to the natural resources, and coastal states would feel a need to protect themselves in this respect. So my point is that there is an ongoing process here and that a critical issue in this process is whether the existing system will provide sufficient protection of natural resources on the basis outlined by Mr. Vindenes. If, for example, new accidents were to occur in the field of chemical transport, which is of course a very difficult thing coming up, this might force governments whether they like it or not to supplement the existing system and to develop further coastal state jurisdiction.

HELGE VINDENES: In response I would just like to point out that, as Mr. Lykke said, there is no real difference of view between him and myself, nor do I think that there is any difference of view between myself and the Chairman of the Third Committee. I may be wrong, but personally I did not find in my own views anything which was inconsistent with the views expressed by Ambassador Yankov. I am also in full agreement with Mr. Lykke on his comment that there is a continuing and ongoing process of development of law. However, there is one point which merits attention, and that is that in this ongoing process we have had a trend towards extension of coastal state jurisdiction. In my view this has occurred because it has been possible to reconcile the new powers of the coastal state with those concerns that are considered to be vital by the maritime powers. As I see it, the reconciliation of these two different sets of concerns is one of the great achievements of the Law of the Sea Conference. However, I do not think that it will be very easy to carry the trend towards the strengthening of coastal state jurisdiction in environmental matters beyond the point where it begins to get into conflict with the vital interests of the maritime powers. Finally, I agree entirely

that pollution is very much resource-related in that pollution of the sea represents a threat to the resources. Indeed, it was for this reason that in my statement I raised a question as to the provisions of article 56, which states that the coastal state has sovereign rights not only for the exploration and exploitation of the natural resources in the EEZ, but also with regard to "conserving and managing." The question is whether in this reference to sovereign rights for the purpose of conserving and managing the resources there is not inherent a general jurisdiction on pollution.

THOMAS CLINGAN: Thank you. We now move to the audience and the first speaker is Dr. Mario Ruivo from the IOC.

MARIO RUIVO: Thank you, Mr. Chairman, for giving me the floor. I certainly need to exert control on my Latin temperament in order to be brief. This session has been so rich and has touched on so many subjects in which I have been involved that I am tempted to comment on them more extensively.

To begin with, the subject matter that we are dealing with, the environment, is by its very nature an area where interactions between different users and related institutional arrangements become apparent. It raises, therefore, a number of questions deserving further exploration.

I should like to point out, as some other speakers have, that one of the factors that stimulated the need for a new ocean regime was the progress in the knowledge of the oceans through science and the development of marine technology. Throughout the Conference an effort was made to respond to these new trends by providing a comprehensive framework. The negotiating process itself was marked, particularly during its initial phase, by a close interaction between scientists, especially at the national level and as part of the briefing of their respective delegations. As the negotiations went on, scientific experts progressively disappeared from the scene, which was understandable, and the negotiators proper took over.

As we are entering the phase of implementation of the new ocean regime, it is again time to reactivate, both at the national and at the international level, the dialogue between scientists and other experts, on the one hand, and decision-makers, on the other. As stated in the Convention itself, implementation in respect of the use and management of resources, as well as the protection of the marine environment, should indeed be based on the best scientific findings available. For example, the formulation of global standards for management and protection purposes, and their approval for international use, depends basically on the adequacy of the scientific input available.

Without entering into detail, I should also like to point out that institutional adjustments are required within states to enable them to cope with the new demands regarding marine science as a basis for action. At the Conference the Group of 77 submitted a draft resolution which was adopted and later

endorsed by the General Assembly of the United Nations. It noted the enormous gap between developed and developing countries in the field of marine science and technology and it recognized that unless an increased international effort is made in the coming years to reduce this gap, the implementation of the Convention may not be realized, nor the opportunities for socio-economic development opened by the new rights granted to coastal states.

There are three levels at which this process needs to be promoted. One is at the national level; national structures were developed historically on a sectoral basis and they do not reflect the integrated approach under which ocean affairs should be dealt with in the contemporary world. The second is that of international mechanisms of a global and regional level. The third is that of mechanisms for coordination. It is quite clear that there is considerable interaction among these three levels, but it is still not sufficient to modify substantially the status quo. The international structures are strongly influenced by the national structures and the latter have impeded the evolution of the former.

It should also be pointed out that unless real progress is made in the coming years in strengthening national capabilities in marine science and related fields -- that is, in achieving self-reliance -- legal developments will become merely theoretical and will not achieve their purpose.

In this connection I should also like to make some comments on the role of appropriate international institutions in the implementation of the Convention. I was very touched when Ambassador Beesley mentioned the proposals I made at UNCLOS III as Head of the Portuguese delegation on the role and improvement of institutional arrangements in the field of ocean affairs. The existing organizations have played a most useful role in facilitating international cooperation and many of them are potentially useful, provided that adjustments are made to allow then to play such a role under the new ocean regime. However, in view of the comprehensive and integrated nature of that regime, there is a need for an intersectoral approach, which also calls for interdisciplinary research, whereas in the past the approach was mainly sectoral.

It is rather encouraging to note that governments are progressively becoming aware of the institutional implications of the new trends in multiple use and management of the oceans. In this process two main approaches are emerging at the national level. One is towards the establishment of an intersectoral administration dealing with ocean affairs as a whole; the creation of Ministries of the Sea, as in France and Portugal, falls in this category. The other is based on the use of existing sectoral administrations -- fisheries, merchant navigation, etc. -- operating in a concerted manner under a body with the power to formulate a national policy in ocean affairs and to coordinate its implementation. This is the case with the Department of Ocean Development in India.

At the international level steps have already been taken, or are under way, to adapt the UN organizations dealing with ocean affairs to the new demands and to the need to fulfill effectively the functions assigned to "competent international organizations" in the Convention. Having this in mind, the IOC initiated an in-depth study of the implications of the Convention in order to strengthen its program and to undertake the structural adjustments needed to cope with the new demands of the international community in the fields of marine science and ocean services, including training, education and mutual assistance. I am convinced that the feedback between national and international entities, global, regional and subregional, will accelerate this institutional re-shaping process. Nevertheless, in special circumstances and as part of a broader process of adaptation to the requirements of the new regime, it may prove necessary to set up new mechanisms. The proposed International Sea-bed Authority is a case in point.

I still believe in the validity of the draft resolution submitted by Portugal and a number of other states to UNCLOS III on the establishment of a group of distinguished personalities to study international institutional arrangements in the field of ocean affairs, including existing coordinating mechanisms and their future adaptation to the requirements resulting from the Convention, and to report through the Secretary General to the General Assembly. That resolution merits further consideration.

THOMAS CLINGAN: Thank you, Mr. Ruivo. The next speaker is Rose Pfund.

ROSE PFUND: Thank you, Mr. Chairman. By way of introduction: the relationship of what I have to say to the present discussion falls under the general rubric of pollution and it also is of a hortatory nature. I'd like to entitle it, "Was it Miss Muffet's tuffet or was it a hole in the ground?" The ocean environment has many feminine characteristics traditionally assigned to her by nearly all cultures. Furthermore, much of the feminine attributes describing the ocean have sinister and even derogatory overtones. I point to such examples as the power of the Sirens who lured hapless sailors to their deaths, the inconstancy of the oceans, and the violence and power masked by surface gentleness, etc. It is also safe to assume that these descriptions of the ocean have largely originated in the minds of males and have been part of the risk factor of ocean enterprises, whether computed according to the calculus promoted by the London School or the Chicago School of Economics. However, this lurid history is overshadowed by the new heights of metaphorical creativity which have been reached in this 1983 LSI conference on the Law of the Sea. Therefore, I would hope that this body fervently pledge, corporately and individually, to desist from adding further unearned earnings to the existing traditional capital stock of feminine-related myths by creating metaphors such as, "A fat peasant woman sitting with her backside to reality" to describe

stupid macropolicy. And, lastly, it is hoped that future anthropomorphic references to macro or micro failures of character or actions be properly neutered to prevent further violence to mother ocean and women. (Applause).

THOMAS CLINGAN: Thank you, Ms. Pfund, for that very refreshing comment. Now I call on Mr. Valenzuela from IMO.

MARIO VALENZUELA: I know that the time is very late so I will exclude many points. Working with IMO, I am very much concerned with the matters dealt with in all the four excellent papers, but I would not want the international civil servants to monopolize the commentaries on this panel. I should add that I am much helped by Ambassador Yankov's paper which was presented two days ago. He covered many important issues, thus facilitating my task. Also, Mr. Grolin has taken care in large measure of the remarks I would make. One factual point concerning his commentary: the latest and the most important conventions of IMO were drafted in 1978 and they are either in force or they are going to enter into force shortly. So the time it takes for IMO conventions to enter into force is in fact not ten years, but less than five years.

Coming to another specific point: as one of the few participants with the nationality of a developing country, I would like to comment on something mentioned by Ambassador Vindenes in his very good paper: the dichotomy between maritime and coastal states. I was a delegate of my country and I was in some way responsible for the introduction of coastal state powers for the protection and preservation of the marine environment in the exclusive economic zone. One of the explanations for the compromise on marine pollution is that the developing countries went through a process of education in all these years. The experience in IMO shows that the great danger has always been that of unilateral action, as mentioned today by Ambassador Beesley. And the developing countries, especially the coastal states among them, have realized that they are not only coastal states, but that they are also either maritime states or potential maritime states.

In this context, the great danger does not lie in the provisions referring to the different jurisdictional powers, but in the provisions on enforcement by port states, provisions that cannot be separated from those on which Ambassador Vindenes has commented. The fact is that after the Amoco Cadiz incident IMO and the Law of the Sea Conference took very strong action. Of the provisions then approved, I should quote only article 211, paragraph 3, which has far-reaching consequences. As far as I know, the Memorandum of Paris, which has not been mentioned here, does not refer to this article, but that provision has served in fact as an implicit basis for this action on the part of the most important maritime states in the world. These fourteen states of western Europe have established a system of port state control which makes rather unnecessary a discussion on the implementation and enforcement of IMO conventions. These

states are using the best weapon they have: if any flag state does not comply with the generally accepted international rules and standards, its ships are not able to enter into the ports of the most important maritime states, which in this case behave as coastal states.

THOMAS CLINGAN: Unfortunately, the chairman must exercise his prerogative, as unpleasant as it is, and terminate this session. I hope you will all join me in expressing appreciation to our excellent panel.

LUNCHEON SPEECH

BERNARD OXMAN: Our three previous luncheon speakers have come from the developing countries of Africa, Asia and Latin America. Just as one could imagine no more articulate spokesmen for the views held by many of those countries, so I believe we could not have hoped to have a more articulate representative of the values espoused by many Western governments, particularly their commitment to the rule of law. Our speaker today has served the British Government as a legal advisor at both the Foreign and Commonwealth Office and abroad, including its Permanent Mission to the United Nations. His duties brought him to the law of the sea negotiations both during the earliest preparatory stages and then again as Deputy Head of delegation during the crucial final stages. It is a great honor to introduce Mr. Henry Darwin.

# THE CONVENTION AND THE DISTRIBUTION OF ECONOMIC AND POLITICAL POWER

Henry G. Darwin
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Mr. Chairman, your Excellencies, ladies and gentlemen:

In his brilliant speech of yesterday on an inspiring theme Ambassador Castaneda gave me a difficult act to follow. Indeed, before yesterday the immensely high quality of the speeches of Ambassador Koroma and Ambassador Pinto give me -- in all -- three difficult acts to follow. I hope the last act does not turn out to be a tragedy.

At this meeting we have heard many contributions on many aspects of the United Nations Law of the Sea Convention. It is not easy, on this last day, to say much that is new on specific aspects; but the title under which I was invited to speak justifies some personal comments on the Convention as a whole.

The distribution of political and economic power, which is the special theme of this act, as a phrase has a fine ring to it. It suggests that one is commenting on some radical convulsion in world arrangements. I doubt if such extreme language is a correct description of the Convention, but this does not mean that the developments which it records are not important. The mere holding of the Conference was indeed a most important event. For it was the first occasion when the full membership of the world community, as now constituted after the dissolution of the historical empires, was gathered together to debate the great current issues in the law of the sea. If the Conference and its Convention in fact drew heavily on past practice, they have also indicated new solutions to many old and many new problems; and they have themselves already generated a mass of new practice which has revolutionized the law of the sea.

One can, therefore, legitimately look at the distribution of power in two distinct senses. First, there is the distribution of power which brought about and shaped the Convention. Secondly, there is the distribution of power which would result from the Convention.

Let me speak first of political power.

In the strictest sense of the word, the Convention is not fundamentally a political treaty. It does not deal with the great political issues, such as military and political groupings, leagues and alliances, and even less with the ultimate instrument of political power, the use of armed forces for the conduct of hostilities. It is not a disarmament or arms control agreement designed expressly to control or moderate activities in the military field. In the interest groups established at the Conference most of the political groupings of the world were distributed, if not evenly, at least widely,

since the economic concerns of each country on the matters of the Convention had some priority over the affiliations which apply in more purely political activities.

It is true that some of the rights protected by the Convention are of interest in this field of political power in the strict sense. Thus, the right of freedom of passage through and over straits enables states to follow their own desired courses of development, even if these are not always politically pleasing to their neighbors. The technical rules about passage through straits have a surprisingly close link with issues in the domain of self-defence. However, this is only one aspect of navigation: a right mainly exercised as part of commercial intercourse between states.

Nevertheless, in debates on so vast a subject matter, to have attained so broad a consensus is indeed an achievement. If only it could have been even broader! If the Convention itself does not make a distribution of political power, nevertheless the work on it has, in a sense, shown a distribution of political power. The course of negotiations showed a willingness to move towards agreement on many issues in a spirit of mutual concession. On many issues no interest group thought it necessary to try to exercise political power to coerce others to abandon points of fundamental importance. The Convention would have been stronger if this had been true on all issues. But the application of consensus, as far as it went as a mechanism for achieving a balancing of forces, evidenced a distribution of power which was not one-sided and was not tyrannical.

What then can be said about economic power? Here one can give a longer and more affirmative answer.

The Convention is fundamentally an economic treaty and the distribution of economic power in it calls for more comment. Those who worked at the Conference will recall how it was dominated by the diversity of interests and of geography. States divided about a multitude of issues. If I may be allowed a digression, at least at this stage in this excellent meal, it was like a wedding cake with many tiers or floors which was divided differently on each tier. One's closest friends on some issues were the bitterest foes on others. Similarities of geographical circumstances led to groupings which cut across every known line of regions of the world, political affiliations, and even that most pervasive criterion: level of wealth. Working with other delegations, one had to have, so to speak, a profile of the characteristics of each country with which one was dealing in one's head in order to carry on business. Furthermore, the issues were very real. They were not only verbal. Ships go to rich and to poor countries. Rich and poor countries have specialised communities particularly dependent on, for example, fishing. And usually poor communities they are. The land-locked countries include some of the richest and some of the poorest in the world. The producers of minerals found on the deep sea-bed include among their numbers some highly developed and some much less developed

countries. Nevertheless, it was possible over a wide range of issues to achieve a balanced distribution of power.

In resolving all these issues the Conference was perhaps helped by the very reality of current practice. The Conference could see much more clearly what it was dealing with. For example, the necessity for more extended fishery zones, the problem of overfishing and the need for regulation for the benefit of the fishing industry had, before the Conference, begun to show themselves. They became ever more widely recognised over the long period during which the Conference wrestled with its monumental agenda. The importance of navigational rights in the offshore waters of others, including, particularly, straits; the interest of coastal states in protection from unsafe vessels and the impossible burden for shipping of a multiplicity of divergent and even contradictory technical requirements; the need for greater scientific knowledge to make full and wise use of the seas; and the desire of coastal states to protect information of economic value about their own offshore resources; all these and others, and I am only giving examples, were known in international life and in the international use of the sea. However difficult the balancing of the different interests, on the basis of their knowledge of the subject the delegations groped their way to texts which in general could be given adoption by consensus.

Any modern consideration of economic power will also include the protection of the environment. A good environment was not within the traditional meaning of economics or wealth, but the world is wiser now and a good environment certainly is part of the underlying sense of wealth, namely well-being. The Convention in its work on these matters represents a significant advance. Measures for the protection of the environment are often expensive and ultimately impose a cost on the persons benefiting from them. So here there was again a compromise to be struck, even if the working out of this compromise in detail may have been dependent on the competent international organisations concerned. But it was not an unexplored area and much was known of the physical and economic facts which must be taken into account.

Similarly, the formulations on marine technology in Part XIII and on the settlement of disputes in Part XV all built on knowledge and practice from the past.

This did not mean, and I stress this, that the Conference was a slave of practice or had any fear of innovating. On the contrary, it consciously introduced new rules and new principles when the need for them was clear to all. As Ambassador Castaneda pointed out so brilliantly yesterday, there was conscious decision-taking and not the slow accretion of practice as a means for the development of law.

But on all these subjects, whether the rules were new or old, there was a balancing of power to produce a compromise. By the end there was a certain recognition within the Conference that in these fields and in general the distribution of powers, and of the rights and interests which would result from the

Convention, was a better distribution than had resulted from earlier rules and regimes.

On deep sea mining the situation was unhappily different. Though many new uses of the sea have been introduced over the centuries, state practice was so far limited to experimental dredging for deep sea nodules and, as the Conference continued, to legislation in a limited number of countries whose companies were interested in this activity and which, therefore, found it necessary to control those companies and avoid conflicts between them. It might have been thought that negotiations would be easier on an activity which was only becoming economically interesting than on other maritime activities, the history of which had been unfortunately marked by disagreements over years and centuries. Paradoxically, it did not prove so. With the benefit of hindsight, one can say that in some ways the First Committee and its Chairman had a more difficult task than the others. A blank sheet of paper is not the easiest paper to write on; in some ways it is easier to write on a paper with lines. Nobody knows whether the resources of the deep sea are recoverable at a reasonable cost. Any piece of land or coastal sea-bed which nobody has explored is always believed to be full of oil! Every square mile of water which nobody has fished is believed to be full of fish! Similarly, nobody knows the real value of deep sea nodules or the real shape of an industry based on them. But if they are of economic value, then the world should not be deprived of them. If they are resources which can be economically exploited, then they should be available. With a reasonable regime which does not obstruct access; with a reasonable return on the high investment which is involved; and with a reasonable degree of security of access in the light of that investment. This, unhappily, was, however, an area where the Conference was not able to reach the same meeting of minds as on other issues. A clearly identified minority was overridden.

On this particular topic, therefore, I have with regret to say that, in my view, powers were exercised by delegations in the Conference which had better been left unexercised. And the distribution of powers which resulted fell below the standard achieved on other topics.

Fortunately, it was always recognized that the rules and regulations for sea-bed mining to be drawn up by the Preparatory Commission, even if the Convention had been achieved by consensus, would have been an essential element in so novel a field of regulation, and an element by which states could assess the Convention and on the basis of which they would ratify or not ratify the Convention. The Preparatory Commission, for a Convention which was not adopted by consensus, becomes even more important. Perhaps, as was said by Ambassador Koroma, the Preparatory Commission can indeed be a framework to find solutions to all the necessary questions.

"The captains and the kings depart," though happily we have had here at least one king and several most distinguished captains. The Conference itself has come to an end and

discussion must take a new form. But this leaves to the states to appraise its work and to decide their future conduct. To them is distributed, under the Convention and under international law, the power to ratify or accede to the Convention when its true power is known; the power not to ratify or accede to it; or the power to work together to achieve those solutions by consensus for which so many worked so long and so devotedly. Let us hope that the states choose how to exercise their powers with that wisdom, moderation and farsightedness which inspired so many decisions in the Conference.

So much for the serious theme which I accepted. Since I have not exhausted my time and I hope I have not exhausted your patience, may I touch briefly on one other matter? It happens sometimes to a participant in a conference to have a text which has not been widely distributed. The text I am mentioning is not in a language which is widely known and I will not venture to quote a version in the original Icelandic. I will give it in English. The title would be in Icelandic De Sjothingfarasaga, which an Icelandic friend has told me can fairly translate as: "The Saga of the Travellers to the Sea Thing". "Thing" is, of course, the old Scandinavian word for an assembly. Following the normal saga form, it begins as follows:

> There was a man; he was called Evensen. He lived in a beautiful town surrounded by fine forests and wide waters. The waters were well stocked with fish. And, when the time for the Sea Thing was due, he prepared a ship. When all was ready, he sailed to the Thing and with him sailed his henchman whose name was Helge and his friends. And his friends were few but famed for their skill and hard work. And when he arrived at the Thing he would sit in his booth and many great men of the Thing came to him, singly or in groups. And he heard them gravely, and would make an award. And often they would accept the award; and that was a great honour to him. Or when they took their case to the court of the Quarter, or the Fifth Court which heard from all the four quarters of the island, the Court and its chief often would uphold his award, though he was the Lawspeaker of the Court, and that was an even greater honour to him.

I will not go on, but I would like to offer this little lighthearted tribute to Ambassador Evensen and his country for their work towards the Convention. I would like to offer it as a gesture of thanks also to the Institute named after another great Norwegian worthy of a saga, the Institute to whom we are so much indebted for this most interesting meeting. I wish I could do the same for the other Institute from Hawaii to which we are equally so much indebted. But, unfortunately, the first great Pacific navigators of Polynesia, sometimes called the "Vikings of the Sunrise," though no doubt they had sagas, had no means of writing them down. And the technological adventures

which may occur at some future date in and under that ocean have not yet merited their sagas. But without any more comic literature, I would like to offer sincere thanks equally to them.

The two Institutes and all those who have worked so hard for this conference will by the end of tonight be able to congratulate themselves on a well-merited success.

# PART VII

# THE FUTURE OF THE CONVENTION: RELATED ISSUES

# INTRODUCTORY REMARKS

Albert Koers
Institute of Public International Law
University of Utrecht

Ladies and gentlemen:

I would like to call this last panel of the Seventeenth Annual Conference of the Law of the Sea Institute to order. I will chair this panel in place of Dr. Gamble, whose name you may have seen in earlier versions on the program, but who was unable to attend. The topic of this panel is "The Future of the Convention: Related Issues." I think you will agree with me that it is not for this panel to settle the issue of the future of the Convention; only time can do that. Therefore, you should see this panel primarily in light of its subtitle, "Related Issues." We will look at some special issues affecting the future of the Convention.

Our first speaker is Professor Riphagen, Legal Advisor to the Minister of Foreign Affairs of the Netherlands. It gives me great pleasure that Professor Riphagen has accepted the invitation to participate in this panel and that he was willing to interrupt his work in Geneva in the International Law Commission. I am sure that Professor Riphagen is known to most of us as the Head of the Netherlands delegation at UNCLOS III. He was also very much involved in the drafting of the last annex to the Convention dealing with the participation of international organizations in the Convention. Thus, Professor Riphagen is eminently qualified to speak to us about the topic of the UN Convention and the Treaty of Rome.

When it became clear last week that Mr. Bo Johnson was unable to come to Oslo, Mr. Sollie, our second speaker, graciously accepted the invitation to participate in this panel. He could do so on such short notice because of an involvement of many, many years in the problems of the polar regions. We are very fortunate to have Mr. Sollie with us today.

Our third speaker is Miss Renate Platzoeder, who has been a participant in UNCLOS III of some long standing. She is associated with the Stiftung fur Wissenschaft und Politik in the Federal Republic of Germany and we are all in her debt because she prepared the most complete collection of UNCLOS III documents so far generally available.

It would be presumptuous on my part to make much of introducing our fourth speaker, Professor Oxman, to you, not only because he has done so much introducing himself in this conference, but also because I am quite sure that all of us are aware of his contributions to the negotiations in the Third United Nations Conference and to the law of the sea generally. So allow me to make only a personal observation. Being one of this conference's program chairmen, it was a privilege for me to work with him in defining the program of this conference and if that program has had any merit, I am sure it is due to him.

Our first commentator, Ambassador Holger Rotkirch, is Deputy Director of the Legal Department of Foreign Affairs in Finland and he was involved in the Conference as a member of the Finnish delegation.

Our last speaker, at least from behind this table, is Professor Tullio Treves of the University of Milan and a member of the Italian delegation.

# THE UN CONVENTION ON THE LAW OF THE SEA AND THE TREATY OF ROME

Willem Riphagen
Ministry of Foreign Affairs
The Netherlands

## INTRODUCTION

The relationships between the UN Convention on the Law of the Sea and the Treaty of Rome (EEC) must be looked at from two points of view. The Convention's, and more generally the general international law, point of view and the EEC point of view are both needed in order to understand -- and complete! -- the synthesis of these points of view as attempted in Annex IX of the Law of the Sea Convention.

The rules of general international law are based on the co-existence of separate, internally independent and externally sovereign states. This co-existence requires at least a minimum of rules of international law. The minimal character of the rules of international law is reflected in their technique, which is essentially bilateral in the sense that they normally do not create "norms," but rather bilateral legal relationships, i.e., obligations corresponding to rights and rights corresponding to obligations, between each pair of two states separately, even if the content of those separate relationships may be uniform. This bilateralism is also apparent in the legal consequences of breaches of international obligations.

In a sense the rules of, or rather the legal relationships created by, international law also require the separation, internal independence and external sovereignty of individual states. The legal relationship between state A and state B presupposes those three factors, inasmuch as it may ignore, i.e., not recognize, a situation in which state B has indirectly "transferred" its rights to state C by exercising such rights for the benefit of state C or in which it has actually "transferred" some of its rights to state C. An example of the former situation is the case where state B gives the right to fly its flag to ships which have no genuine link whatsoever with state B, but rather with state C; an example of the latter situation is the case where state B admits state C to patrol in state B's territorial sea for the purpose of enforcement of state C's laws and regulations even as against ships flying the flag of state A. In the case of a full transfer of rights, i.e., a transfer of part of the territory of state B to state C, treaties between state A and state B cease to be applicable to the transferred territory (article 15 under (a) of the Vienna Convention on Succession of States in respect of Treaties) and, more relevant in our context, even in the inverse case of transfer to state B of part of the territory of state C, treaties between state A and state B will not become applicable to the transferred territory if "it appears from the treaty or

is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions or its operation" (ibidem, under (b), in fine).

Obviously, for the same reason that the mere co-existence of states without rules of international law is untenable, this isolation of bilateral relationships does not correspond to the realities of modern international life and indeed we see in state practice many instances of a "linkage" or even a "fusion" of bilateral relationships. One example is given by the liberal interpretation put on the notion of "origin" of products, possibly based on the recognition by a developed country of the needs of developing countries to expand trade between them. Another example is the most favored nation clause and the exception of custom unions from the application of this clause, in the case of GATT under certain provisos! Still another example is the recognition by a treaty between state A and state B that not only state B is in fact not completely isolated from state C, but is in law "bound" to state C. In the latter case state A, in its treaty with state B, may even go so far as to treat, in the relevant context, states B and C as one "unit." This "relevant context" may then cover the -- as between states B and C legally required! -- absence of barriers at the frontier (between state B and state C) to the movement of goods, etc., the common exercise of jurisdiction (stricto sensu) by states B and C, or even the common exercise of external sovereignty through the conclusion of treaties.

The problem of the relationship between the Law of the Sea Convention and the EEC then may be described as follows:

- The Convention is based on, and requires to the extent to be discussed later, the "separation" of states, as regards the rights of use of their territories, as regards their jurisdictions (stricto sensu) and as regards their external sovereignties (treaty-making power, state responsibility);
- The EEC effects, as between its member states, a partial "fusion" of usage rights, of jurisdiction, and of external sovereignties; and
- The fusion being only partial, third states may logically either ignore it as a res inter alios acta or as a purely internal (domestic) matter of each member state or they may treat it as a full fusion of the member states, i.e., assimilate the EEC to one state in all the contexts of the Convention.

Neither the former nor the latter course of action of third states would completely correspond to the actual situation. Hinc lacrimae!

The EEC is an international organization, if we take this technical legal term to include both purely intergovernmental organizations (do they still exist?) and organizations with a "supranational" element, if only an independent secretariat! On the other hand, as already mentioned in the above, there is a

lot of state practice recognizing the links between states. We may, therefore, have a look first at the treatment of international organizations in other rules of international law than those embodied in the Law of the Sea Convention and at rules of the Convention other than Annex IX in which such links seem to have been recognized.

## RULES OF INTERNATIONAL LAW OTHER THAN THE CONVENTION

As to the other rules of international law it is interesting to note article 36 bis of the draft articles prepared by the ILC concerning "treaties between states and international organizations and between international organizations." This draft article reads as follows:

> Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:
>
> (a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and
>
> (b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating states and negotiating organizations.

The article only deals with one stage in the process of international law: the legal relationships created or not created by the conclusion of a treaty between an international organization and a state. Presuming that the article is a "codification" of "existing" international law and concentrating our attention on treaties between an international organization and a state which is not a member of that organization, we note that the article does not deal with:

- The procedure through which the member states participate in the conclusion of the treaty;
- The position of member states vis-a-vis the further "life" of the treaty (denunciation, etc.);
- The (other) conditions and consequences affecting the "force" of the treaty (such as a "fundamental change of circumstances" or, for that matter, a change in the memberships of the international organization); and
- The legal consequences of a breach of the treaty ("responsibility").

The first point is dealt with in other draft articles, partly by reference to the internal rules of the organization, partly by article 46 which concerns the possible non-conformity of the conclusion of the treaty with those internal rules. But there is nothing on the position of member states as to reservations to the treaty, nor on the question whether a "bilateral" treaty between an organization and a third state possibly becomes a multilateral treaty for the purpose of the application of the rules of the Vienna Convention on the Law of Treaties relating to modification of the legal relationships as between some "parties" to the treaty only (inter alia, articles 41 and 58).

The second point is apparently supposed to be dealt with in, or at the occasion of conclusion of, the treaty itself between the international organization and a non-member state. Clearly, there are a lot of questions left open by the draft articles but, after all, the draft articles are concerned with treaties and not with the law of international organizations, nor with the law of "state responsibility"!

The main point for the present context is, of course, that article 36 bis recognizes that direct legal relationships between a member state and a third state may arise from a treaty concluded by an international organization.

In this respect article 36 bis is a "projection" into the realm of general international law of article 228, paragraph 2 of the EEC Treaty, though, of course, a "mirror projection" is embodied in article 36 bis' requirement that the parties, i.e., the organization and the third state, really intend to create direct legal relationships between the third state and each member state of the organization. We are, therefore, faced with a synthesis between two points of view, as referred to above in the first paragraph.

In this connection it should be recalled that the Treaty on the European Coal and Steel Community (ECSC) remained silent on both the treaty-making power of that organization and on the (internal) legal consequences of treaties concluded by the ECSC. It needs also to be kept in mind that the Treaty on European Atomic Energy (EURATOM) has internal rules of the organization, entirely different from those of the EEC, on treaty making and that it contains no provision analogous to article 228, paragraph 2 of the EEC Treaty.

## THE PROVISIONS OF THE CONVENTION OTHER THAN ANNEX IX

Turning now to the provisions of the Law of the Sea Convention other than Annex IX, a first observation is that these provisions deal literally with relationships between "states." Furthermore, the main questions dealt with in the Convention are those concerning the relationships between a coastal state and a flag state, between a coastal state and another coastal state (delimitation problems, including certain provisions limiting the possibility of drawing straight base lines; delimitation in bays and mouths of rivers not inter

fauces terrarum of one state is deliberately left open!); and, occasionally, between a flag state and another flag state. Even the deep sea mining regime of the Area deals with "flag state" rights inasmuch as it attempts to arrive at a certain "automaticity" of contracts with the Authority and even stipulates a compulsory dispute settlement procedure in case of refusal of a contract.

Now, apart from not being a state, the EEC is at present neither a coastal state nor a flag state, nor even a "sponsoring" state in the sense of Part XI on the deep sea mining regime of the Area! But this is, of course, not the whole answer!

The separation of states is reflected in the wording of some of the Convention's provisions. Thus article 91, for example, requires that there be a "genuine link" between a ship and the state whose flag it is entitled to fly. Perhaps fortunately, the Convention remains silent on what exactly is a genuine link and also on the legal consequences of an absence of such link (compare a contrario, article 92, paragraph 2 dealing, in a sense, with multiple nationality of ships).

If it were otherwise, the question could arise whether a ship flying the flag of a member state of the EEC, but owned and managed completely by nationals of one or more other member states, could be considered as having a genuine link with the flag state. Actually, an analogous question arises within the framework of Protocol no. 2 to the Act of Mannheim which reserves cabotage between points on the Rhine to, essentially, vessels registered in one of the states parties to the Act and Protocol and having a genuine link with that state party as to be defined in common agreement between those states parties. The common definition prepared in the Central Rhine Navigation Commission indeed solves the problem by assimilating nationals of states members of the EEC, not parties to the Act of Mannheim, to nationals of states parties to the Act, the intention being that an identical definition of the "genuine link" will be adopted by the competent organ of the EEC.

Several provisions of the Law of the Sea Convention are of the most favored nation type, inasmuch as they forbid discrimination as between foreign ships. Thus, article 24, paragraph 1 (b); article 25, paragraph 3; and article 26, paragraph 2 require non-discriminatory treatment of foreign ships in the exercise of a coastal state's powers relating to navigation in its territorial sea (see also the reference to these articles in article 211, paragraph 4 and the more general article 227 covering the exercise of all powers of non-flag states in the field of the protection of the marine environment). Obviously, in the application of these provisions by state A it is irrelevant whether a ship flying the flag of state B is "genuinely" a ship of state B, rather than a ship of state C.

But here the inverse question arises whether state A may discriminate in favor of state B as compared with the treatment given to state X if state A is "linked" with state B, e.g., when

states A and B are members of a group of states applying a "common policy" in the matters dealt with in those provisions of the Convention. Could a coastal state, member of NATO, distinguish between ships of other NATO members and ships of non-member states if it suspends temporarily in specified areas of its territorial sea the innocent passage of foreign ships "if such suspension is essential for the protection of its security" (article 24, paragraph 3)?

More important in the present context is the question whether a coastal state, member of the EEC, may exempt vessels flying the flag of another member state from the application of its laws and regulations relating to the prevention, reduction and control of pollution of the marine environment.

In this connection it is interesting to note that article 211, paragraph 3 envisages, in the limited field of coastal state requirements as conditions for the entry into its ports, the possibility of "cooperative arrangements" between two or more coastal states. While article 25, paragraph 2 empowers the coastal state "to take in its territorial sea with respect to ships proceeding to its internal waters the necessary steps to prevent any breach of the conditions to which admission of ... ships to internal waters ... is subject," such measures cannot be taken by another, possibly neighboring, coastal state in its territorial sea, even if between these two coastal states there is a cooperative arrangement, including identical conditions of admission to internal waters. In other words, a coastal state cannot exercise its powers in its territorial sea "on behalf of" another coastal state. Article 211, paragraph 3 only obliges the flag state to require the masters of its ships to furnish information as to whether it is proceeding to a state of the same region participating in such cooperative arrangement and, if so, to indicate whether it complies with the port entry requirements of that state. This obligation of the flag state is part of the general obligation of flag states to "adopt laws and regulations for the prevention, reduction, and control of pollution of the marine environment from vessels flying their flag" (article 211, paragraph 2) and it is, in a way, comparable to the general duty of a flag state to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag" (article 94). The difference is, of course, that, while the articles 94 and 211, paragraph 2 refer to international standards, article 211, paragraph 3 deals with the application of regional standards.

It is also significant that other "cooperative arrangements" of a regional nature, although admitted and even prescribed in other provisions of the Convention, are not being given any effect as to third states. Thus, while article 199 prescribes cooperation between "States in the area affected" as regards "eliminating the effects of pollution and preventing or minimizing the damage" and, in particular, as to "jointly develop and promote contingency plans for responding to pollution incidents in the marine environment," article 221 recognizes the right of a state in case of a maritime casualty

"to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage" only to protect its coastline or related interests.

Several provisions of the Convention "discriminate" between states, inasmuch as they give a special "status" to developing, in contradistinction to developed, states; to land-locked states; to "geographically disadvantaged" states; to states bordering enclosed or semi-enclosed seas; etc. On the other hand, some provisions withdraw an otherwise existing "status" from states which have not fulfilled certain obligations. Thus, a flag state cannot "take over" proceedings instituted by another state against one of its ships in connection with a violation of anti-pollution provisions if it has "repeatedly disregarded its obligations to enforce effectively the applicable international rules and standards with respect to violations committed by its vessels" (art. 228, paragraph 1). Also, "outstanding obligations to the coastal state from a prior research project" may nullify whatever "right" of consent another state may have with respect to marine scientific research in the exclusive economic zone or on the continental shelf (article 246, paragraph 5 and article 252, paragraph d).

Theoretically, it would be conceivable that these cases of acquisition or loss of "status" were influenced by the relationship between a state and a third state. For example, one could imagine that a land-locked state which has secured for itself access to the sea through a treaty with a coastal state would no longer be treated as "land-locked" for the purpose of the application of provisions of the Convention giving special rights to land-locked states. Actually, the Convention applies a different technique. On the one hand, some provisions of the Convention create legal relationships between a flag state, undertaking marine scientific research with the consent of a coastal state, and the "neighboring land-locked and geographically disadvantaged states" (article 254), irrespective of any arrangement between the latter states and the coastal state. On the other hand, as regards fishing rights of a land-locked state in relation to a particular coastal state, account is taken of "the extent to which the land-locked state ... is participating or is entitled to participate ... in the exploitation of living resources of the exclusive economic zones of other coastal states."

Obviously, rights given by provisions of the Convention to states on the ground of their special status cannot, in principle, be "transferred" to another state which does not have that status. As regards the fishing rights of land-locked and geographically disadvantaged states, article 72 prohibits all transfers, "directly or indirectly," to third states "or their nationals." No such provision is made as regards the fishing rights of the coastal state itself. While the coastal state is obliged to give other states access to the surplus of the allowable catch which it cannot harvest itself, the question whether a coastal state does "itself" harvest when it admits foreign nationals to fish under its flag is not addressed in the Convention!

Looking now at the Convention from the point of view of the Treaty of Rome, we can note immediately that the EEC creates a very special relationship between its member states on all three "levels" of their sovereignty: these member states are not "separate" any more, inasmuch as there is a freedom of movement between them as regards goods, persons, etc.; there are common regulations with "direct effect" within each member state; and common institutions are empowered to enter into treaties with third states. Yet, each member state remains a sovereign state and the EEC as such has no territory, nor nationals, nor even a government in the normal international sense of those words. Why then bother about the relationship Convention-EEC? The simple answer is that the member states of the EEC, and the EEC as an international organization, wish to be treated as a unity and wish to act as a unity, both as regards the exercise of their rights and as regards the performance of their obligations under the Convention, this in order to avoid any incompatibility between their mutual relationships, present and future, and their relationships with third states. Obviously, third states cannot accept such a wish unless the unity as such, i.e., the EEC as an international organization, "takes over" the obligations which would otherwise rest on the member states and exercises only the rights which the member states otherwise would have.

As to the last-mentioned point, the Convention creates a special difficulty inasmuch as it is far from clear to what extent rights of states, as stipulated in the Convention, are dependent upon obligations of the same states, as stipulated in the Convention, nor to what extent those rights and obligations are independent from the status of a state as a party to the Convention, in other words, are rights and obligations under customary general international law. This is a particularly difficult question as the Convention provides for an institutional framework by stipulating many obligations to cooperate, the establishment of a new international organization and last but not least, compulsory forms of dispute settlement!

There is no doubt that the Convention was always considered as a "package deal." Accordingly, reservations are not admitted unless expressly allowed in its provisions.

Furthermore, by virtue of article 36 of the Vienna Convention on the Law of Treaties, a treaty may create rights for a state which is not a party to it and the presumed assent of the state to the creation of such rights carries with it that the state exercising such rights "shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty." According to the draft articles adopted by the ILC in 1982 this provision would also apply to treaties to which an international organization is a party. Obviously, this provision presupposes that the parties to the treaty are legally in the position to create the right in question and, therefore, to impose "conditions" on the exercise of such rights without the express consent of the third state.

This is not the place to dwell on the question of which stipulations in the Convention are a "codification" of already existing customary rules of international law. Suffice it to say that the recognition of several coastal state rights and flag state rights by the Convention is clearly dependent upon the acceptance by the state concerned of the institutional framework provided in the Convention.

ANNEX IX OF THE CONVENTION

Turning now to Annex IX of the Convention, we note that its main legal significance lies in the recognition of what could be called the "direct effect upwards" of the Treaty of Rome and the decisions taken under that treaty -- in short, of EEC law. Indeed, the "direct effect downwards" of EEC law means that its provisions, if intended to have this effect, are automatically incorporated in the domestic law of each member state and cause the inapplicability of existing domestic law, the application of which would be incompatible with EEC law. This direct effect implies, if necessary, a transformation of a legal relationship between states into legal relationships with other entities than states, in particular with natural and legal persons under the jurisdiction of the member states. We can leave aside here the exact extent of this penetration of international law into domestic law.

A similar transformation and penetration takes place "upwards," if legal relationships with the member states are transformed into legal relationships with the EEC as an international organization. In a sense this is the mirror image of the "direct effect downwards" envisaged by article 36 bis of the draft articles referred to in the above.

This transformation is effected by article 4 of Annex IX: the international organization accepts "the rights and obligations of states under this Convention," it "shall be a Party to this Convention," and it "shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under the Convention."

All these formulae refer to matters with respect to which the international organization has competence and its member states have "transferred" competence to it. Indeed, the last sentence of article 4, paragraph 3 stipulates that "the member States of that international organization shall not exercise competence which they have transferred to it." The terminology of "transfer of competence" also appears in article 1 of Annex IX. What does this actually mean?

Like all treaties, the EEC Treaty limits the sovereignty of the individual member states: they are bound not to exercise their sovereignty in certain ways incompatible with the existence of a "common market" between them. Furthermore, as is in principle the case with any treaty establishing an international organization, the institutions of this organization are given certain powers, the mere existence of which, and even more so the exercise of which, again limits the

freedom of action of the member states. Some of those powers are treaty-making powers.

Although the "competence" which the member states have "lost" does not fully correspond to the "competence" the EEC has "acquired," since the EEC institutions cannot either take decisions incompatible with the existence of a common market between the member states and since it is not always fully clear to what extent the existence or exercise of their powers puts additional limits on the sovereignty of the individual member states, and although most of EEC law leaves the enforcement of its provisions to the individual member states, all this can, nevertheless, be considered a "transfer" of competence, be it a very particular and complicated one! In this connection, it must be recalled also that, even though article 228, paragraph 2 of the EEC Treaty provides that treaties lawfully concluded by the EEC are binding on the member states, in actual practice there are many so-called mixed treaties, i.e., treaties with third states concluded by the EEC and its individual member states. One of the reasons for this is that one can simply not always foresee whether a treaty concluded with a third state or states may not, under certain circumstances, require conduct for which the EEC is not competent.

The upshot of article 4 of Annex IX then clearly is that third states, parties to the Convention, accept that neither the individual member states of EEC, parties to the Convention, nor the EEC as such, also party to the Convention, have all the rights and obligations resulting from the Convention. Furthermore, it follows clearly from articles 3 and 8, paragraph c of Annex IX that the possibility is envisaged that the EEC is a party to the Convention while one or more of its member states are not a party, and vice versa! The combined effect of those provisions is, to say the least, not quite in conformity with the object and purpose of either the Law of the Sea Convention or the EEC regime!

Actually, both regimes are "package deals" and a perfect combination of the two regimes can only be effected if all the individual member states of the EEC and the EEC itself are parties to the Convention. And even then the transformation of member states rights and obligations into EEC rights and obligations alters the substance of those rights and obligations.

It is the possible claudicans situation referred to in the foregoing paragraph that is responsible for some provisions of Annex IX which in themselves do not make much legal sense. Thus, it is clearly in the interest of the Convention's regime, intended to become universal, that an international organization with "competence over matters governed by this Convention" accepts the obligations laid down in the Convention and that this acceptance take place irrespective of the position of its member states vis-a-vis the Convention. Indeed, under article 1 of Annex IX (juncto article 305, paragraph 1 (f) and article 306) the EEC is qualified to become a party to the Convention even if none of its member states had signed and ratified; and

article 8, paragraph c (I) makes it impossible for the EEC, once it has become a party, to withdraw from participation as long as only one of the member states is a party. On the other hand, under articles 2 and 3, the EEC can only become a party to the Convention if the majority of its individual member states are parties to it; and article 8, paragraph c (II) forces the EEC to withdraw when none of its member states are parties any longer.

There is clearly no consistency in these provisions. No doubt this is due to the persistent linking of rights with obligations under the Convention in a sort of cost/benefit relationship. The Conference apparently somehow reasoned that an international organization should not exercise rights "on behalf of" member states which were not parties to the Convention and, consequently, should not have obligations either. Now this reasoning may be correct in respect to rights given by the Convention, so to speak, "in return" for obligations imposed by the Convention, but it cannot apply to rights already given to states by pre-existing customary international law and "transferred" to an international organization. If ever member states of the EEC "transfer competence" to the EEC with respect to their territorial seas, it is certainly unthinkable that the EEC, being itself a party to the Convention, would not be bound by its provisions imposing obligations with respect to the exercise of those rights.

Furthermore, the reasoning overlooks the fact that whatever rights and powers are "transferred" to the EEC, the EEC can, under the Treaty of Rome, only exercise those rights and powers "on behalf of" <u>all</u> its member states. In any case it is clear that member states of an international organization cannot "transfer" to that organization rights they do not have themselves. Rights of "representation" are clearly new rights given by the Convention to states parties. Article 4, paragraph 4 of Annex IX is, therefore, self-evident. On the other hand, article 4, paragraph 5 stating that participation of an international organization will in no case confer any rights under this Convention on member states of the organization which are not parties to the Convention is also self-evident with respect to new rights. Indeed, there can be no "re-transfer" from the organization to the member states. The only legal sense of article 4, paragraph 5 then is that it makes clear that the rule laid down in article 36 bis of the ILC's draft articles (see above) does not apply in the Law of the Sea Convention.

Equally self-evident is article 4, paragraph 6 of Annex IX. Actually, it is an application of the rule of international law laid down in article 27 of the Vienna Convention on the Law of Treaties and made applicable to treaties with international organizations in article 27 of the ILC's draft rules (see above). One can hardly assume that article 4, paragraph 6 of Annex IX by not mentioning the principle embodied in article 46 of the Vienna Convention and article 46 of the ILC draft rules, manifest violation of an internal rule of fundamental importance regarding competence to conclude treaties, means to imply that this principle does not apply in matters governed by the Law of the Sea Convention.

Actually, as the international organization only has obligations under the Convention to the extent that competence, including the competence to enter into treaties, has been transferred to it, the question dealt with in article 46 cannot arise in that form.

But the question comes back in another form. Third states should be in a position to know the extent to which competence has been transferred, or the transfer withdrawn, at any given moment. This thought is behind article 2; article 3, paragraph 2; article 4, paragraph 2; article 5; and article 6, paragraph 2 of Annex IX.

As a matter of fact and as noted already in the above, it is extremely difficult to indicate precisely to what extent "competence is transferred" by member states to an international organization. In the case of the EEC an additional difficulty is that whatever the member states and the institutions of the EEC may declare in this respect is, as regards these states and institutions, subject to the final decision of the completely independent European Court of Justice.

When, therefore, article 5, paragraph 3 of Annex IX stipulates that "States Parties which are member States of an international organization which is a party to this Convention shall be presumed to have competence over all matters governed by this Convention in which transfers of competence to the organization have not been specifically declared, notified or communicated by those states under this article," this is in possible contradiction both with the objective formulation of previous articles and with the equally objective determination by the European Court of Justice.

Furthermore, it gives a somewhat unreasonable precedence to the declarations, notifications or communications of a member state concerning transfer or non-transfer of competence over possibly divergent declarations etc. of another member state or of the institutions of the EEC! And, finally, with respect to "responsibility and liability" there seems to be a contradiction between article 5, paragraph 3 and article 6, paragraph 2 as it seems to result from article 6, paragraph 2 that in case of non-contradictory information provided "within a reasonable time," that information, rather than the declarations etc. under article 5, determines whether the EEC or one (or more) individual member state(s) is (are) "responsible."

The practical significance of these contradictions should not be exaggerated. For one thing, article 5, paragraph 5, particularly the last sentence thereof, gives the opportunity to the organization and the member states to communicate, on their own initiative, information as to competence "with respect to any specific question which has arisen." For another thing, one may presume that the institutions and the member states will coordinate their declarations, notifications and communications. In respect of the EEC it is important to note that the views of the European Court of Justice can be ascertained beforehand (article 228, paragraph 1 of the Treaty).

Finally, one should not forget that a breach of obligations under general international law, particularly in matters of the Convention, results in most cases from an exercise of physical power. Since powers of enforcement are generally not transferred to international organizations, the question does normally not arise. There are, of course, also obligations to take positive measures possibly of a non-physical kind, e.g., the making of regulations, but then the question of competence will in practice be solved before any breach of obligations is involved.

Does article 4, paragraph 6 of Annex IX stipulate more than the general rule that a party to the Convention cannot invoke its internal law as justification for its failure to perform the Convention?

The wording of article 4, paragraph 6 is akin to that of article 103 of the Charter of the United Nations. Nevertheless, one could hardly assume that this article intends to create the same type of hierarchy of obligations as article 103 of the UN Charter. In particular, there is no reason to assume that it intends to affect the legal relationships between the organization and its member states, which, in themselves, are a transformation in the sense indicated above of the legal relationships between the member states as created by, or under, the treaty establishing that organization. Indeed, the "transfer of competence" by the member states to the organization may well be qualified by obligations of the organization vis-a-vis its member states in respect of the exercise of such "transferred competence." And since the organization only has obligations under the Convention to the extent that it has competence, a conflict between those obligations and the obligations it has vis-a-vis its member states cannot then arise. Of course, the qualification of such transferred competence must be mentioned in the declarations, notifications and communications of information under article 5 of Annex IX.

Furthermore, article 311 of the Convention seems to be relevant here, if only by analogy. Actually, the paragraphs 2, 3, 5 and 6 of this article address the question to what extent between two or more states parties to the Convention a regime derogating from the Convention's regime is admissible. One can argue that the provisions of Annex IX of the Convention, as well as their object and purpose, "permit and preserve" in the sense of article 311, paragraph 5, international agreements establishing international organizations as defined in article 1 of Annex IX. This does not mean, of course, that such agreements are "permitted and preserved" irrespective of their content, but it must mean that such agreements are admitted as compatible with the Convention also as regards those of their provisions which are necessarily linked with the "transfer of competences" to the organization established by them. This is important because, as mentioned earlier, to substitute the international organization for its member states necessarily "affects the enjoyment by other States parties of their rights

or the performance of their obligations" under the Convention. In other words, if the international organization becomes a party to the Convention, the resulting substitution of the organization for its member states to the extent of the transfer of competence is admitted, and even prescribed, the relevant words of article 311, paragraphs 2 and 3 notwithstanding!

The same reasoning is valid for other elements of the treaty establishing an international organization in the sense of article 1 of Annex IX. Indeed, the transfer of competence referred to in that article, in particular the transfer of competence to enter into treaties, never stands alone; it is the culmination of a regime between the member states of the organization and the organization itself, which necessarily implies and is built upon special legal relationships between the member states in the field of "integration" of their territories and "fusion" of parts of their domestic jurisdictions, i.e., jurisdictions stricto sensu. Actually, if this were not the case, one could not possibly justify the substitution of the organization for its member states! Inversely, this substitution implies the recognition of this special relationship between the member states of the organization by third states; in other words, the recognition that the member states of such an organization may give each other a treatment different from that which they give to non-member states to the extent that such difference is justified by the "transfer of competence" to the organization.

Article 311 of the Convention contains three other notions limiting the admissibility of agreements between two or more states parties which derogate from the provisions of the Convention, namely: (1) "incompatible with the effective execution of the object and purpose of the Convention"; (2) "affecting the application of the basic principles embodied herein" (sic); and (3) "amendment (sic) to the basic principle relating to the common heritage of mankind, set forth in article 136." Actually, the three notions would seem to overlap each other. It is hard to ascribe a single "object and purpose" to the Convention, which combines provisions embodying centuries old customary international law, such as the freedom of the high seas, with rather new concepts and principles, such as the obligations to conserve the living resources of the sea to protect the marine environment, and the treatment of the Area and its resources as "the common heritage of mankind." Anyway, the substitution of an international organization, as referred to in article 1 of Annex IX, for its member states, while changing the modalities of execution, obviously does not affect the basic principles themselves.

Article 6 of Annex IX deals with "responsibility and liability," apparently using the two terms as synonyms. The main point here is that "responsibility" is linked with "competence"; in other words, it is divided between the international organization and its individual member states. This seems logical since the organization under article 4, paragraph 3 has "taken over" the obligations of its member

states "on matters relating to which competence has been transferred to it." But, as noted earlier, this "transfer of competence" is a rather complicated affair, at least in so far as the EEC is concerned. In particular, where institutions of the EEC are empowered to make regulations on matters pertaining to the Convention and to take decisions as to the application in concrete cases of such regulations, the enforcement of such regulations and decisions within the territory or zone of jurisdiction of a member state is normally left to that member state, which vis-a-vis the other member states and the organization in principle is obliged to proceed to such enforcement, but of necessity also has some discretion as to the modalities of the enforcement.

The Convention imposes a variety of types of obligations: obligations to cooperate (e.g., article 117, article 118 and article 197); obligations to enter into agreements with other states (e.g., article 62, paragraph 2); obligations to make national regulations (e.g., article 61); obligations to effectively exercise jurisdiction and control (e.g., article 94); obligations to provide local remedies (e.g., article 32, article 235, paragraph 2 and, by implication, the articles 113-115); obligations to abstain from certain enforcement measures (e.g., article 226 and article 230); and obligations relating to modalities of enforcement (e.g., article 27, paragraph 4 and article 225).

In many cases it is easy to establish that the EEC as such has taken over such obligations from its member states, e.g., the obligation under article 62, paragraph 2, or that the facts of the case have nothing to do with an act or omission on the part of EEC institutions, e.g., a breach by a member state of the obligation laid down in article 225. But there may be cases where a non-performance of obligations under the Convention is the combined effect of an act or omission on the part of a member state and an act or omission on the part of an EEC institution. Actually, article 6, paragraph 2 of Annex IX permits in such cases an arrangement between the EEC and the member state involved to "channel" the responsibility one way or another. In any case, there is at least one responsible "entity."

In addition, where the violation consists of a physical act, such as the arrest or detention of a ship or crew, the injured state can, it would seem, always hold responsible the state to which such conduct can be attributed under the general rules of state responsibility, irrespective of the question of whether the conduct was related to some act or omission on the part of EEC institutions for which the EEC could be held responsible. The principle of division of responsibility laid down in article 6, paragraph 1 of Annex IX cannot be applied in such a case to shift responsibility to the EEC, even if the member state could be said to act "on behalf of" the EEC.

Indeed, in this case a right of a third state is infringed by the physical act of a member state and the "obligation" not to infringe rights cannot be "transferred" together with the the "competence" to perform obligations.

In this connection, it is interesting to note that article 28 of the draft articles on state responsibility, up till now adopted in first reading by the ILC, stipulates that "an internationally wrongful act committed by a state in a field of activity in which that state is subject to the power of direction or control of another state entails the international responsibility of that other state," but it adds that this is "without prejudice to the responsibility ... of the state which has committed the internationally wrongful act."

On the other hand, the principle of division of responsibility does imply that a member state cannot be held responsible for the fact that an organ of the EEC, rightly called "institution" in the Treaty of Rome, does not perform its obligations under the Convention in matters relating to which competence has been transferred to it, notwithstanding the fact that such member state through its representation in the Council of the European Communities "influences," to put it mildly, the conduct of the EEC. It would even seem that a special provision such as article 139, paragraph 3 would not be applicable in case of an international organization which is itself a party to the Convention.

The Convention does not make any attempt at defining what responsibility of an international organization, party to the Convention, actually means and what, in the terms used by the ILC, "the forms, contents and degrees" of that responsibility are. If "responsibility is taken as covering all the legal consequences of an internationally wrongful act, i.e., not only the duty to make "reparation," but also the possible right of the injured to apply "reciprocity" and even to take "reprisals," a number of formidable questions are left open in the Convention! Even only as regards reparation in pecuniary terms, there is the problem of what happens if the international organization has no funds available to fulfill this duty. Is there then a subsidiary duty of the member states to pay the sums due to the third state? Would this then be a "joint and several liability"?

If questions of reciprocity and reprisals are also considered, a host of other questions arise, again dealing with the involvement of the member states "behind" the organization.

Furthermore, the international organization party to the Convention may well be injured by an act of a third state which is internationally wrongful under the Convention, and as regards reciprocity and reprisals, again the question arises of a possible "injured state" status of the individual member state. And, incidentally, what, if any, is the impact of the "package deal" concept of the Convention on the notion of "reciprocity"? And what is the impact of the interests of the community of states as a whole, underlying provisions in the Convention on conservation of living resources, protection of the marine environment, and the common heritage of mankind, on the admissibility of reprisals?

The last two questions, of course, are relevant beyond the scope of the present topic. But even within that scope, this

paper cannot begin to try to give answers to questions on which the provisions of the Convention remain completely silent!

Article 7 of Annex IX deals with (part of) the "implementation" of responsibility, namely the settlement of disputes. The principle is clear: since the international organization is party to the Convention, there are legal relationships between the organization and third states, both "primary" and "secondary," i.e., arising out of breaches of the "primary" relationships, and the dispute settlement provisions of the Convention then should apply. A "technical" problem is that disputes between the international organization and a state cannot be brought before the ICJ under the latter's statute. Accordingly, article 7 excludes for the international organization the choice of this means of settlement. Under article 287, paragraph 5, this means that if the organization is a plaintiff against a third state party which has chosen only the ICJ, the dispute can only be submitted to arbitration in accordance with Annex VII. If the organization and the defendant third state have chosen the same procedure, that procedure applies under article 287, paragraph 4.

The next technical problem is the case of a dispute in which the organization and one or more of its member states are joint parties to the dispute or parties in the same interest. Actually, this problem may also arise if any two or more states which have not made the same choice under article 287 are joint parties or parties in the same interest. Presumably, article 287, paragraph 5 will then apply, the three or more parties to the dispute not having accepted the same procedure and this irrespective of whether the joint parties or parties in the same interest are plaintiffs or defendants in the dispute. But here article 7, paragraph 3 of Annex IX derogates from this solution if an international organization and one or more of its member states are joint parties or parties in the same interest. Then the choice of the international organization is discarded in favor of the common choice of the member states involved. This is certainly not in conformity with the principle of division of rights and other provisions of Annex IX. Obviously, some choice between the different procedures accepted by the international organization and the member states involved has to be made in the case of "joint and several liability" as referred to in article 6, paragraph 2 *in fine*, but that choice could very well be the solution envisaged in article 287, paragraph 5, i.e., arbitration, a solution which applies anyway if the member states involved have not accepted the same procedure. Furthermore, the case of article 6, paragraph 2 *in fine* only arises when the organization and its member states are defendants. Anyway, when they are plaintiffs, for the reason that partly transferred competences and partly non-transferred competences are involved in the case, one procedure should also apply, but again, that procedure might well be the one indicated by article 287, paragraph 5. Actually, that procedure applies under article 7, paragraph 3 of Annex IX if all of the member states involved happen to have chosen only the ICJ!

## FINAL REMARKS

All in all, Annex IX is a typical compromise leaving many questions unsolved. This is not surprising since the "dovetailing" of the "objective regimes" of the EEC and of the Convention is a novel problem. The mere existence of "objective regimes" is already responsible for a number of questions of applicability of rules of general international law, based on bilateralism, as between the parties to such objective regimes. The counterpart of the legal relationships between the parties to a regional, objective regime and states which are not parties to the regime is also a complicated affair. One could, therefore, hardly expect that Annex IX of the Law of the Sea Convention would give a full answer to the problems raised by the combination of the two complicated issues!

# POLAR SEAS:
# ISSUES NOT DEALT WITH IN THE LAW OF THE SEA CONVENTION.
# REASONS AND PROBLEMS

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## INTRODUCTION

At the Twelfth LSI Conference, at the Hague in 1978, on the subject of issues neglected at the Third United Nations Law of the Sea Conference (UNCLOS III), the problems of polar regions were included, together with military questions, amongst the issues that were seen as neglected, or insufficiently dealt with, at UNCLOS III. The final text of the Law of the Sea Convention that is being discussed at this LSI conference has a total of 320 articles and eight annexes and fills almost 200 typewritten pages. In that massive document there is one single-paragraph article on ice-covered waters which deals directly with a polar seas problem. As to military questions, there is not much more dealing openly with warships and military uses of the oceans, but we know, i.e., from Ken Booth's paper at this LSI conference, that if military matters were neglected in the public deliberations, they were never ignored in the internal considerations of those parties with an understanding for, or interest in, naval matters. Military interest certainly influenced positions on many questions and did in some respects determine the final outcome of negotiations, particularly on issues involving the freedom of navigation and transit.

It is for obvious reasons that polar issues have been much less important than military questions, which can affect any and all parts of the world seas. Polar sea problems are by definition restricted to the regions where, in the words of article 234, "particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation." These areas are limited in size to some 12 million sq. km in the North and some 18 million in the South, i.e., less than 12 percent of the world oceans (362 million sq. km). Polar seas also are remote from ports and shipping lanes and the uses of them have been rather limited in the past.

## THE STATES INVOLVED

Only a few countries are directly involved in polar affairs. In the North, five countries border the Arctic Ocean and have an immediate interest in the polar seas: the United States with Alaska, Canada, Denmark with Greenland, Norway with Jan Mayen and Svalbard/Spitsbergen, and the Soviet Union which alone encircles almost half the Arctic. In the South, only fourteen states have demonstrated sufficient interest to become actively involved as Consultative Parties under the Antarctic

Treaty. Seven of them have territorial claims in Antarctica: the United Kingdom, New Zealand, France, Australia, Norway, Chile, and Argentina (in chronological order). Seven are non-claimants and do not recognize the claims of others, but have manifested interest through past and present activities: (1) as original signatories to the Treaty: Belgium, Japan, the Republic of South Africa, the Soviet Union, and the US; and (2) as acceding parties: Poland and the Federal Republic of Germany. Another fourteen states have acceded to the Antarctic Treaty without yet having demonstrated, in the words of the Treaty, sufficient "interest in Antarctica by conducting substantial scientific research activity there" to become entitled to participate in the Consultative Meetings, which are held regularly under article IX of the Antarctic Treaty. However, some of these states are expected soon to claim full consultative status. Furthermore, additional states are acceding to the Treaty; the most recent accession was China a few weeks ago, and others are expected to follow suit.

Even if the number of states with a direct polar interest is still small, the list of parties participating in the so-called Antartic Treaty system includes important nations and interest in Antarctic matters is steadily growing. Furthermore, with new technologies more extensive use of the polar seas may be expected and with these new capabilities follow new expectations for advantages and benefits and, of course, fresh desires to secure access to those advantages, or to protect established or claimed rights within polar regions. Thus, in relation to the polar seas we can see the same clash of interests and the same tug-of-war between opposite demands for rights to resources and rights to control maritime operations, or to not be controlled, which have been so characteristic of the whole development of the law of the sea in recent decades.

## SPECIAL FEATURES AND PROBLEMS OF THE POLAR SEAS

The question, then, must be if polar seas are so different in any significant respect from all other seas in the world that they must be treated as special cases calling for special rules and regulations or even for the application of other general principles than those which prevail, by tradition or as a result of deliberations and agreements, such as the Law of the Sea Convention, in the law of the sea. Article 234 of the Law of the Sea Convention certainly recognizes one such difference in natural conditions and hazards for navigation and for that reason determines that in polar seas (covered by ice for most of the year) coastal states have "the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone." But is that sufficient? Or are there perhaps other problems and issues in regard to polar seas that were neglected at UNCLOS III, deliberately or by default, and that may require action now or soon or that, if action is not taken, may lead to serious

problems in the use and utilization of polar seas and, possibly, to international dispute?

One obvious observation is that if conditions in polar seas are so bad that special authority is required to regulate shipping within EEZ's, similar authority should be required also beyond areas under national jurisdiction. The entire central part of the Arctic Ocean, which in a not-too-distant future may become a shipping lane between the North Atlantic and the Pacific, lies beyond 200-mile limits and it may require special measures. The Arctic Ocean may, of course, be seen as an "enclosed or semi-enclosed sea" as defined in article 122 of the Convention, where bordering states "should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention" (article 123). But if their rights and duties are restricted to the EEZ's, can they then exert regulatory powers collectively, as a small group of specially concerned states, beyond their area of jurisdiction? Or should they act in accordance with article 197 on a global or, more appropriately, on a regional basis "directly or through competent international organizations" to establish "international rules, standards and recommended practices and procedures?" And what about the Antarctic seas? These are certainly not enclosed in any way; national jurisdiction has not been generally recognized for any part of the ice-covered areas; and it is not possible to identify any one regional group of states with specific interest in all Antarctic seas.

The question about national jurisdiction in Antarctic waters leads automatically to the difficult question about disputed sovereignty as a basis for jurisdiction over land areas and, by implication, for extended jurisdiction as recognized in international law in zones beyond the coast. This is not a question that is directly dealt with in the Convention, nor can it be easily subsumed under any of its provisions. The Antarctic Treaty, on the other hand, states that neither the Treaty itself, nor any acts and activities while the Treaty is in force, imply (1) any renunciation of existing claims to territorial sovereignty; (2) any weakening of any basis for a claim; or (3) any prejudice to the position of any Contracting Party in regard to recognition or non-recognition of claims. Furthermore, as long as the Treaty is in force, no new claim or enlargement of existing claims can be made (Antarctic Treaty, article IV, paragraphs 1 and 2). This last provision is particularly important in regard to the unclaimed sector between 90 degrees and 150 degrees West longitude. Under the terms of the Antarctic Treaty this sector and its coast is not only unclaimed, but also unclaimable by any of the parties. It is, however, an integral part of the Treaty area where the principles and the provisions of the Antarctic apply and where, under the terms of the Treaty, the Consultative Parties may formulate and adopt measures in furtherance of the principles and the objectives of the Treaty, including measures regarding:

- Use of Antarctica for peaceful purposes only,
- Facilitation of scientific research,
- Facilitation of international scientific cooperation,
- Facilitation of the exercise of the rights of inspection,
- Questions relating to the exercise of jurisdiction, and
- Preservation and conservation of living resources.

It should be noted that this list of article IX of the Antarctic Treaty is not exhaustive. Other matters too may become a subject of consultation and the adoption of measures. One such matter, is, of course, that of regulating the exploration and exploitation of resources within the area covered by the Treaty.

Two further comments should be made at this point about the Antarctic Treaty. One is that the Treaty is an international instrument that has been in force for more than twenty years and that it remains in force. In this connection and in relation to the law of the sea, it must be noted that the Law of the Sea Convention will not enter into force before "12 months after the date of the deposit of the sixtieth instrument of ratification" (article 308). Pending the entry into force of the Convention, which may or may not happen soon, further and necessary measures may be adopted for Antarctica. The second point is that under the terms of the Antarctic Treaty the parties must "exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles and purposes of the present Treaty" (Antarctic Treaty, article X).

The conclusion is, of course, that the Antarctic Treaty is a valid and operating international instrument for cooperation in the Treaty area, which extends north to 60 degrees South latitude and thus includes the southern polar seas. Within this area the consultative arrangements of the Treaty function as an effective rule-making system. So far, the most important measures have been directed towards the protection of the environment and the preservation of living resources. In addition to environmental measures, the parties have adopted "Agreed Measures for the Conservation of Antarctic Fauna and Flora" (1964); a special "Convention for the Conservation of Antarctic Seals" (1972); and a "Convention on the Conservation of Antarctic Marine Living Resources" (1980). At present, the Consultative Parties are actively negotiating a special regime on mineral resources for application if and when minerals, including hydrocarbons, may be systematically explored and commercially exploited. It is the view of experts that resource potentials are grossly overestimated in some of the public statements that can now be heard, but a certain potential for future development will exist. Under the circumstances, a basic regime is required to avoid a disorderly, competitive rush and a juggling for positions which may upset the tenuous political equilibrium in regard to the sovereignty problem, an equilibrium which must be maintained if "Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord" (Preamble,

Antarctic Treaty). For this reason and to prevent damage to the environment that may be caused by irregular, speculative ventures even of a preliminary nature, early agreement on the fundamental principles of a regime is required.

The questions and issues that have been mentioned here are but a few of the special problems that relate to polar seas but they should be sufficient to demonstrate that polar seas are indeed different from other oceans and that these differences can be measured both in terms of natural conditions and hazards and in terms of regulatory measures and politics. On this basis, one might have expected that polar issues would be brought up in the UNCLOS III deliberations and that further provisions might have been included in the Law of the Sea Convention.

We know that some governments and delegations did in fact consider the need and possibility of introducing polar issues for deliberation at UNCLOS III and that Arctic as well as Antarctic questions were involved. The motives for raising such questions were not the same for the North and the South and the parties were not the same parties that considered possible initiatives. The reasons why proposals were opposed or why they were not submitted and pursued also were different for the Arctic and for the Antarctic. These differences were, of course, caused by the very real natural and political differences between the the two polar regions and the different nature of the problems that arise.

## THE ARCTIC OCEAN

Excepting similarities in climate and ice problems, northern and southern polar seas are literally poles apart in all essential respects. The Arctic Ocean is a central polar sea surrounded by continental land masses. These land masses are divided between established and internationally recognized nation states. Territorial disputes did occur as late as the 1920's and 1930's with disagreements on the application of the so-called sector principle and disputes over the degree of effective control required to justify territorial claims in polar regions. Examples are the dispute between Denmark and Norway over Greenland which was settled in favor of Denmark in 1933 by the Permanent Court of International Justice and the Norwegian protests to Canada and the Soviet Union in relation to the sector principle. This principle was first advocated by Canadian politicians and subsequently applied by the Soviet Union in a Decree of 1926, which declared "all lands and islands discovered, as well as those which may be discovered in the future" between the Soviet Union's mainland coast and the North Pole as being part of Soviet territory.

For all practical purposes, Arctic land disputes must now be considered as settled. Consequently, there can be no doubt as to the sovereign rights as defined in international law in zones beyond northern coasts or as to the rights of the respective Arctic states to exercise national jurisdiction in

accordance with international law in their maritime zones. The actual and potential disputes that do remain concern the exact delimitation between the national zones of adjacent states, as in the case between Norway and the Soviet Union in the Barents Sea. Here, the difference between these negotiations and similar negotiations elsewhere is that the Soviet Union insists on a dividing line that will follow the sector line due north, while Norway maintains the principle of equidistance or median line and has declared its willingness to reach a compromise. Other real or potential disputes concern possible attempts in Arctic waters to extend national control beyond normal limits, be it in a geographical or in a material sense. Here, a re-interpretation and extension of the sector principle may be attempted or references to exceptional conditions in Arctic waters may be used to justify excessive claims for extended zones or for expanded powers within the zones.

Soviet legal theory is rich in arguments for special rights and powers in polar seas. Thus, while the official sector Decree from 1926 lays claim to all lands and islands northward to the pole point, several writers claim that the very nature of Arctic waters is such that it requires and justifies the exercise of full territorial rights in the whole sector: islands, ice, water and all. Other claims are that the circum-polar rim seas between the northern islands and the mainland are historically internal waters. In this connection the Soviet Statute on the Protection of State Boundaries of August 5, 1960, is significant by stating that bays, seas and straits which belong historically to the Soviet Union are Soviet internal waters. If such claims are pressed in the Arctic, Soviet baselines and, consequently, Soviet 200-mile zones, will extend far beyond normal limits.

On the whole, Soviet policy must be considered as ambiguous. Apparently, this was a contributing reason why western shipping companies did not accept a Soviet offer in 1967, when the Suez Canal was closed, to use the Northeast Passage for sailings between the North Atlantic and the Pacific. Such use was conditional on payment of dues and observance of regulations and this might possibly be construed to imply acceptance of the Passage as an internal, national route. However, actual non-use of the passage when it was in fact offered may be seen later as proof that the Northeast Passage cannot be regarded as an international strait.

Canada too has followed an expansive policy in northern waters. Thus, in 1970 the Arctic Waters Pollution Prevention Act was adopted to introduce strict standards and controls for shipping within 100 miles of Arctic baselines. This unilateral extension of national jurisdiction was justified as a necessary measure in lieu of effective international agreement. At the time, the United States -- as the primary potential user of those waters -- protested strongly against the measure as an illegitimate interference with the freedom of navigation. The Act can now, of course, be justified under the Law of the Sea Convention's provision on ice-covered waters as long as the regulations are non-discriminatory.

An extra complication in the North is the strategic importance of the Arctic Ocean and of the polar rim seas. Together they form an Arctic Mediterranean between the North American and the Euro-Asian land masses and they constitute a crossroads between the continents and between the Atlantic and the Pacific. With the superpowers on each side, the Arctic is important as a buffer, as well as as a passageway for airplanes, rockets and nuclear submarines. Therefore, security interests are particularly important and they will necessarily influence policies as well as positions on questions of legal principles and their application. Thus, while clarification and more precise definition of legal principles may be desirable in relation to the north polar seas, national interests and policies -- which still are in a developing phase -- will make active negotiations difficult and time-consuming.

Apparently, this was one reason why the states most directly concerned -- the Arctic states themselves -- did not want to introduce polar sea problems with all their complexities into the UNCLOS III negotiations. Such a move would make these most difficult negotiations even more complex and could endanger the ultimate outcome. The net effect is, of course, that many and difficult problems remain unresolved even if the Law of the Sea Convention enters into force and is approved by all Arctic states. However, one very significant question must be regarded as being settled by that one short article in the Convention on ice-covered waters.

In providing for a special right of coastal states to adopt and to enforce special non-discriminatory measures to prevent pollution from vessels in hazardous ice-covered waters within their EEZ's, the Convention does in effect exclude other and more extensive measures to control navigation within the economic zone, as well as measures beyond the 200-mile limit. Thus, further measures must obviously come as a result of international negotiations and agreement between the parties concerned, either on the basis of the Arctic being a semi-enclosed sea (article 123 of the Convention) or on a general global or regional base, directly or through competent international organizations (article 197 of the Convention).

## THE ANTARCTIC

Turning once again to the problems of the south polar seas, we find a different situation altogether. Here, the central polar area is made up of the Antarctic continent and the south polar seas lie in the middle of nowhere -- a wide cold-water zone between the continent and the world oceans. The remoteness and isolation of the Antarctic, including the seas, is demonstrated by the fact that a 200-mile zone around Antarctica does not even touch the 200-mile EEZ of any state on any other continent. The only "continental connection" between Antarctica and other continents follows the long loop of the submerged ridge from the Antarctic Peninsula over the South Orkneys and South Sandwich Islands, South Georgia, Shag Rocks and the

Falkland Islands/Malvinas to Tierra del Fuego at the tip of South America.

Two fundamental issues dominate the legal and political problems in the south. One stems from the disputed status of the territorial claims on the Antarctic continent and involves the argument that Antarctica must be regarded as part of the common heritage of mankind and must thus be controlled and managed by a universal international organization and, presumably, must be developed for the special advantage of the poor countries. If the continent is part of the common heritage, so must obviously be the surrounding shelf and the waters, which could then be administered by the International Sea-bed Authority as part of the Area beyond national jurisdiction, as defined in article 1, paragraph 1 and article 137 of the Law of the Sea Convention. Suggestions to this effect did turn up at UNCLOS III -- and in other fora -- but met with strong opposition from the Antarctic Treaty parties. Significantly, this opposition came from claimant and non-claimants states alike: no matter what their position on the question of territorial claims, they could not accept extension of the Sea-bed Authority to include control over Antarctica. Their opposition, however, could not prevent Antarctica from remaining an international issue. The non-inclusion of southern polar seas questions in the Convention must be seen as the main reason why Malaysia brought up the question of Antarctica at the UN General Assembly in 1982, after the conclusion of the law of the sea negotiations. The Malaysian initiative addressed itself directly to the question of uninhabited lands, "the largest of which is the continent of Antarctica" and which, it was suggested, "belong to the international community." It goes without saying that if Antarctica and other uninhabited lands were to be established as international areas, so would their offshore regions.

However, the parties to the Antarctic Treaty do maintain and will continue to maintain that the Antarctic Treaty remains the proper and authoritative international legal base and that the Antarctic Treaty system with its consultative procedure remains the correct and best-suited instrument for the continued handling of Antarctic affairs, including matters relating to the south polar seas, definitely within the 200-mile limit and, possibly, up to the 60 degree limit of the Antarctic Treaty area.

Thus, a second issue arises: the relationship and the accommodation between the Antarctic Treaty system, on the one hand, and the wider international community and the Sea-bed Authority, on the other. If a model of "collective domain" under the Antarctic Treaty is developed -- including a circumpolar economic zone -- the legal question as such would seem to be a simple one as a parallel to the "normal" EEZ's. More difficult but no less necessary may be political accomodation and the acceptance by all concerned of the Antarctic Treaty system as a "regulatory agency" for the Antarctic area and the manager of Antarctic resource development

if and when such development becomes technically feasible and commercially attractive.

In this connection, it should be remembered that the Antarctic Treaty is an open system, with a right to accede and participate on equal terms for any and all nations. As already noted, "membership" is increasing and includes states from all continents, of all sizes, and at varying stages of development. All of them, it seems, agree that the achievements of the Treaty and its system are worth preserving and lay the best base for continued international cooperation towards the peaceful use of Antarctica. However, one feature of exclusivity is typical of the Treaty system: only those acceding parties who demonstrate their interest in Antarctica "by conducting substantial scientific research activity there" are entitled to participate in the consultative meetings and, hence, in the "governing process." By recent decision, non-active parties may participate in these consultative meetings as observers. This clearly is less than full membership, but in a system that operates on the basis of the principle of consensus and unanimity, this may be less important than under a majority rule system.

Defenders of the present system will claim that polar problems are special and require knowledge, experience and understanding that can only be acquired through active participation in the field. That, obviously, is part of the special challenge of polar problems and the ultimate reason why it remains necessary to treat polar seas issues as something different from the blue waters of the world.

# WHO WILL RATIFY THE CONVENTION?

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So far only six countries out of 168 states participating in the Third UN Conference on the Law of the Sea have ratified the Convention and at this point it is nearly impossible to answer the question: Who will ratify the Convention? Therefore, the most reliable approach might be to take a look into a crystal ball and in preparing this paper I was almost tempted to get a piece of Steuben glass at Fifth Avenue, New York -- incidentally, the material preferred by the White House for royal wedding gifts.

Unfortunately, the decision taken in Washington not to sign the Convention is only one aspect of the question before us. Not having a crystal ball, I suggest we rely on the ancient Socratic method of asking more and more questions in cases where an answer is not yet available:

One: 123 states have signed the Convention. Will these states also ratify the Convention?

Two: 45 states have not signed the Convention. Will these states sign and ratify or accede to the Convention?

Three: the President of the United States announced on June 9, 1982, that the US will not sign the Convention. How final is this decision?

Four: the British government has decided to sign if the deep sea-bed regime will be improved. France and Japan have signed the Convention but have expressed concern about the deep sea-bed mining regime. Is there a chance to meet the requests of these countries?

Five: the government of the Federal Republic of Germany has postponed the decision without giving a date for reconsideration. Will the Federal Republic of Germany sign and ratify or accede to the Convention?

Six: will the European Community sign and accede to the Convention?

Seven: will the Soviet Union ratify the Convention?

Eight: is there an alternative to the Law of the Sea Convention?

Nine: what are the chances that the Law of the Sea Convention will enter into force?

Finally, ten: what remains to be done to make the Law of the Sea Convention generally acceptable?

Now I would like to try to answer my ten little questions.

The first question. Signature by a state is an indication of support, but it does not lead to an obligation to ratify the Convention. As a general rule, about 60 percent of the states signing a multilateral treaty will ratify it. However, in the case of the Law of the Sea Convention this rule can not be applied unconditionally. Before deciding whether or not to

ratify the Convention, states will take into account the work of the Preparatory Commission, in particular with respect to the costs involved in establishing the International Sea-bed Authority and the International Tribunal for the Law of the Sea. Having heard two days ago the extremely competent statement by Mr. Mati Pal on planning for the Sea-bed Authority, I am very confident that the UN Secretariat will make a very important contribution to the successful work of the Preparatory Commission. If the states participating in the Commission will refrain from philosophical discussion and wishful thinking and will work in a constructive and practical manner, the Preparatory Commission will produce generally acceptable results, at least for the participating states. If this is the case, I see no reason why at least 60 percent of the states that have signed the Convention will not also ratify it later on.

The second question. Will the 45 states that have so far not signed the Convention sign and ratify or accede to the Convention? From among these 45 states only a few have openly stated they will not sign. These are the United States, Argentina, and Turkey. Quite a club. Therefore, one can assume that the remaining 42 states are considering signing the Convention and perhaps, later, ratifying it.

My third question concerns the decision of the President of the United States. How final is this decision? To answer this question, I would like to start with a general remark. A big power is always good for the price, as we have experienced in the Law of the Sea Conference. I would not exclude the possibility that President Reagan may change his mind. Perhaps he has not been told yet that his ocean policy has contributed to the successful conclusion of the Third UN Conference on the Law of the Sea. I want to recall the following two events.

When the Reagan Administration announced in 1981 a holiday period of about one year to reconsider the results of the Conference so far, the father of that idea did not anticipate the positive effects of this decision. It is my view and the view of many of my colleagues that this decision helped in making possible a successful conclusion of the Conference. In my recollection a, if not the most, decisive day in that long Conference was August 28, 1981, when its President, Tommy Koh, got his five-stage program of work for the eleventh and final session of the Conference adopted. I remember very well that the Head of the US delegation, Mr. Malone, tried to propose a flexible program of work and not to agree to a final one. Tommy Koh snapped at him asking whether the United States had decided to come back to the negotiations and if President Reagan knew that. As Malone could not answer, Koh then concluded that a consensus had been reached on a final program of work.

Another major constructive contribution towards the Law of the Sea Conference is in my view the request by the United States for a recorded vote on the Draft Convention and the related Draft Resolution on April 30, 1983. This initiative put an end to the desire of a number of delegations to have a consensus convention, which would have been contrary to the

rules of procedure of the Conference and contrary to the traditional decision-making process of law-codifying and law-making conferences. In my view a Convention adopted by a vote is more viable because it is clear who voted yes and who voted no. The very high number of votes, 130, for the Convention and the high number of signatures of the Convention so far, is, of course, a demonstration against the US policy, but at the same time it will assure that this Convention will come into force, at least in my view.

So all who have worked for the progressive development of the Law of the Sea and its codification should pay tribute to the Reagan Administration for its policy, and perhaps that is one way to change the mind of that Administration. I can think of several additional possibilities to reverse the decision of the Reagan Administration. First, if the Soviet Union really wants the Convention, it should have a word with the White House and should take initiatives for consultations among the most powerful states of this world, the so-called Group of Five. Secondly, the states participating in the Preparatory Commission should take Mr. Leigh Ratiner's advice not to care about the present US policy. Instead, they should go ahead without the United States. I can not imagine the United States remaining outside the Preparatory Commission if that Commission undertakes serious work and this work gets done without the US. Third, the United States and scholars who know the advantages of conventional international law over customary international law should start a dialogue on the criteria of customary international law and on the principles established for the identification of customary international law in the Law of the Sea Convention. As we know from its decisions, the International Court of Justice, so far the only organ of the UN system on dispute settlement, is very conservative to declare new trends in international law. I advise, for example, the present Reagan Administration to read the judgments of the Court in the North Sea Continental Shelf Cases; in the case on the fisheries dispute between Germany, Iceland and the United Kingdom; and in the case on the dispute between Libya and Tunisia, and especially the dissenting opinion of Mr. Evensen, who served as a judge ad hoc. In doing this the Administration will perhaps comprehend the criteria established for customary international law, and it will also understand that these criteria cannot easily be manipulated. Fourth, the states with which the US wishes to conclude bilateral agreements concerning rights in their respective waters should refer to the provisions of the Law of the Sea Convention when undertaking those negotiations. And if the United States wishes to depart from the Convention, the states concerned should ask for a high price.

Having listened to Mr. Breaux's statement three days ago and having spoken to some of the architects of the present US ocean policy, I was reminded of a statement made by a British diplomat in the UN Sea-bed Committee. Being very disgusted over proposals presented by developing countries that did not take

the interests of other states into account, he exclaimed: "We have got to re-invent the wheel!" In my view time has come for the wheel to be re-invented by the most developed states.

The fourth question. The British government has decided to sign the Convention if the deep sea-bed regime will be improved. France and Japan have signed, but expressed concerns about the deep sea-bed regime. Is there a chance to meet their requests? The answer is simple: yes. The PIP Resolution and the Preparatory Commission provide such opportunities, but will the states participating in the Commission accept changes in favor of the United Kingdom, France, and Japan? The answer is: why not? The states opposed to a regime more acceptable to these countries should consider that industry interested in deep sea-bed mining might lose interest in mining the sea-bed underlying the high seas proper. Miners of the 200-mile zones and the continental shelf beyond 200 miles are the real competitors for the sea-bed mining regime of the Convention and not the participants in the mini-treaty.

Now my fifth question on the Federal Republic of Germany having postponed its decision without naming a date for reconsideration. The decision on signature was postponed by the government for several reasons. First, there was only recently quite a dramatic change of government and at the moment the new government has to deal with more urgent problems than the law of the sea. These are unemployment, economic and budgetary problems, and perhaps above all the problems related to the deployment of medium-range missiles in Europe. Secondly, the Minister for Economics is not satisfied with the deep sea-bed regime. He is not new to the Cabinet, having been a member of the Schmidt-Genscher Cabinet, and he holds the view that alternative ways to the Convention's deep sea-bed mining regime must be explored. Thirdly, the new Chancellor, Helmut Kohl, heads a coalition of three parties. In order to manage the difficulties of such a complicated house, it is not likely that he will overrule a member of his Cabinet if it can be avoided. Consequently, the Federal Republic of Germany will in all probability sign the Convention only if the Minister of Economics has been convinced.

The sixth question. Will the European Community sign? The ten member states of the European Community and the Community itself have fought hard for a set of provisions in the Law of the Sea Convention to allow participation by international organizations. The so-called EEC clause contained in Annex IX provides that an organization may sign the Convention if a majority of its members are signatories of the Convention. At present, the European Community has ten members and, consequently, six signatures are required. So far, only five EEC member states have signed the Convention: Denmark, France, Greece, Ireland, and the Netherlands. Who will be the sixth state to sign? Belgium, Luxembourg, the Federal Republic of Germany, Italy, or the United Kingdom? Except for Luxembourg, all are interested in deep sea-bed mining, and they are not satisfied with the deep sea-bed mining regime. Consequently,

Belgium, the Federal Republic of Germany, Italy, and the United Kingdom are sitting more or less in the same boat and they have adopted a wait-and-see position on the law of the sea issue. Now the question arises as to why Luxembourg has not signed. Attempts were made to persuade Luxembourg to sign the Convention as the sixth member state of the European Community. What has conspired in Brussels concerning the signature of Luxumbourg is that Luxembourg is the only land-locked state of the Community and at the same time its smallest member, and it did not want to take the responsibility of setting in motion the complicated decision-making process required for EEC participation in the Convention.

The seventh question. Will the Soviet Union ratify the Convention? I am not an expert on the Soviet Union. I can only recall that the Soviet Union was very reluctant to agree to the Third United Nations Conference on the Law of the Sea. If I remember well, the Soviet Union had only two major interests in the negotiations: the twelve-mile territorial sea and the new regime for international straits. In my limited knowledge of the Soviet Union and its maritime interests, I can assume that this big power could do without the Convention if the twelve-mile territorial sea as well as the transit passage regime were customary international law.

The eighth question. Is there an alternative to the Law of the Sea Convention? The alternatives suggested by the United States, customary international law as identified by the US and mini-treaties on deep sea-bed mining, are no alternatives in my view, and I guess they are no alternatives for the majority of states. One might think of a Fourth Conference on the Law of the Sea in due time, but I would like to ask the question of what to discuss and what to negotiate there. It is all in the Convention and in the Resolutions within the competences of the Preparatory Commission.

The ninth question on the chances of the Law of the Sea Convention entering into force? To answer this question, one has to identify the major incentives to ratify the Convention by the required number of states. According to article 308 of the Convention, sixty instruments of ratification or accession are needed. So the Convention will enter into force if sixty states have decided that it satisfies their interests and is a better choice than the alternatives just mentioned. In my view the following categories of states are satisfied with the Convention. First, the majority of developing states. Second, the coastal states with long shorelines and broad continental shelves. Third, states having interests in deep sea-bed mining and which favor the deep sea-bed mining regime of the Convention such as India, China and Canada. Fourth, the archipelagic states. Fifth, the straits states to which the exceptions of the straits regime apply, such as Denmark, Sweden, Finland and Italy. Sixth, there is the category of states benefiting from special regulations: for example, Sri Lanka with regard to the delimitation of its continental shelf, Bangladesh with respect to the drawing of special baselines, and Canada and India with

provisions in the text concerning marine pollution in special areas. There might be other states to be identified which benefit from special regulations in the Convention. In my view the following categories of states cannot afford to rely on the alternatives available, i.e., mini-treaties and customary international law as identified by the US. First, states with interest in deep sea-bed mining other than the United States and the Soviet Union. Secondly, broad margin states who wish to benefit from the definition of the continental shelf of the Convention. Land-locked and geographically disadvantaged states also cannot rely on the development of international customary law in law of the sea matters.

In conclusion, it is my view that only big powers and some odd states having no interest in the use of the sea can afford to stay away from the Convention. I hope that there is not a third category besides big states and odd states, namely states upon which a big power asserts pressure to rely on customary international law and mini-treaties. I hope this consideration is empty speculation.

The tenth question. What remains to be done to make the Law of the the Sea Convention generally acceptable, resulting in at least sixty ratifications? The major responsibility is with the Preparatory Commission. International organizations having competences in the uses of the sea, such as the European Community and the specialized agencies of the United Nations, can contribute by stressing the need for conventional law and by making clear that their work in maritime affairs depends upon the entering into force of the Law of the Sea Convention. Extremely helpful indeed would be what could be called the Sputnik effect, by which I mean that at least one state or one industrial consortium would prove that it can mine the deep sea-bed under the Convention and the Resolutions on the Preparatory Commission and Pioneer Investment Protection and under arrangements with the Preparatory Commission.

# CUSTOMARY INTERNATIONAL LAW IN THE ABSENCE OF WIDESPREAD RATIFICATION OF THE U.N. CONVENTION ON THE LAW OF THE SEA

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Are we better off with or without a widely ratified comprehensive treaty on the law of the sea?

That is a policy issue now facing most governments. Resolution of that issue depends on three related questions:

- What do we want from the international law of the sea?
- What is the situation likely to be in the absence of a widely ratified treaty on the law of the sea?
- What are the comparative benefits and costs of accepting or rejecting a treaty in light of our answers to the two previous questions?

## PRIORITIES

Anyone who has ever attempted to answer these questions has learned to approach them with caution, if not humility. The activities affected by the law of the sea, to name but a few: defense, fishing, mining, shipping, travel, communications, scientific research, recreation, and mere repose -- all compete for priority of attention. With respect to any one of these activities in any one country, interests may be contradictory. Experience and specialized expertise are required to sort out these interests in each case. Generalists are then required to sift this information and advise the politicians who must decide on priorities. They make these decisions in response to the competing demands for attention at home and in light of the interests and preferences of foreign governments.

## LAW, RESTRAINT AND FREEDOM OF ACTION

It is the unhappy lot of law and lawyers to set limits on what any one actor can do in pursuit of a particular goal. Any serious student of individual freedom understands that freedom itself must be restrained if only to avoid conflict with the freedom of others. This point is reflected in the fundamental principle of high seas law: the freedoms of the high seas must be exercised with due regard to the interests of others in exercising the freedoms of the high seas.

In this connection, one might recall, if only simplistically, a basic tenet of Hohfeldian analysis: every right has a corresponding duty. To say that a state has freedom to navigate close to the shores of another state is to say that the law does not permit interference with that freedom by the

coastal state. Similarly, to say that a coastal state has the right to regulate fishing off its coast is to say that the law does not permit fishing by any other state or its nationals in contravention of coastal state regulations.

Thus, while governments that invoke international law frequently speak in terms of their own rights and freedoms, what they mean is that the freedom of action of foreign states is limited by the law and that exceeding those limits may justifiably entail an unpleasant or even violent response.

Seen from this perspective, which is by no means the only perspective, what we want from the international law of the sea are restraints on the freedom of action of others.

We must bear in mind that direct application of military force by a foreign government is not the only, or even the principal, kind of freedom of action we wish to restrain. We wish to limit a whole range of private and commercial activities by foreigners that we perceive to be adverse to our interests and we want to accomplish this without placing ourselves in a posture where we must pay for those limitations in each case through a forcible response or a concession of value. Moreover, in at least some cases, such as property interests in movables, it is the judicial as much as the political organs of a foreign state that we wish to influence.

Optimally, what we seek to induce is self-restraint.

Let me attempt a brief, and necessarily simplistic, elaboration of this point. Let us assume that there is an international air route that some governments believe is freely open to use by all, but that the government of a state along the route believes is subject to its sovereign control. How many people in this room would board an airliner that proposed to fly that route without the consent of the objecting government? If the use of a different route were merely inconvenient and a bit more costly, but not impossible, how many people in this room would support an armed confrontation over the issue? Economic retaliation might not be effective and could be costly. On the one hand, the economists tell us that the industrial countries have great bilateral leverage. But when it comes to using economic leverage in a particular case, the economists tell us that political disruption of international trade is harmful to all. The point is that the key objective is to influence what other people think are their duties to you. A persistent error made in the analysis of the law of the sea is the assumption that the use of force or other retaliatory measures are readily available tools for dealing with the day-to-day problems of this sort. That error is compounded by the facile assumption that bilateral negotiation will resolve the matter; it will if the objecting state receives a concession of value, be it political, economic or military. At that point, the proclaimed "right" to use the airlane has been converted into an opportunity to bargain for its use, and nothing more.

In many discussions of international law, and indeed municipal law, legal restraint and fear of a forcible response are equated. This is at best an unduly simplistic application

of Thomas Hobbes. The world in which we operate most of the time is one in which most governments, at least for the time being, do not wish to resort to violence to resolve their differences with each other. They also do not wish to negotiate all of their rights and duties toward each other all of the time, a task that would render all negotiation meaningless and all planning impossible.

A government bends to the restraints imposed by law for at least three basic reasons:

- To avoid signalling aggressiveness in its behavior toward another government;
- To preserve its option to insist on such restraint by others without resort to force or new negotiation or concessions; this reciprocity of restraint is not limited to related issues, but affects the credibility of a state in insisting on law-abiding behavior in general; and
- To avoid the risk that widespread interest in ensuring respect for a rule of restraint will increase support for some retaliatory response to a breach, put simply, to avoid framing a dispute with an adversary in terms that are likely to promote support for the adversary.

THE CALCULUS

A complete analysis of the costs and benefits of accepting or rejecting a treaty requires, with respect to each activity affected by that treaty, a decision as to what kinds of actions we wish to restrain and the efficacy of the alternatives for achieving such restraint. Once this exercise is completed, we cannot simply add up our total differentials. It is at this point that we must assign different weights to the different restraints that we seek, since a lesser difference in comparative restraint between a treaty and no treaty on an issue of great importance might outweigh a relatively greater difference on an issue that is less important to us.

A significant error can be made in failing to distinguish between the importance of an activity and the importance of achieving a particular legal restraint on foreign actions detrimental to that activity. The latter is the relevant question. Normally, we need not trouble ourselves with restraining behavior that is either implausible or inevitable.

We must also recall that the difference between a treaty and no treaty may not be limited to the degree of restraint. The nature of the restraint itself may be different.

We must not assume that there are only two alternatives available, a treaty law restraint or a customary law restraint. There is a third alternative: no law. In other words, in the spirit of the Lotus case, there would be no legal restraint on the particular behavior in question.

By this I do not mean that governments would actually say there is no law on the subject, nor do I mean that the International Court of Justice, if called upon to resolve a

dispute, would necessarily reach that conclusion. What I mean is that competing inconsistent views of the law would be maintained by significant groups of states and, therefore, none would be successful in inducing the other to behave in accordance with desired restraints on legal grounds.

It is against this background that we need to address the question of what, if anything, are the rules of the customary international law of the sea. In each case, the answer depends on why we are asking the question. What do we want?

## LAW AND LABELS

I will assume we all agree that we want more than labels without much content. Thus, since it was not called upon to do so, the International Court of Justice did, for example, not add very much with its recent dictum to the effect that the economic zone may now be regarded as part of customary international law. A cursory examination of national claims reveals zones containing little more than resource control, with exceptions for tuna, to zones that are barely distinguishable from territorial seas.

## CONVENTIONAL VERSUS CUSTOMARY LAW

For ease of analysis, we can tackle the problem by asking: is the U.N. Convention on the Law of the Sea declaratory of customary international law? If so, why do we need it? If not, is either customary law or no law better?

## WHAT IF THE RULES ARE THE SAME?

There is widespread agreement that many, perhaps most, of the rules set forth in the new Convention are the same as the rules of customary international law in force today. Nevertheless, we must recognize that even if the rules of the Convention and customary law are the same, there are at least four significant differences:

1. How stable is the rule? The Convention contains difficult procedures for amendment and disincentives to denunciation. Since they rest on the custom and practice of states, individual rules of customary law can be changed or eroded more easily by individual action of states.
2. How do we decide whether there has been a violation? In many, although not all, instances a state alleging violation of the Convention can require that the dispute be arbitrated or adjudicated. Outside the Convention, third-party settlement of disputes is rare and frequently depends on specific agreement after the dispute arises.
3. How risky are ad hoc pragmatic adaptations of and variations from the rule? While customary law is often glibly praised as a source of flexibility, the reverse is often true. Since bilateral arrangements are themselves

cited as evidence of state practice, governments are frequently unwilling to make pragmatic accomodations in particular instances for fear of eroding a general principle. The Convention contemplates a role for specific agreements in derogation of its provisions and limits their scope. A system of third-party dispute settlement also permits gradual adaptation without endangering the entire system. A Convention is therefore less susceptible to erosion and stress in the course of practical accomodation.

4. Who influences the interpretation of the rule? Parties to the Convention will have more influence over its interpretation than non-parties. This relates in part to the general rule of treaty law that great, if not decisive, weight is to be given to the interpretations of the parties. It also relates to the fact that the parties will choose the judges and arbitrators, frame the issues and appear before the tribunals that produce highly respected interpretations. Needless to say, if one takes the position that the rule has moved into customary law but not the interpretation, then one is no longer saying that the Conventional and customary rules are in fact the same.

These differences can have a great impact on self-restraint by a government. It will be recalled, for example, that in its Arctic waters pollution claim, which had a direct effect on navigation rights, the Canadian government stressed its view that it was promoting a desirable change in customary law and simultaneously filed a reservation to its acceptance of the jurisdiction of the International Court of Justice. I submit that if that unilateral claim were contrary to a treaty containing compulsory and binding dispute settlement procedures, it is less likely that Canada would have acted unilaterally. I should add, however, that I think Canada's diplomatic success in negotiating on the issue would have been as great, if not greater, without such unilateral action had there been such a treaty.

WHAT IF THE RULES ARE NOT THE SAME?

There is also widespread agreement that some of the rules set forth in the new Convention are not today binding on non-parties under customary international law. In this case, there is a critical difference between asserting that there is a different or more substantial restraint under customary law and simply asserting that there is no restraint under customary law.

The latter is easier, since one is not attempting to elevate other sources of law above the results of a ten-year global negotiation. One is merely propounding a negative: those results have not themselves become binding on non-parties.

On the other hand, there is a fundamental difficulty in attempting to prove the continuing vitality of rules of law that are directly at variance with those in the Convention. That difficulty relates only partly to state practice. The more serious challenge relates to the second, frequently overlooked,

requirement for finding a rule of customary law: that of an opinio juris. What is required is a sense of legal obligation. That, in turn, depends on perceptions of legitimacy.

It is exceedingly difficult to point to an internationally accepted source of legitimacy regarding the rules of the law of the sea superior to that of the new Law of the Sea Convention, at least for the time being. Invocation of historic principles rejected or modified at the recent Conference may have the opposite effect on precisely those states where self-restraint is most at issue.

In this connection, lawyers can err in merely equating the impact on customary law of the new Convention with that of the 1958 Conventions on the Law of the Sea. Although very influential, the 1958 Conventions were prepared before decolonization was complete and in much more limited technical fora and contexts. The Third U.N. Conference on the Law of the Sea and its preparations engaged most countries at high levels for over a decade. It, therefore, has affected their expectations more profoundly.

## A GENERAL CONCLUSION

The foregoing analysis leads to a potentially important general conclusion: in the post-Convention world, whether or not a purported rule of customary law is the same as the rule in the Convention, its restraining impact will often be weaker than, or weakened by, the Conventional rule. Only rarely, if ever, will it be stronger.

## UNDIVIDED COMMON INTERESTS

One of the shortcomings of traditional analysis of international law is that it tends to focus on the relationship between identifiable states. It does not take account of the desire to impose restraints on all states, in order to advance a common interest in situations where there is not necessarily an identifiable adversely affected party. Some conservation and environmental protection questions raise problems of this sort. So do questions of sharing benefits or, more broadly, wealth distribution and human rights.

Customary international law is a weak instrument for developing duties where there is arguably no precise state that is the object of the duty, that has a severable and identifiable corresponding right. First of all, states are less prone to raise such issues bilaterally. Second, even if they do, they face legal problems of the sort encountered in the dismissal of the first Southwest Africa Case and that probably would have arisen in a different form in the Nuclear Test Cases had the Court proceeded to the merits.

Customary law mediates between autonomous actors. It often invokes, but rarely builds, a sense of community. If anything, it more often presumes a beggar-thy-neighbor attitude. Even if a state were prepared in principle to accept a

particular obligation in the general community interest, it will be reluctant to do so without the assurance that other similarily situated states will also do so. This normally requires something more than custom and practice, it requires some kind of agreement.

Customary law is a particularly weak instrument with respect to imposing environmental and financial obligations and wealth transfer, which, I think, in part explains the facile preferences for customary law by some conservatives.

Thus, one reaches a further general conclusion: the restraining impact of rules designed to protect or advance an undivided and indivisible interest in a common value will be weak in the absence of a widely ratified Convention.

## WHEN IS THE CONVENTION DECLARATORY OF CUSTOMARY LAW

Against this background, let me return to the basic questions and offer some more specific responses.

Question: Is the Convention declaratory of customary international law? Answer: Yes, maybe, and no. We must analyze it rule by rule. And in each case, it depends. On what does it depend?

Some would say it depends on state practice. That is a half-truth. State practice can certainly demonstrate the absence of a consensus on a rule stated in the Convention. But it would be difficult to find sufficient uniform state practice and opinio juris today to demonstrate convincingly that there is some other generally accepted positive restraint of customary law substantially more restrictive than, or inconsistent with, the Conventional rule of restraint.

Some would say it depends on the nature of the rule. Citing the North Sea Continental Shelf Cases, they would say that general principles are capable of absorption into customary law and technical details generally not.

## THE EXCLUSIVE ECONOMIC ZONE

What then, for example, do we make of the exclusive economic zone? Article 55 of the Convention states that the essence of the economic zone is precisely the functional allocation of rights and freedoms set forth in the Convention. Once we get beyond resources, article 56, the basic list of coastal state powers, is essentially a table of contents that cross-references highly detailed provisions. Similarly, article 58, the basic provision on the freedoms of all states in the economic zone, is in substance a cross-reference to virtually all the non-resource rules of high seas law.

## FISHERIES

Even the principle of coastal state sovereign rights over living resources of the exclusive economic zone offers an example of the problem. Under the Convention, the rights of the

coastal state, while very extensive, are not completely unfettered. They are qualified by overall duties to ensure conservation; to protect the overall ecological balance; to promote optimum utilization; by special rules regarding anadromous species, catadromous species, highly migratory species, marine mammals, and stocks that traverse the limits of a particular state's economic zone; and by the interests of land-locked and geographically disadvantaged states. Any participant in the negotiation of these articles knows that these limitations were necessary to secure a consensus on the underlying principle of sovereign rights.

Clearly, there were many states in the negotiation that would have preferred, and still prefer, unfettered coastal state control over fisheries to 200 miles and perhaps beyond. Any reasonably trained international lawyer can manipulate the twin pillars of state practice and general principle to produce a plausible argument that customary law confirms coastal state sovereign rights, but that the specific coastal state duties set forth in the Convention are merely contractual in nature, binding only the parties.

The key point is that the invocation of the Convention as a source of law in that case is a sham: the argument is in fact an attempt to propound a rule of law different from that in the Convention, but is masked by selective quotation of quids without the corresponding quos.

## VESSEL-SOURCE POLLUTION

The most dramatic and probably most important illustration of this problem is found in the treatment of coastal state control of pollution from ships in the economic zone.

The underlying problem was that of reconciling navigational rights and freedoms with potential interference by the coastal state on environmental grounds. In this case the apparent general principle in article 56 of the Convention, that the coastal state has jurisdiction to control pollution in the economic zone, is not only essentially a cross-reference to other detailed provisions; in the case of ships it is in fact quite misleading.

The detailed pollution provisions make clear that, outside ice-covered areas, unilateral coastal state legislative competence is limited to intentional dumping of wastes, that there is neither legislative nor independent enforcement competence over navigation or construction violations, and that enforcement competence with respect to discharges of pollutants in violation of international standards is restricted by a large number of detailed procedural safeguards and compulsory third-party settlement of disputes when it is alleged that such enforcement infringes navigational rights.

Is there any expert in constitutional law or individual rights who is prepared to argue that the delegation of jurisdiction and the establishment of procedural safeguards on the exercise of that jurisdiction are unrelated? Is this merely

a peculiarly American perception based on the fact that adoption of our Bill of Rights was necessary to gain acceptance of a more powerful central government?

Yet the pundits of customary law simply copy the list of coastal state powers in article 56 without more. Indeed, even the recent US Declaration on the economic zone can be misread as doing the same, to the apparent delight of some observers. Once again, if one is arguing that the coastal state has comprehensive jurisdiction over navigation for environmental purposes in the economic zone, any reliance on the Convention is mere window dressing: the Conventional rules are in fact quite different.

## INSTALLATIONS AND STRUCTURES

A similar example exists with respect to objects on the sea-bed. Once again, the supposed principle in article 56 is in fact a cross-reference to the finely honed provisions of article 60. If one reads article 60 carefully, one discovers that it is most, but not quite all, installations and structures in the economic zones and on the continental shelf that are subject to coastal state jurisdiction. This jurisdiction embraces:

- All artificial islands;
- Installations and structures used for resources or other economic purposes;
- Installations and structures subject to coastal state rights over scientific research; and
- Installations and structures that may interfere with the exercise of the rights of the coastal state in the zone.

Moreover, if one examines the text of the Convention closely, one will notice that other provisions use the word "device" as distinguished from "installations" and "structures;" that word is not used in articles 56 or 60.

Is all of this mere detail? Does the preference of a majority of coastal states for comprehensive jurisdiction over all installations and structures make that customary law, even though certain major maritime powers had made clear that they could not accept a Convention containing such a result? How easily can one assemble a respectable argument that state practice confirms an exception for non-economic installations that do not interfere with coastal state rights? How useful is the argument if most coastal states disagree?

## ARCHIPELAGIC WATERS

The application of similar lines of argument to other aspects of the law of the sea is obvious.

If the right of a nation to assert sovereignty over archipelagic waters is a general principle, but the specific, and admittedly somewhat arbitrary, limitations on the lengths of baselines and the land-to-water ratio are merely contractual,

what limit is there to the principle? A rule of reasonableness? Is there any nation in the world that does not have lawyers at its disposal able to make plausible arguments that its claims are reasonable?

What of the navigational rights through archipelagos? Is the rule that the sea-lanes must be approved by an international organization the kind of principle one normally finds in customary international law? Is the limitation of the principle to independent island nations of that nature?

Again, as everyone involved in the negotiations knows, these limitations and others were necessary to achieve agreement on the archipelagic principle.

## CHARACTERISTICS OF CUSTOMARY LAW

Among the many responses that can be made to these observations, perhaps the most important is that all I have done is point out the difference between treaty law and customary law. As Ambassador Castaneda reminded us yesterday, the key to treaty law is express agreement in a fairly limited time frame, whereas the key to customary law is acquiescence in fact over time. That may be so. But if it is, let us clearly understand what we are saying:

1. Customary international law is continuously changing in response not merely to rational dialogue or a battle of words and ideas but to a contest of action, sometimes violent. The "is" and the "should" become less distinguishable. Law loses some of its stabilizing and civilizing functions.
2. Because it is so difficult to prove a level of state practice and opinio juris beyond generalities sometimes barely distinguishable from mere labels, customary international law is a much more blunt instrument than written law. Broad allocations of power can move easily into the corpus of customary law, refined limitations on the exercise of powers are more easily avoided. Absent express agreement, mandatory obedience to the decisions of international organizations or tribunals is for all practical purposes out of the question.
3. As a consequence of the foregoing points, little if anything in the Convention -- properly understood -- may prove to be declaratory of customary law, precisely because the essence of the most important regimes in the Convention are the detailed, sometimes purely arbitrary, collective interpretations of what constitutes a reasonable exercise of power.

## THE RELATIONSHIP BETWEEN THE CONVENTION AND CUSTOMARY LAW

In making these points, I do not wish to be understood as endorsing the view that the Convention is a package deal that must be accepted or rejected in its entirety as a source of

customary law. My point is that the combination of rights and duties with respect to each particular use will have an inevitable tendency to unravel, substantially altering the balance -- and therefore the content -- of each of the particular regimes.

I also do not wish to be understood as saying that the inevitable alternative to the Convention is imminent chaos. Governments have many reasons for restraining themselves and their nationals that do not derive from a sense of legal obligation. The lines between inertia, caution, habit, usage, custom and law are not precise.

My basic point is that to the extent that we look to law itself as a source of restraint, it is foolhardy to suppose that the same restraints, in kind and in degree, will operate with or without a widely ratified Convention. True, treaties are far from perfect instruments of restraint. But the difference is substantial.

## THE CONSEQUENCES OF NO TREATY

Without a widely ratified Convention, it will be harder to restrain trends in 20th century state practice that are clearly discernible to anyone who bothers to look:

- It will be harder to restrain the tendency to expand coastal state jurisdiction, not only with respect to area, but perhaps more importantly, with respect to the object and degree of untrammeled coastal state discretion;
- It will be harder to maintain that outsiders have the same rights in semi-enclosed seas as the littoral states; and
- It will be harder to restrain those with power from proceeding to partition the commons, be it coastal states reaching ever further out to sea or major powers making reciprocally recognized claims.

We must face the fact that many will welcome this state of affairs, sometimes vocally, sometimes secretly, but almost always for different reasons. There are very few states that have nothing at all to gain from avoiding at least some of the restraints of the Convention. That, of course, is not the issue. The issue, to use an American phrase recently in vogue, "the bottom line," what are the net gains and losses for each state after all the advantages and disadvantages are weighed and added?

In considering this question, we must avoid the temptation to assume that this is a zero-sum calculation, in which comparative advantage as between different states or groups -- East and West, developed and developing, coastal and land-locked -- decides the issue. The object of every bargain or exchange -- from the simple sale of a house to a complex international treaty -- is to produce a situation in which every party is on balance better off with the exchange than without it.

I submit that every state will suffer some prejudice to significant interests if there is no widely ratified treaty on the law of the sea. To cite but a few examples:

- The costs and uncertainties of global naval operations will increase. This will prejudice the interests not only, or even especially, of the major powers, but of other countries that look to global naval powers to offset the pressures of their neighbors or adversaries;
- The costs and uncertainties of global shipping operations will increase. This will prejudice the interests not only of the transport industry, but of producers and consumers that can ill afford market disruptions and higher costs;
- Uncertainty as to the precise location of the outer limit of the continental margin may complicate investment in development of the continental rise;
- Developing countries are less likely to receive a share of the wealth exploited from the vast continental margins beyond 200 miles off the coast of developed states or from deep seabed mining;
- The land-locked and geographically disadvantaged states will have to rely on the largesse of their coastal neighbors rather than on universal treaty rights for access to the sea and a share of fisheries resources;
- A most significant advance in the law of environmental protection, a binding treaty containing broad obligations subject to compulsory dispute settlement, will be lost as what some call "hard" law;
- The absence of compulsory settlement of disputes will expose the weak to the tyranny of power and the strong to political blackmail; and
- The common heritage of mankind will become the object of rancor, rather than an experiment in international cooperation: the major goal of a cooperative international endeavor in regulating the exploitation of a common resource will, by definition, be frustrated. Ironically catapulted into a fulcrum, the Soviet Union can deliver neither western technology to the third world nor global legitimacy to western miners.

SOME SUGGESTIONS

Can anything be done to ameliorate these consequences? In the long run, only a globally accepted law of the sea treaty can achieve this goal.

But there is an interim step that could help. To the extent possible, let us all, party and non-party alike, act as if the rules of the Convention are binding on all. Let us behave as if the non-institutional provisions were customary law. This does not mean we abandon our respective interpretations. But it does mean at least three things:

1. We should not choose between the related rights and obligations of individual regimes in the Convention;

2. We should voluntarily implement provisions on dispute settlement and revenue sharing;
3. Both the West and the Third World should leave the door open to eventual accomodation on deep sea bed mining and resist the efforts of those who would drive a deeper wedge between them.

To this end, the legal community can make, I believe, a contribution of some importance. Even if professional scruples or personal conviction force us to stop short of describing the entire Convention as declaratory of customary international law, we can take the position that a clear showing of state practice and opinio juris is necessary to demonstrate that there is a rule of law at variance with the non-institutional provisions of the Convention. At the very least, this should call attention to the fact that the choice is frequently between the Convention rule and no rule at all.

What then of the institutional provisions, in particular the Sea-bed Authority? I believe it is futile, and self-defeating, to maintain that non-parties are bound to yield to the powers of an international organization. It is equally futile to assert that all states are legally bound to recognize the permissibility of sea-bed mining outside the Convention. The reality is that neither side can make an effective claim to a universal duty to respect its position as things now stand.

A solution can be found in a renewed commitment to the procedural implications of the common heritage principle: a duty to keep negotiating in good faith until a universally acceptable regime is achieved. This will surely take some time and a great deal of diplomatic skill. But it remains the only rational and the only likely long term solution.

# THE FUTURE OF THE CONVENTION

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The theme of this panel is the future of the Convention. We have heard four interesting and very thought-provoking statements, taking up different aspects.

Professor Riphagen dealt with the question of a new dimension of international law, treating the difficulties we face in integrating into the community of states international organizations like the EEC which have certain supranational powers, i.e., parts of sovereignty which the member states have given up and transferred to the organization. Professor Riphagen also presented a survey of the intricacies involved in the transfer of competences from a member state of the EEC to that organization, which was particularly interesting to those like myself who are not familiar with the internal relationships between the EEC and its member states. We all know that the drafting and acceptance of Annex IX to the Convention was the result of lengthy and complicated negotiations during which the representatives of the EEC member states often were called upon, both formally and informally, to explain in which particular instances competences had been transferred to the EEC. Having listened to Professor Riphagen's brilliant analysis, we now know the reason why it was so difficult to get a short and clearcut answer.

I would like to make an observation only in relation to the transfer of competences. My question deals with the relationship between those EEC member states that ratify the Convention and other Contracting Parties. It seems that the drafters of Annex IX did not contemplate the situation which will arise if certain members of the EEC become Contracting Parties to the Convention, but not the EEC itself as an organization. Professor Riphagen said that third states can never be unclear as to who bears responsibility in each case. But this point is not clear to me. It would seem that if the EEC does not also become a Contracting Party, the EEC member state which has ratified the Convention would stand on one leg only in its relation to other Contracting Parties. The other leg can only be provided if the EEC accepts the Convention, thus creating a situation where the responsibilities in relation to other Contracting Parties can be fully undertaken.

Dr. Sollie has discussed certain extremely interesting and important issues not dealt with in the Law of the Sea Convention in any detail. I think that we all should be grateful for his clear and comprehensive presentation of the different and complex problems which have to be solved, both for the Arctic and Antarctic regions. Although neither of the regions received any special treatment in the Law of the Sea Convention, it was

for very different reasons based on their physical characteristics and different legal regimes. This topic would need a panel of its own and it could be discussed at length. I would only like to make two short observations.

As regards the Arctic Sea, I completely agree with Dr. Sollie that the provisions of the Convention are fully applicable also in Arctic areas as far as the legal regimes of the territorial sea, the EEZ, the extension of the continental shelf and the high seas are concerned.

As to the Antarctic region, it is obvious today that, in view of the expiration of the Antarctic Treaty in 1990, in the next few years an ever increasing interest will be focused upon the whole complex of questions related to Antarctica, including the exploration and exploitation of its sea and sea-bed resources. As Dr. Sollie said, Malaysia has already brought this question up in the UN General Assembly. These questions are of interest to the world community as a whole and they will become exceedingly important in view of political, legal, economic, environmental and strategic considerations. These are certainly questions which the LSI conferences will be discussing in the future.

Dr. Platzoeder and Professor Oxman have both dealt with questions which have formed the red thread throughout this conference, beginning with Ambassador Evensen's keynote address. The question of when and how the Convention will enter into force and the rules of customary international law underlying the Convention, and possibly created by it, have been intensively discussed both inside and outside this room during these four conference days.

I would like to compliment both Dr. Platzoeder and Professor Oxman for their very honest and, I would say, courageous statements based on their vast experiences. I would like to add certain personal comments, taking into account various arguments presented during this conference. In some statements it has been argued that it is not so relevant if the Convention is ratified or not as most of its central provisions are in force anyway as customary international law. This seems to be a line advocated particularly by those who would prefer not to accept Part XI of the Convention, i.e., the provisions on the international sea-bed Area and the establishment of the International Sea-bed Authority. To me it is a very surprising argument and also a dangerous one.

Why did we embark upon drafting a global convention on the law of the sea in the first place? Clearly, it was to bring the rule of law to apply to the various uses of the sea and the sea-bed and this with the ultimate aim of creating a satisfactory order governing the world's oceans and reducing the possibilities of inter-state conflicts. Our aim was to harmonize the conduct of the different states in the world. Such harmonization can only be achieved through the instrument of a global convention, the provisions of which will be incorporated into the national laws and regulations of each state. Customary international law can only give legal force to

certain principles of law; but their detailed regulation, including particular exceptions to the rule, can only be effected through the provisions of an international convention.

In the Law of the Sea Convention in particular the various provisions were extremely carefully drafted, often giving expression to delicately worked out compromises. We all know how careful delegations followed even the final stages of work in the Drafting Committee to secure that no new nuances would be introduced which could undo the agreed compromises. How could such carefully worked out provisions ever be expressed as norms of customary international law?

I find it rather surprising that at this stage when serious work is about to begin, or in many cases has already begun, in order to adapt the various national legislations to the requirements of the Convention, several of our esteemed colleagues start arguing that it really does not make that much difference whether the Convention is ratified or not or whether it enters into force or not.

If states do not follow up their signatures by ratifying the Convention, and hopefully this should happen in the near future, we will face a very unfortunate situation where various national laws will contain certain elements of the Convention while leaving out others; in certain cases the national laws might even be contrary to the provisions of the Convention. If we allow states to pick and choose provisions to their liking while rejecting others, we will quickly destroy the carefully worked out balances.

My final observation deals with the question of which provisions of the Convention are based on generally accepted principles of international law.

Ambassador Yankov in his statement on the first day of this conference demonstrated how the vast majority of the provisions falling under the mandate of the Third Committee, elaborated under his able leadership, basically form a body of new rules, reflecting the progressive development of the law of the sea. It would be difficult to argue that these provisions have created what has been called instant customary international law. Many of these provisions, e.g., those dealing with enforcement with respect to pollution, could clearly not be implemented without a convention which is in force.

A controversy has developed over the status of the principle of the common heritage of mankind. In my opinion Ambassador Beesley was quite correct last Wednesday when he questioned the argument that the provisions of the Convention reflect customary international law with one exception: the common heritage of mankind. I believe that there are good grounds for considering in particular the concept of the common heritage of mankind, including the prohibition of states from claiming or exercising sovereignty or sovereign rights over any part of the international sea-bed Area, as a principle of customary international law. There were no objections to this principle when the Declaration of Principles was adopted by the UN General Assembly in 1970 in Resolution 2749 (XXV), nor at any time during the Conference or its preparatory stage.

During the Conference it was even asserted that the principle of the common heritage of mankind had already acquired the status of jus cogens. As a result of the ensuing discussion a provision was added to article 311 in the Final Provisions of Part XVII according to which the "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be a party to any agreement in derogation thereof."

Mr. Chairman, as lawyers we have a particular interest in and responsibility for promoting and strengthening the rule of law in the world. The United Nations Convention on the Law of the Sea is a unique instrument in achieving that goal. We should not allow the prospect for its realization to be undermined. We should work for getting it respected and upheld throughout the world.

# THE U.N. CONVENTION ON THE LAW OF THE SEA AS A NON-UNIVERSALLY ACCEPTED INSTRUMENT: NOTES ON THE CONVENTION AND CUSTOMARY LAW

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## INTRODUCTION

The present situation of the U.N. Law of the Sea Convention can be characterized as follows:

- The Convention has been signed by a sizable number of states, but ratified only by a few;
- It may be assumed that some years will elapse before the sixty ratifications or accessions needed for entry into force are deposited;
- It seems certain that even after entry into force more time will be needed for the Convention to become binding as a treaty for a wide majority of the states of the world; and
- It is far from certain that the Convention will ever become binding for all the major maritime and industrial states.

As the British representative said at the Montego Bay session of the Conference, "We have to contemplate that the Convention may come into force without enjoying general acceptance." This implies that the question of the relationship between the rules of the Convention and customary international law is particularly urgent and important. How much of the Convention corresponds to customary law? Which rules of the Convention are likely to become binding upon non-contracting states as customary rules of international law recognized as such in accordance with article 38 of the Vienna Convention on the Law of Treaties?

The importance of answering these questions is evident in order to assess the situation of the law of the sea as it stands today and as it may stand in different points in time in the future. Among other things, on this assessment depends whether, and to what extent, states may rely on the 1958 Geneva Conventions, be they a party to these instruments or not. And this assessment in particular is, and will be, of fundamental importance in influencing the decision of states on ratification and accession.

While the question can be put in a clear manner and while its importance is easy to understand, the answer is difficult and cannot be given in terms that are at the same time simple and unambiguous. One important point only seems easy: provisions that set up new institutions, in particular the International Sea-bed Authority and the International Tribunal on the Law of the Sea, are not susceptible to becoming customary law. The establishment of institutions requires inter-

governmental cooperation of the kind that can only be the consequence of conventional obligations. The same holds true for rules providing for the compulsory settlement of disputes: no state can bring another state before an international court or tribunal unless that state has given its agreement. With certain restrictions, such agreement is given by becoming a party to the Convention, but that cannot, of course, be invoked by or against a state that is not a party.

As regards the other provisions of the Convention, leaving aside for the time being those on deep sea-bed mining, no general answer to the question can be given. A detailed study is needed on each rule or group of rules. However, it seems possible to make some general observations that can serve as guidance while undertaking such study, a task that will certainly keep legal advisers, as well as legal scholars, busy for many years. These observations concern the method of envisaging the problems, as well as some aspects of substance.

## METHODOLOGY

The main methodological observation is that the inclusion of a given rule in the Convention is a relevant element in order to consider it as generally accepted by the international community, or, at least, as likely to become so, but that this cannot be deemed a decisive element unless corroborated by state practice. This seems to be what the International Court of Justice had in mind when, in its judgement of February 24, 1982, in the case concerning the continental shelf between Libya and Tunisia, it observed that "it could not ignore any provision of the draft Convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law."

Compromise formulations accepted within the framework of the Conference with a view to obtaining "packages" that could be accepted by consensus cannot as such be considered as binding law. It is the actual behavior of states that gives the most persuasive indication of their conviction as to their rights and duties.

Unilateral action subsequent to the Convention being opened for signature can be significant from this point of view. It seems interesting at this juncture to refer, as a very relevant example, to the Proclamation of March 10, 1983, issued by the President of the United States on the creation of an exclusive economic zone and to the "ocean policy statement" of the same day. The protests of states claiming that the US is purporting to "pick and choose" among the provisions of the Convention may be understood politically. However, it seems safe to say that the acceptance by the major non-signatory state of the substance of an important group of provisions of the Convention is a very relevant element in international practice in order to conclude that the rules contained in these provisions have already become general international law. Of course, no conclusions can be

drawn from this Proclamation and statement as regards matters not covered by them, such as the continental shelf.

As regards points where the Proclamation deviates from the Convention, one cannot but admit a weakening of the the contention that on these points the Convention reflects customary law. This seems particularly true in relation to the fact that the US has abstained from claiming sovereign rights over tuna in its economic zone. This suggests that the compromise between fishing states and coastal states struck in article 64 of the Convention is not solidly based outside the Convention. To a lesser degree, as different sets of observations might be developed, the same can be said about the positions taken in the US Proclamation as regards marine scientific research and the delimitation of maritime areas between neighboring states.

The second methodological observation is that the answers to the question may change with the passing of time. A few years ago it could be argued relatively easily that the relevance of the Convention for customary law would become greater upon its being opened for signature, i.e., when compared with the stage of provisional drafts; but the same argument is perhaps less easy to present today in the light of the fact that the drafts reflected a process fully developed by consensus while the final text does not. In the same vein and looking towards the future, it may be said that for as long as there are solid chances of the Convention's drawing a substantial number of ratifications, its influence on customary law will be important. However, this influence will have to be reconsidered after a certain number of years when the measure of success of the Convention has become more clear.

Lastly, it must be underscored that even if state practice reflects faithfully the contents of the Convention's provisions, there is always a difference between the customary law evidenced by this practice and the written rules of the Convention. Even when the principle is the same, it would not be wise to presume that the customary rule corresponds in every detail and shade of meaning to the written rule: it is in the nature of written rules to cover details and convey shades of meaning that unwritten rules cannot express. Considering the amount of detail they contain, this seems to be particularly true for the rules of the Law of the Sea Convention.

## SUBSTANCE

As far as substance is concerned, there seems to be a certain measure of agreement that the provisions of the Convention, apart from those setting up new institutions, are to be divided into three categories. This division emerges in almost identical terms from the interventions made at Montego Bay by the representatives of the United Kingdom and Indonesia, two important states, one from Western Europe and the other from Asia and the Group of 77.

The first category includes, in the words of the Indonesian representative, provisions that codify "the existing law of the sea which has developed either through customary or through conventional law" or, in the words of the UK delegate, provisions that are "a restatement or codification of existing conventional and customary law and practice." The second category includes, in the British formulation, provisions that "make more precise what is inherent or implicit in existing international law. They manifest concepts which have emerged over the past 25 years." In the Indonesian formulation the second category consists of "provisions that clarify and redefine rules on issues that are the result of political, scientific and technological developments." The third category includes provisions which, in the words of the British delegate, "are new, indeed unique" and which, in the words of the Indonesian representative, are "completely and totally new and without precedent in State practice."

Although this classification seems to be commonly shared, there was little agreement in the interventions at Montego Bay on which rules should belong to which category, nor on the legal consequences of including a provision in a given category. For example, in the UK view rules of the first and second category will bind both parties and non-parties, albeit on different legal grounds, whereas for Indonesia this holds true for provisions of the first category only. As stated by the Indonesian delegate, while provisions of the second category "are gaining universal acceptance as new law, it cannot be claimed that a country may benefit from them without being a party to the Convention."

However, these and similar positions taken by other states were, at least in part, dictated by the needs of the occasion. Thus, it seems preferable not to give them too much weight and assess the situation independently, starting from the overall classification in three categories, on which there seems to be no disagreement, and leaving aside for the time being the third category, which includes matters connected with deep sea-bed mining. As regards the other two categories of provisions, while the first does not seem to raise too many difficulties, it is the second one that seems to cause the most difficult problems.

The first category includes rules which confirm traditional international law. These rules correspond to customary law and are binding on all states, either as conventional rules or as customary rules. The main set of rules in this category are those on the high seas and on the territorial sea. However, even here some doubts may arise. For example, are the rules on "unauthorized broadcasting," which set a new exception to the freedom of the high seas, already enshrined in customary law? Can the list of activities that make passage in the territorial sea "innocent" be considered as already corresponding to customary law in its entirety or in detail and is the list exhaustive, as it purports to be?

The second category contains most of the rules of the Convention, ranging from rules on archipelagic waters to rules on the exclusive economic zone and from rules on scientific research to rules on the protection of the marine environment. Without an in-depth analysis of each rule or set of rules and without much knowledge of state practice subsequent to the Convention, it is difficult to go beyond the following short observations.

Some of the most important new concepts in the Convention seem to correspond already to customary law. However, while this may be true for the main ideas, it is not possible to say that all details as expressed in the Convention already belong to customary law and already bind all states.

Obvious examples of this may be found in the provisions on the exclusive economic zone. The principle that the coastal state has exclusive rights with respect to all economic and resource-oriented activities within the 200-mile limit seems to be accepted by all states. However, it is not possible, without giving further evidence, to say the same, for example, with regard to the obligation to conclude agreements as set forth in the provisions on fisheries or with regard to some of the exceptions and attenuations that qualify the principle of coastal state consent laid down in the articles on scientific research.

Passage through straits presents another aspect of the Convention where the assessment of how far the provisions correspond in all detail to customary law may have important consequences on decisions as to ratification. The same may be true also in relation to the rules on archipelagic waters.

For the third category of provisions, those dealing with sea-bed mining, the question of the relationship between the rules in the Convention and customary law seems to boil down to one very difficult problem: is it internationally permissible to explore and exploit the resources of the international sea-bed in today's situation? Has the principle of the common heritage of mankind achieved customary law status? And, if it has, which are its scope and meaning?

As it is well known, the opinions of states, as well as of scholars, are divided on this subject. Indeed, there are arguments that can be put forward for upholding either opinion. It is not my intention to dwell at length on this subject as there exists an abundance of literature. I will just give some indications of the directions for inquiry that seem to me to be the most promising.

First, it seems interesting to ask whether in the light of the Resolution on Preparatory Investment Protection a possible international unlawfulness may be limited to the exploitation of the deep sea-bed resources and thus does not extend to exploration for them.

Second, the relevance of domestic legislation on deep sea-bed mining and of agreements or arrangements between states having passed such legislation could be examined in order to evaluate its impact on customary law.

Third, it seems very useful to inquire into the meaning of the common heritage principle. One might, for example, use as a working hypothesis that while the substantive aspect of the principle, i.e., that exploitation must entail some form of sharing of the benefits, is generally accepted, the same cannot be said of the more procedural aspect, i.e., that exploration and exploitation must be conducted under a regime and within a framework and a machinery set up by a general convention.

## DISCUSSION AND QUESTIONS

ALBERT KOERS: Ambassador Kolosowski has asked me to allow him to make an intervention from behind this rostrum and I am, of course, happy to give him that opportunity.

IGOR KOLOSOWSKI: Mr. Chairman, ladies and gentlemen:

The participants of this forum have been acquainted in some detail with the views of the representatives of different countries. I think it would be interesting for those present here to know the views of the Soviet participants, taking into account in particular that the Soviet Union is interested not only in the problem of the territorial sea and straits, as was stated here, but in all the problems of all the oceans. We were participating actively in the work of the Conference and now we are participating actively in the work of the Preparatory Commission and it would not be our fault if that Commission does not work as quickly as we want. As a matter of fact, we want peace, cooperation and security in the world ocean and the earliest possible beginning of the productive work of the International Sea-bed Authority. This would be my answer to the question of what the real attitude of the Soviet Union is towards the law of the sea, towards the Convention and towards the Preparatory Commission.

Now, Mr. Chairman, I would like to draw the attention of the audience to some aspects of the new Convention which I consider to be of predominant importance for its future. The first point is that the Convention is a source of contemporary universal rules of the law of the sea. There have been statements here which created the impression that the different parts of the Convention have a different nature and a different status and that the Convention could be divided into different parts, that it could be separated in pieces. In my opinion such an approach is absolutely erroneous and unjustified from the legal point of view and very dangerous from the political point of view.

That this approach has no legal justification has been successfully demonstrated by my esteemed colleagues, the Ambassadors Evensen, Yankov, Engo and Beesley, as well as by a number of other participants. They are quite right that all parts of the Convention represent an indivisible package of compromise decisions on all, closely interrelated questions of the law of the sea. The Convention is a package deal and any attempts to recognize some of its parts and not recognize other parts would be unjustified. This assertion is based on a very important legal argument already presented here and it is also supported by the very history of the Conference.

As to the political aspect of this issue, allow me, Mr. Chairman, to bring to the attention of this forum a very important page in the history of the Conference. I have in mind the interventions made by the participants in the final session of the Conference. There is the position of the Group of 77 as it was expressed by its Chairman, Ambassador Arias-Schreiber.

He said that the negotiations and the adoption of the Convention as an indivisible package exclude the possibility of selective implementation. Any measure concerning the international area adopted unilaterally under national law or through multilateral agreement outside the Convention would thus lack international validity and would result in other states adopting in their turn all measures necessary to protect their interests. This statement of the Group of 77 was supported by the Socialist countries and by some of the Western countries. As an example I quote from the statement made by the representative of Australia. He said, "Mining the sea-bed outside the Convention would be highly divisive and the country concerned would incur the hostility of the bulk of the world." Summarizing all these statements the President of the Conference, Ambassador Tommy Koh of Singapore, said, "The provisions of the Convention are closely interrelated and form an integral package ... it is not possible for a state to pick what it likes and to disregard what it does not like. Any attempt by any state to mine the resources of the sea-bed outside the Convention will earn the universal condemnation of the international community and will incur great political and legal consequences." Thus, the representatives of many countries concluded that the so-called mini-treaties and so on are illegal and void.

I hope that a reasonable approach and a sense of reality will prevail in those countries which have not yet abandoned the intention not to accept the Convention and which act in contravention of its provisions. However, if they do not abandon this intention, they will come into conflict with the entire international community and they will assume grave responsibility for the consequences of their actions.

My second point, Mr. Chairman. I would like to express satisfaction with the fact that, according to the speeches delivered here, common sense and a sense of reality are prevailing in the thinking of some representatives of the states which have not yet signed the Convention, such as Great Britain and the United States. I think that in his intervention Mr. Archer arrived at the convincing conclusion that the member countries of the EEC will sign the Convention as soon as possible as this would benefit the individual EEC countries and the whole of the EEC. It would also contribute, I quote, "to establishing a more stable legal regime of the world ocean and help to resist excessive demands of transnational corporations as mirrored in the policy of the Reagan Administration". I also agree with the statements made by Mr. Richardson and Mr. Ratiner that neither the internal laws of the United States nor mini-treaties create legal foundations for the exploitation of the sea-bed resources and that any expectation that such treaties can replace the Convention are not realistic.

I would add, however, that these plans could be very dangerous if they disregard the legal order of the world ocean. Attempts to put into practice unilateral action incompatible with the Convention would inevitably result in serious contradictions and conflicts in the world ocean. In this

connection a report to this forum is worth mentioning in which suppositions are made as to the likelihood of a demonstration of military force to support a country's claim for unilateral action on the sea-bed. This underlines the necessity for all countries that pursue a policy of international peace, security and cooperation to prevent and to oppose such attempts and to actively promote the successful achievement of the purpose of the Convention and of the Preparatory Commission.

My last point, Mr. Chairman. How to assure the success of the Convention? At this stage it is first of all essential to facilitate by all means the activities of the Preparatory Commission. It is common opinion that the future of the Convention depends to a considerable extent on the possible success or failure of this Commission. Proof of its efficiency would be an equitable and effective system for the exploration and exploitation of the resources of the sea-bed. If this is achieved, it will urge countries that have not yet signed the Convention to join. However, from this correct premise as to the necessity to ensure for the future success of the Convention that the Commission works efficiently, the conclusion is drawn that the main task of the Preparatory Commission is to obtain by all possible means the goodwill and sympathies of those countries that did not sign the Convention. I think this conclusion is wrong. Moreover, it is suggested that the Commission should strive to achieve this irrespective of the positions taken by those countries and of their actions. I think this conclusion is also wrong.

Those who support this view forget that the Preparatory Commission has another main task to secure the effective and quick fulfillment of its function, that is to prepare the normal work of the International Sea-bed Authority. And the International Sea-bed Authority and the Preparatory Commission will be able to function and fulfill their tasks even if membership remains as it is now. Certainly, in that case the Authority will have some difficulties. It will live modestly, it will have economy class facilities and no luxuries at all, but it will live and it will function. At the same time there are great doubts that those countries which prefer to stay outside the Convention will have an easier life. In any case they are guaranteed to be in a situation of isolation from the rest of the international community. Of course, the door to the Preparatory Commission is so far open to these countries and the Commission should try to bring them back on board. But, as Ambassador Paul Engo rightly underlined, it is worth taking up this matter "only in case the fellow travelers are prepared to demonstrate a clear willingness to be helped back aboard."

Unfortunately, so far the fellow travelers do not demonstrate a willingness to be helped. On the contrary, they take an attitude of wait and see and of skepticism towards the Commission and the future International Sea-bed Authority. They approach the issue this way: first, wait and see what the Commission will do for us and then we will determine our attitude towards the Commission. Why, at this stage, should

emphasis be given to what the Commission can do for the countries that did not sign the Convention so that they would become full members of the Commission? Why not put the emphasis on what these countries should do for the Commission so that the Commission would accept them into full membership? It is illogical and it is unjust that a majority of countries, having signed the Convention, would work hard in the Commission to prepare very important rules and regulations and that a minority would only await the result of this hard work.

This concerns, first of all, those countries that have a big advantage in comparison to others, namely a potential right to be a pioneer investor. This fact is particularly important because Resolution II, which grants this right, has already entered into force. Therefore, the future place and role of the countries which have not yet signed the Convention is, so to say, in their own hands. They should demonstrate a clear willingness to be a party to the Convention and to sign it as soon as possible.

In concluding, Mr. Chairman, on behalf of all the Soviet participants I would like to thank the organizers of this conference for inviting us and to express the hope that this is not the last time we meet and discuss these very important problems.

ALBERT KOERS: Thank you, Ambassador Kolosovski. I now open the floor for discussion.

UWE JENISCH: This late hour of our Oslo meeting seems to be the hour of medical doctors offering alternatives and in that vein I would just like to make a brief remark on the unpopular alternative of mini-solutions. Let me say at the outset that the idea of one comprehensive Convention covering all ocean uses should not be abandoned, but in the absence of consensus it is timely to think of alternatives, to open ways for others to join. As a starting point we have to accept the fact that there will be no large scale sea-bed mining in the foreseeable future. Mr. Ratiner took away our last illusions two days ago, telling us that we are twenty years away from sea-bed mining and this is exactly what I am told by industry in Germany. The technological, financial and legal obstacles and the commodity prices stand in the way of substantial investments. As a logical consequence, the sea-bed regime is premature and in its bureaucratic perfection it is at the same time too complicated. Under these circumstances small is beautiful.

The first alternative would be a mini-treaty, probably the most advanced alternative for the time being. A mini-treaty is currently under discussion among several non-signatories and this would lead to another multilateral legal instrument, independent of and competing with the Convention. An interesting new proposal has been tabled by D'Amato in the April edition of the American Journal of International Law, the so-called "expanded mini-treaty" consisting of a new sea-bed regime plus non-sea-bed provisions taken from the Convention. This

would lead to two competing comprehensive regimes, on an equal footing with each other and serving as a valid example of state practice. However, one might question whether there is any political will at all among non-signatory states to proceed along this avenue.

Therefore, a second alternative comes to mind, which I would like to call the mini-sea-bed-authority, subject to the Convention, but operating on the basis of a mini-regime. This would require a suspension of Part XI, totally or in part, for a considerable period of time -- for example, for the whole initial period ending with the Review Conference. Part XI would then have to be replaced by means of a memorandum or a resolution similar to those which were adopted at Montego Bay. It would be the Preparatory Commission's task to develop this idea of a mini-authority, characterized by a minimum of personnel and a reduced mandate. However, the mini-authority would at the same time require a mini-regime. Substantial incentives for mining and substantial improvements in the fields of transfer of technology, production limitation, Review Conference and so on are necessary. On the other hand, and this is my main point, such a mini-regime should incorporate also the possibility of joint ventures between firms from developing countries and from industrialized countries and it should do so in much stronger terms than is the case in the present Convention in order to pass the test of being a credible alternative, attractive to many states.

Unfortunately, and here they have to blame themselves, all industrialized states have failed so far to introduce reasonable joint venture models for sea-bed mining as an alternative, while experience in other fields, including terrestrial mining, shows that profit-sharing, transfer of technology and training of personnel can be accommodated in joint ventures much better than in international organizations. Anyway, the financial and technical risks of sea-bed mining are so enormous that they can only be handled by consortia and not by individual firms. Moreover, joint ventures with developing states would, in my view, be in the mutual interest of a workable and fair mining system. So my suggestion would be that the industrialized countries, either individually or collectively, would be well advised to come up with some new ideas or reactivate old ideas on joint ventures between developing countries and industrialized countries in order to show a way out of the dilemma.

HENRY DARWIN: Very briefly, and I regret taking the time of the meeting. In her dazzling and entertaining account of the present position Dr. Platzoeder has unhappily not quite correctly stated the British position. The United Kingdom has not taken the decision which she suggests. For brevity I simply quote the Under-Secretary of State for Foreign and Commonwealth Affairs in the House of Commons on December 2, 1982, "As the Convention is open for signature for two years, there is ample time for revision before taking a final decision."

J. ALAN BEESLEY: Given the very high level of discussion this afternoon, which I think not only meets the standard of previous panels, but may even raise it to a higher level, I think it is presumptuous for me to comment on what has been said. It is no secret, of course, that the statements of some of the speakers, like Professor Oxman's, express my own views perhaps more eloquently than I could hope to do. And in defense of Miss Platzoeder it seems to me that we have seldom heard a more succinct and entertaining, and somehow pleasing, expression of views based on a vision taken from the crystal ball. I want to do something a little narrower.

Firstly, I want to say a word for the league of forgotten countries. We do hear a lot about the industrialized countries and the Group of 77, but I think it is worth noting that several industrialized countries have signed the treaty. I will refer only to Western industrialized countries because as we know Eastern Europe supports the Convention. The following countries have also done so: Austria, Australia, Canada, Denmark, Finland, France, Greece, Iceland, Ireland, Japan, the Netherlands, New Zealand, Norway, and Sweden. That is not an insignificant list of insignificant countries. And I think this should be borne in mind in appraising the future of the Convention.

I have a purely personal observation to add. If a way can be found to bring into force a skeleton international machinery without a massive bureaucracy and if an arrangement to that effect could be worked out with the Group of 77, one might find such countries as I have just listed ratifying sooner rather than later. If they hold back for the time being, it may be for functional reasons, but it may also be out of a desire not to incur huge costs any earlier than is necessary. I say this from the point of view of a country which estimates that it will be a major contributor, whether or not the United States signs and ratifies the Convention, because of the combination of revenue sharing with respect to deep ocean sea-bed mining and revenue-sharing with respect to offshore drilling on the continental shelf beyond 200 miles, but within Canadian jurisdiction.

I wanted to make another comment. You have heard today a fascinating and elegant statement by my old friend and colleague Henry Darwin who ventured in his luncheon speech the suggestion that freedom of transit itself is the greatest killer of self-determination. For all I know, I agree with him, but I just never heard that suggested before. I am afraid I was under the impression left with me by Buckminster Fuller who described some years ago the old law of the sea -- that it is a total freedom of navigation with flag state jurisdiction, except for a narrow territorial sea within which there was the right of innocent passage -- as a system of law tailored for global empires. I think if we agree on anything, we at least agree that that is no longer the law and that we have improved the law. And I am sure that this is some kind of foundation for the future in spite of the differences of view we have heard expressed.

My final comment is that even though I am speaking here personally I ought perhaps to give an indication as to the Canadian government's position on an issue that keeps recurring in our discussions. I would like to read from a statement by the Right Honorable Pierre Elliot Trudeau, the Prime Minister of Canada, "We cannot, at the same time that we are urging other countries to adhere to regimes designed for the orderly conduct of international activities, pursue policies inconsistent with that order simply because to do so in a given instance appears to be to our brief advantage. Law, be it municipal or international, is composed of restraints. If wisely construed, they contribute to the freedom and well-being of individuals and of states. Neither states nor individuals should feel free to pick and choose, to accept or reject, a law that for the moment may be attractive to them."

Now, it may surprise some present here to know that however immediate and timely that statement may be, it was not directed to some of the events being discussed this week. It was delivered in the Canadian House of Commons on October 24, 1969, during the Speech from the Throne and it was directed to the problems of safeguarding Canada's Arctic environment. So I feel I owe it to this meeting to make a comment in the light of the action taken by Canada at the time and referred to very kindly or at least in kind terms by Professor Oxman. Prime Minister Trudeau referred to Canada's reservation to the jurisdiction of the International Court on that issue as "an interim measure pending multilateral development of the law, intended to push back the frontiers of international law." It is a nice choice of phrase, especially seen a decade later. Some of us have written on this subject and in the words of US Supreme Court Justice William Douglas: "the Arctic Waters Pollution Prevention Act alertly fills a void created by the failure of the family of nations to create a common environmental code for the oceans."

With respect to one of the papers presented by the panelist, I want to stress that Canada did not assert its long-standing claim to sovereignty over its Arctic waters, but rather, and I quote, "only that degree of jurisdiction was asserted that was essential to meet the real, as distinct from the psychological, needs." Now, my reason for saying all this is simply to add that, speaking personally and certainly not officially on behalf of the Canadian government, it is my view that the time has come to withdraw the reservation to the jurisdiction of the International Court.

PAUL BAMELA ENGO: I apologize for taking the floor at this late hour, but I thought that I should clarify the air a little bit in view of the emphasis, interest and enthusiasm that seems to have been attracted at this last moment by the question of decision-making. Those who were in the Conference will recall that this is the subject that was taken up last of all, and for very good reasons. Everything that has been suggested here today was, at one stage or another, suggested at the Conference. One had to examine the feelings of states against the background

of the experience in the international community. It cannot rightly be said that the Convention has imposed on the international community a blunt or unqualified one-man-one-vote situation. Contrary to that thesis, the decision-making process adopts a unique categorization of issues and prescribes a realistic methodology for taking decisions on them.

The real problem that has to be addressed is not the adjustments that the international community is constantly being called upon to make with regard to the global power structure in the economic, political and military fields. It is my view that we must approach global problems on the basis of trying realistically to identify the critical interests of each and ensuring that these are not irresponsibly undermined, either by an unthinking majority or by a repressive and powerful minority.

We must note, however, that the experience in the international community, especially in the United Nations system, has shown that it is not the majority that tends to use its voting power tyrannically against the minority; the trend has been the contrary.

At the Conference, we were inspired by the realities of our contemporary times. We designed a progressive system that responds to the delicate economic and social concerns of states. The voting system prescribed protects interest groups and does not expose critical interests to decisions based purely on political considerations. In the business of exploiting mineral resources, the alignments do not follow purely ideological or political lines. They are dogmatically interest-oriented and it would have been amiss for us to be swayed by discussions that were irrelevant. The simplistic and often overworked concept of one-man-one-vote was as irrelevant as the single state veto is anachronistic in modern civilized thinking.

FILLMORE EARNEY: Whereas many of the speakers have been rather general in their comments, I would like to ask one specific question of Mr. Sollie. Could you please indicate specifically in the case of the Arctic, the area that you referred to as the Mediterranean of the North, how you view the future of the "Gray Zone" in the Barents Sea, given that negotiations are still going on between Norway and the Soviet Union and also given that the Soviet Union now has a drill ship operating in disputed waters that are not far from your territorial sea?

FINN SOLLIE: The answer to that question is that the "Gray Zone" agreement is adopted for a year at a time. It is a temporary and non-prejudicial arrangement to avoid problems and episodes in connection with fishing within the "Gray Zone," which is not identical to the disputed area. As soon as we get an agreement on the final dividing line, the "Gray Zone" arrangement will obviously lapse; it will not be necessary anymore. The so-called "drill ship episode" relates to a Soviet ship drilling one mile and a half to the west of the median line suggested on Norwegian maps used in the negotiations. The

Norwegian government has declared the ship to be within the margin of error because there is not yet agreement on the baselines for the proposed median line. The government thereby stated that it does not consider the ship to be in violation of a tacit understanding that there should be no drilling in the disputed area, but it is very close. The government has also said that the margin of error can be considered to be approximately two to three miles. Any move by any drill ship further into the disputed area than this margin of error will be demonstrating something because it would contravene a clear political statement by the Norwegian government. Obviously, this will have to lead to some sort of reaction on the Norwegian side, but this does not mean that we will not negotiate in good faith for a compromise as that is the stated goal of the Norwegian government. The so-called "drill-ship episode" has, from the point of view of the Norwegian authorities, been clarified with the definition of the margin of error and with the statement that any action beyond that margin must be regarded as something less than a friendly act.

ALBERT KOERS: Ladies and gentlemen, I have now no choice but to conclude this meeting. I do so after apologizing to those who wished to speak but did not get the opportunity and after thanking the members of the panel for their contributions to the success of this meeting. The last session of the Seventeenth Annual Conference of the Law of the Sea Institute at Oslo is closed.

BANQUET SPEECH

# BANQUET SPEECH

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Let me begin by expressing my deep appreciation to the organizers and co-sponsors of this meeting and to the excellent co-chairmen who put the program together and made it such a success. I believe I can speak for all of us in that regard. The proceedings of these meetings will indeed contribute much at a very critical stage of our history.

When I was asked to say a few words at the banquet, I confess I was seized with alarm and this alarm has, over the past few days, been accelerated to the point of near panic by the quality of superb luncheon speakers we have had. I had always thought that a banquet speaker was selected because he was thought to be an appropriate person to say something profound and of lasting import. The prospect of responding to such a challenge frankly humbled me. But a colleague of mine placed my mind at ease by explaining that a banquet speaker is something that comes after a meal. At home, he said, we call that the leftovers.

After my final role as the Chairman of the US delegation at Montego Bay, I feel that I indeed qualify as a leftover and so I am prepared to share a few thoughts with you tonight, not as a representative of the United States, but as a member of the intellectual community of which we are all a part.

You have had a full platter of substance in the past few days, so it would be appropriate for me to depart a bit from the normal format and talk a little about the significance of this particular meeting. I speak tonight to you as colleagues in a joint intellectual effort.

This meeting confirms that these are interesting times. Of course, in the long history of the law of the sea the same could have been said at many stages. Perhaps this particular stage is unique because of the circumstances in which we find ourselves. We tend to lay the blame for our dilemma, in part, upon these unique times, but as Thomas Fuller once said: "Accusing the times is but excusing ourselves." In the months since the signing of the Convention, many meetings such as this one have been held. They have given us a good start in analyzing the Convention, but in large part they have tended to be introspective. They have reflected upon the obvious questions: "What happened?" "Why did it happen?" "What could have been done differently?"

It is very natural, if not essential, that we should pass through this phase, although for the most part it does not seem to be very productive. Pursuing the answers to such questions may, in the long run, be useful in shedding light on future multilateral negotiating procedures, but more immediate concerns lie ahead. It is true, no doubt, that there were missed

opportunities during the Conference, but dwelling upon them at this point may not produce results that are immediately useful. When one thinks of missed opportunities, one may take some measure of guidance from the experience of the man from Louisiana during the recent torrential storms that swept his area causing devastating floods. He stood unperturbed as the water rose around his ankles. When it reached his knees, he was approached by a man in a boat, who offered him rescue. He replied: "No, thank you, I place my trust in God." When the water reached his chest, another boatman offered him safe transport, but he replied in the same fashion. Later, when the water reached his chin, a helicopter arrived and lowered a rope. Once again, he refused rescue, placing his faith in God. Finally, the water rose over his head and he drowned. When he confronted his Maker, he demanded: "God, why did you forsake me?" God replied: "What do you want of me, I sent you two boats and a helicopter!"

Though we may have missed a boat or two in the recent years, the story suggests that we can gain from experience, but we can not profit from remorse. The very sea itself is remorseless. As Oliver Wendell Holmes once wrote:

> The sea is feline. It licks your feet, its huge flanks purr very pleasant for you; but it will crack your bones and eat you, for all of that, and wipe the crimsoned foam from its jaws as if nothing had happened.

If that is true for the sea, is it not also true for the Law of the Sea Conference? Now that our bones have been cracked, must we not now wipe the foam from our own jaws and move on? But just what is it that lies ahead for the collective oceans community?

The answer, it would seem, will depend in large part upon the measure of our maturity as an intellectual community. That community, which has done so much in the past to help formulate and test ideas, must once again accept its role as the catalyst that will make possible the emergence of new ideas and new solutions that are consonant with the times. For that reason one must attach much importance to meetings such as we have witnessed this week.

Many of us can recall the meetings organized in the years before the recent Conference was convened, many of them organized by the Law of the Sea Institute. Scholars, decision-makers, representatives of interest groups and others gathered to put forward new ideas that were then analyzed, debated, tested, synthesized, and collated. All points of view were aired. People spoke unfettered by official positions or governmental instructions. As a result, sound positions were advanced and faulty ones exposed and laid to rest. Many new formulae, some of which found their way into the Convention, were first presented on such fertile grounds.

During the Conference itself there was a period of relative intellectual malaise, because all were absorbed by its procedures and the emerging consensus. Most of the academic community busied itself on studying new texts and procedures. The notable thing about this period is that the meetings that were held all seemed to work upon the assumption that there would eventually emerge a universally acceptable Law of the Sea Convention.

That, of course, proved to be but a fond and elusive hope. So now we find ourselves in a situation which, for the most part, we did not anticipate; and the new situation creates a new and demanding challenge for the intellectual community of today, a challenge which it dares not ignore.

At Montego Bay I said: "We need not fear the future." Some thought that in using the plural pronoun I was referring to the United States. I did not so intend it. Rather, I was addressing the international community in the aggregate. I still believe that to be a true statement, but perhaps I should have posed it differently. Whether we need fear the future is a direct function of the degree to which we are willing to put intellectual integrity ahead of partisanship, the degree to which we treasure logic above rhetoric, and our ability to shun opportunism and instead embrace pragmatism. Governments, because of political constraints, may not be able to indulge in such luxuries, at least for the moment. For the intellectual community, however, integrity, logic and pragmatism are traditional charges upon its processes and its failure to embrace them would be deserving of the greatest condemnation and contempt.

The faint-of-heart may falter at the thought of undertaking the monumental task of restabilizing the law of the sea. We are indeed weary of the effort already expended. But if we do not have the strength, then upon whom can we rely? And whom can we chastise if nothing is done?

History proves that logic and integrity will out in the final analysis. Historical deviations from rational behavior only prove the rule, for in these rare instances the inherent power of logic has survived to create even stronger human institutions, immune from the defects that created the initial chaos.

It is the intellectual community, not politicians and not those who profit or lose from political decisions, that must remain the proper custodians of logic and in their hands this logic will assure rationality devoid of the expediencies of the political arena. This is the challenge that lies ahead and we have not the option of rejecting it.

If governments are forced by circumstances to look to the future only in political terms, then it befalls this intellectual community to begin the slow but inexorable process of logical persuasion with the objective of the progressive development of law and the encouragement of beneficial state practices.

This challenge, admittedly, will not be easy to meet. The task will be especially difficult with regard to deep sea-bed mining. The philosophical divisions among us are deep. Some of us will argue that the common heritage of mankind has already risen to the level of customary international law binding upon all nations. Others will reject that argument. Still others will accept the principle, but will be divided regarding its definition and substantive content. These divergences of view can easily lead us into separate paths. Evidence exists to show that the divisive process has already begun. The difficulty lies in the fact that somewhere in the future these paths inevitably will intersect and it is that intersection that should concern us. At the present, the intersection appears to be devoid of stop signs or traffic lights, without speed limits, and with no policeman on duty to direct traffic and avoid collisions.

It is fortunate, however, that there is time available to us. Deep sea-bed mining, by the best estimates, will not occur until sometime in the future. Leigh Ratiner's estimate was 20 to 30 years. Thus, we do not approach the intersection at a great rate of speed. We should utilize this time wisely to explore means, in the first instance, for returning the traffic to a single path. But that, although worth the effort, does not seem a likely occurrence in the near and immediate future. This, however, should not preclude us from exploring the costs and benefits of various options that could be open in the future. While governments may not now be prepared to exercise the political will to pursue this course of inquiry, the academic community is not hobbled by the same restraint.

If logic, in the short run, does not appear to demonstrate an obvious meld of the various divergent interests, it should at least lead us to explore ways to achieve the maximum possible harmony. The intellectual community should provide the focus for this exercise. It is incumbent upon us to narrow the areas of difference, to point an unerring finger of truth at the misleading rhetoric that may emerge from the political arena, and to provide guidelines so worthy of emulation that they cannot be dismissed out of hand. We must not be accused of encouraging an irrepressible conflict between opposing and enduring forces.

If we do not accept this responsibility, the alternative will be that the problems will remain in the political arena alone, where raw national interests are often poured into the crucible, without the benefit of a broadly based and neutrally created intellectual catalyst.

As I previously indicated, there is time for us to examine and debate sea-bed issues in some detail. The same, unfortunately, cannot be said of the wide range of other issues covered by treaty provisions. Here, the time frame is short by comparison. Thus, we cannot afford to fall victim to our normal academic propensities. It is most tempting to become engaged in a debate over which, if any, of the provisions of the Convention other than those dealing with mining constitute presently-

existing norms of customary international law. That debate is reminiscent of the one that followed the 1958 Convention on the Continental Shelf over the "exploitability" text. Those debates may have enhanced many a scholarly reputation, but they contributed little by way of practical solutions. We should not be so sterile. While in 1958 problems concerning the exploitation of the outer continental shelf may have seemed more academic than real, today's problems are much more immediate. The oceans are now being used for navigation. Marine scientific research is being conducted. Marine pollution is more than a faint spectre. Offshore oil is being extracted in significant quantities from ever-expanding offshore areas. Fishing has taken on new significance. For these reasons, systems for rational ocean management are essential and not just a fond dream for the future.

When the Conference convened, it was widely perceived that there was a body of law, albeit deficient in some respects, governing such activities. The task of the Conference was to strengthen these norms, to elaborate them more fully, and, where desirable, to adjust them to accommodate the newer uses and technologies. It has been widely recognized that in this endeavor the Conference was highly successful. It reached accommodations between coastal and other states in areas where other conferences had failed. Whether the formulation of these accommodations can be viewed as customary norms of international law is not the relevant consideration, although that question must eventually resolve itself over time. The proper question is whether the academic community is prepared to allow these accommodations to be rejected for reasons that are essentially political in nature, whether we are prepared to see the structure dismantled with the inevitable return to a spate of new and extended claims to national jurisdiction. If the answer to that is, as I believe it must be, no, then it is our collective responsibility as serious scholars to make our views known. It is up to us to make the persuasive case that will induce governments to act with responsibility in a manner consistent with these desirable rules, regardless of their technical source. If they are valuable to the oceans community, they must be preserved.

The rules to which I refer are, happily, agreeable to most. We recognize their viability and applaud their potential for conflict avoidance and stabilization of expectations. Can we now permit their abandonment? Some have already stated, on the record, that when the present Conference convened, the slate was wiped clean and all previous norms rendered moot. I, for one, can not accept such a premise. That view would leave us, or at least some of us, with no universal rules at all, not even the sanction against piracy. I do not believe that anyone wishes such a state of affairs to obtain.

I am not ignorant of the political ramifications of what I am saying. If all states were to follow the non-sea-bed provisions of the Convention because they are universally beneficial in protecting international communication -- which is

a fundamental objective of modern international law -- then the United States would have achieved outside of the Convention a large segment of the national objectives for which it negotiated. In that sense, my arguments can easily be perceived, because of my prior association with the US negotiating effort, as a devious trick designed to turn the "pick and choose" argument against those who articulate it. But our responsibility, as members of the intellectual community, is broader than just allocating blame. If the US is playing the pick and choose game, then let history judge her. But let not the same history judge us poorly. Let us not throw the baby out with the bath water.

It is time, once again, to muster the intellectual forces of logic that repose in our academic community to preserve the integrity of the oceans, an integrity that will long outlive our own generation. We must not abdicate to the dynamic and potentially destructive propensities of politics. Should those in the political arena fail to salvage the beneficial principles embedded in the Convention, there will be no tears shed in many capitals. But the feline jaws of the ocean are not easily stayed and, if they are not, they will voraciously seek to gobble more and more until little remains of rational resource management, the common heritage of mankind, or the objectives toward which the Conference long labored. If these jaws cannot be quieted by those who lead us, then it remains our task to bell the cat. So, my friends and colleagues, gird yourselves with catnip. But in the end, remember that while we may pacify the great ocean cat, we may never delude her.

In conclusion, I would like to share the following tidbit with you. It purports to be a US internal memorandum on the law of the sea, although when you hear it you will agree that its authenticity may be doubted. You will also agree that one of the prerequisites of diplomacy is the ability to make fun of oneself. I now exercise that privilege.

PURPORTED US INTERDEPARTMENTAL MEMO ON THE LAW OF THE SEA

There once was an ocean regime
So good, or so it might seem,
That all men applauded
Although it defrauded
The hope of the new Reagan team.

The Prepcom will clearly not fly
It's nothing but pie in the sky.
The sea-bed will send
Its riches on end
To those who are ready to try.

Science may suffer a little.
Fishing, well, that is a riddle.
Pollution may come
To a sizable sum
But who cares for that little tittle?

Navigation will truly be free
Throughout the whole of the sea.
Straits will be open
Our fleets will be copin'
And subs will run fast in the lee.

So forget all the negligible things.
We'll see just what Santa Claus brings.
Our rights, we proclaim, though
Remain just the same, so
Ignore the phone when it rings.

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