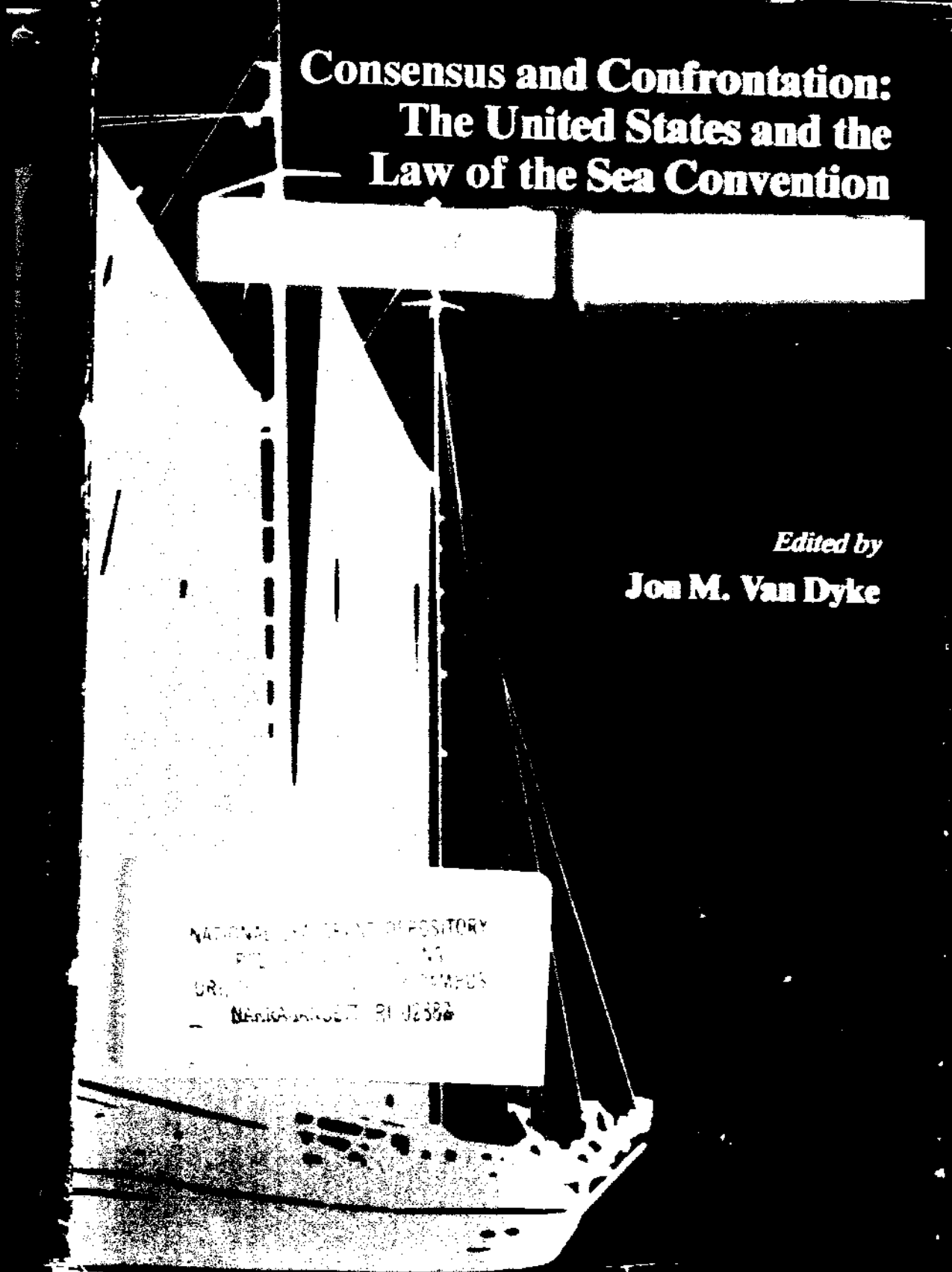
Consensus and Confrontation: The United States and the Law of the Sea Convention



Edited by

Jon M. Van Dyke

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The Law of the Sea Institute

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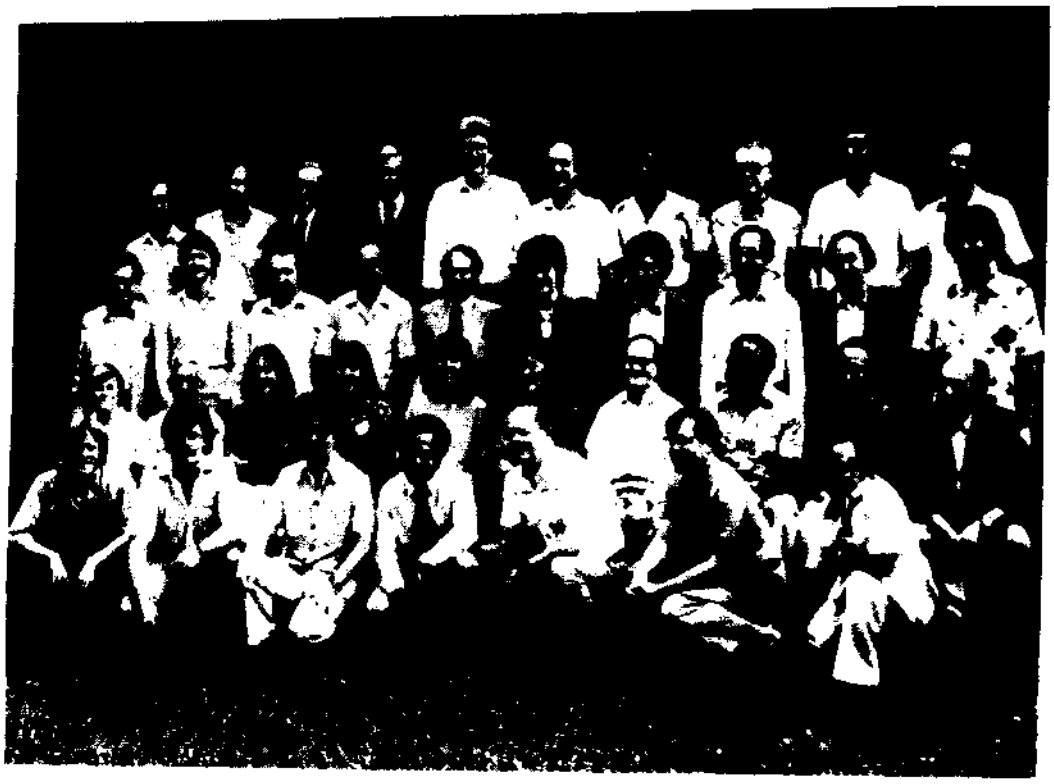

Front row (left to right): Dennis O'Connor, Robert O'Brien, Tommy T.B. Koh, Camillus Narokobi, William Burke, David Colson, R.P. Anand; Second row: Elisabeth Mann Borgese, John Bardach, Maivan Lam, Cori Lau, Carol Stimson, Young-sun Song, Paul Yuan, Rabbie Namaliu, Hasjim Djalal, Anatoly Kolodkin; Third row: Luke Lee, Jon Van Dyke, Anatoly Zakharov, Satya Nandan, Ved P. Nanda, Elizabeth Rodgers, Anthony D'Amato, Choon-ho Park, Nipant Chitasombat, Chad Taniguchi; Last row: Abu Bakar Jaafar, Craig Harrison, Conrad Welling, John Craven, Brian Hoyle, Bernard Oxman, Iosefa Maiava, Scott Allen, Jorge Vargas, Richard Baker.

CHAPTER 1

THE CONTROVERSY AND THE PARTICIPANTS

INTRODUCTION

The Law of the Sea Convention

The Third United Nations Law of the Sea Conference began in Caracas, Venezuela, in 1974, amid great fanfare and high expectations. The United States sent the largest delegation (by far) of any nation to the opening session. Their mission was to negotiate a comprehensive treaty that would clarify and bring certainty to the many ocean issues that had divided nations over the years.

Eight years later, after long negotiating sessions in New York and Geneva, the Law of the Sea Convention was completed. On December 10, 1982, in Montego Bay, Jamaica, 119 nations signed the Convention. Other signatures have been added since then, and nations have now begun to ratify the treaty.

The United States, however, has refused to sign the Convention and will not even participate as an observer at the Preparatory Commission now drafting rules and regulations to govern deep seabed mining.

What Happened?

Why did the United States change its perspective toward this negotiating process and the treaty it produced? And what are the implications for bringing order to the oceans of the U.S. decision to rely on customary international law rather than a treaty to govern its ocean relations with the other nations of the world? Indeed, what is "customary international law" and can it be expected to provide the certainty that is needed to govern matters such as the rights of warships to pass through straits, the allocation of fishing resources among competing nations and the conservation and management of fishing stocks, the protection of the ocean environment in fragile coastal zones, and the mining of the mineral resources in the

deep seabed and on the seamounts and the continental shelves closer to land?

What will become of the carefully negotiated compromises that produced the language of the Convention when nations seek to extend their coastal jurisdiction to make ever-larger claims over their offshore resources? What will become of the navigational freedoms which have been so important to trade during the past several centuries and which now are deemed vital for national security purposes by the maritime powers? What will become of the sophisticated dispute-resolution procedures developed in the Convention to provide a peaceful means of interpreting the ambiguous provisions when the nation that fought hardest for those procedures (the United States) is not in a position to use them?

Although the Reagan administration has made a number of policy pronouncements explaining the basis for its decision to reject the Convention, nagging doubts have persisted that this decision--which was based primarily on a concern about the deep seabed provisions of the Convention--may have been shortsighted in light of the many provisions in the Convention that conform specifically to U.S. policy interests and provide certainty and clarity where before differences existed. In order to air these doubts and to look at the benefits and costs of the Convention as a whole, a week-long workshop was held in January 1984 in Honolulu, Hawaii, bringing together representatives of the Reagan administration, diplomats from the Asia-Pacific region who had represented their nations at the negotiating Conference, and scholars from both the United States and the Asia-Pacific region to analyze all aspects of the Convention. This workshop provided the first--and thus far only--opportunity for these persons to articulate their views and then to question each other to probe the validity of the competing positions. Although all participants came to this meeting in their personal capacities, the diplomats spoke knowledgeably about the views of their nations and the dialogue that was produced provides new insights into the policy considerations that have led to the present division between the United States and most of the rest of the world on ocean governance.

The Competing Perspectives

Brian J. Hoyle, director of the Office of Oceans Law and Policy, and David A. Colson, assistant legal adviser for oceans and international environmental and scientific affairs, were able to present the perspective that has been developed at the U.S. Department of State during the Reagan administration. Tommy T.B. Koh, Singapore's representative to the Law

of the Sea Conference and later the president of the Conference, and Hasjim Djalal, Indonesia's deputy representative to the Conference, were able to present in detail the views and concerns of the developing nations. Satya Nandan, Fiji's representative to the Conference and now special representative to the UN secretary-general for the law of the sea, was able to provide insights into the compromises that were negotiated and the present role of the United Nations in implementing the Convention. Rabbie Namiliu, Minister for Foreign Affairs and Trade in Papua New Guinea, provided the perspective of a concerned Pacific islander, a view supplemented by the lawyer in his ministry, Camillus Narokobi, and by Iosefa Maiava from the University of the South Pacific. Conrad Welling spoke for the U.S. mining industry. Scholars from the Soviet Union (Anatoly Kolodkin and Anatoly Zakharov) and from China (Paul Yuan) gave the specific concerns of their nations.

The U.S. academicians (William Burke, John Craven, Anthony D'Amato, Ved Nanda, Bernard Oxman, and Jon Van Dyke) analyzed the competing positions of all sides, with Professor D'Amato providing an important theoretical overview of the processes by which customary laws are formed and Professor Oxman providing valuable insights based on his previous service on the U.S. negotiating team and his careful observance of the many sessions of the Conference. Luke Lee is now with the U.S. State Department, but has a long academic background as well. The other academicians (R.P. Anand from India, Elisabeth Mann Borgese from Austria and Canada, Nipant Chitasombat from Thailand, Abu Bakar Jaafar from Malaysia, Choon-ho Park from Korea, and Jorge Vargas from Mexico) all contributed in significant ways to bring balance and detail to the discussions. Students from the Richardson School of Law at the University of Hawaii and the East-West Center played a strong supporting role at this workshop, serving as rapporteurs and in two cases (Craig Harrison and Chad Taniguchi) presenting papers. More complete biographical material on the participants is presented below.

The papers and the discussions of them have been edited and reorganized for this publication, in order to group the materials by topics. Each participant has had an opportunity to revise the oral remarks made at the workshop, and every effort has been made to aid the reader to follow these discussions by providing footnote elaboration and cross referencing where needed. Readers may want to have the text of the Convention available while reading this volume, because certain parts of the discussion refer to the text in detail.

Highlights

Although it is difficult to identify highlights of a meeting of this calibre, certain parts of the dialogue do provide particularly fresh and detailed analysis. The U.S. position is laid out clearly and with a detailed background in the opening paper of David Colson (page 36) and in the explanatory statements of Brian Hoyle at pages 249, 262, and 292. R.P. Anand's paper (page 73) analyzes these policies from the perspective of a scholar from the developing world. Chapter 2 contains the competing viewpoints that the participants held on the important question of whether the Convention should be seen as a "package deal" which must be accepted or rejected as a whole (pages 58-65; see also pages 117-20 and 136-37).

Chapter 3 focuses on the process by which customary law is formed and contains a careful theoretical overview by Professor D'Amato which is critiqued by the other participants (pages 125-37 and 170-82). One of the most significant issues in dispute is whether some nations have more impact on the formation of customary law--because they are "more vitally affected" by the issue involved--than do other nations. This Chapter also contains papers on the Soviet and Chinese positions (pages 166, 184, and 213), a dialogue on boundary delimitation (pages 209-12), and a look at the U.S. position on the sharing of revenues from the continental shelf extending beyond 200 miles.

Chapter 4 contains a thorough discussion on the deep seabed mining issue. Brian Hoyle describes the Reagan administration's decision-making process, and Ambassador Koh vigorously challenges the perspectives of the U.S. government and the U.S. mining industry. Ambassador Koh also states that he will bring the matter to the International Court of Justice if any U.S. company begins a mining operation outside the regime established by the Convention (pages 232 and 253). David Colson makes a moving response describing his personal feelings about such a challenge (pages 260-61).

The U.S. position is that any nation can mine the resources of the deep seabed as a freedom of the high seas. This view has been rejected by the vast majority of nations of the world who argue that mining must be done according to the rules established in the Convention. They would argue that even if the norms of the Convention have not yet become law, the action of so many nations acting together to develop this new regime has the effect, at least, of nullifying the view that deep seabed mining is a high seas freedom, leaving the matter in a state of confusion.

The navigational issues are addressed in Chapter 5 and these questions go to the heart of the wisdom of the U.S. decision to reject the Convention. The United

States fought hard for clarity in this area and succeeded in achieving almost all of its goals. If the United States remains outside of the Convention, however, will it be permitted to take advantage of these provisions? Will the ambiguous provisions be interpreted in a manner favorable to the U.S. interests?

Has the regime of customary international law incorporated the definition of innocent passage in Article 19 of the Convention or the provisions on transit passage through straits (Articles 37-44) and archipelagic sea lanes passage (Articles 52-54)? On the question of passage through straits, maritime states can argue that because their ships have always gone through the straits they must continue to have the right to do so. The straits states can argue, on the other hand, that the nations of the world have through negotiations rejected the previous regime on straits and created a new regime in the Convention. This new regime imposes obligations at the same time that it creates rights. Professor D'Amato states that we should observe the behavior of states and infer the customary law from that behavior. We may not, however, have had enough behavior yet to make these inferences, and we may thus have to conclude that the state of the law is uncertain.

Another question on navigational rights concerns warships within the 200-mile zones. What is the customary law at the present time on that question? Could it be changing? Would universal ratification of the Convention prevent such a change? What are the interests of the maritime states on this question?

The brief dialogue at the end of Chapter 5 (pages 305-11) between David Colson and Professor Kolodkin on the right of approach or visit on the high seas illustrates the complexity of these problems. The United States asserts the right to demand information from merchant ships in order to enforce its drug laws. Other states apparently want the right to demand information from military ships so that they can protect their coastal security (see pages 186 and 302). Although the United States strenuously argues that these demands are distinguishable under international law, other nations may view them as analogous.

Chapter 6 on fishing issues contains solid papers and useful analysis. Professor Burke discusses the provisions on fishing and the conservation of living resources, arguing that the terms used in the Convention are so vague and general that they do not serve to limit in any meaningful way the actions of coastal states. Could phrases such as "optimum utilization" and "capacity to harvest" become terms with a specific scientific meaning which would be

meaningful both in helping to conserve overfished species and in promoting greater fish production where appropriate? If so, the question would then be raised whether nations not party to the Convention can have access to surplus stocks in the waters of parties to the Convention.

In Chapter 7 on the environment, the participants debate whether the Convention's environmental provisions are innovative or a codification of existing customary law. Articles 192 and 235 create an obligation on states to preserve and protect the marine environment. Articles 217-20 apportion responsibility and expand enforcement powers. These appear to be a significant advance over the more elusive customary norms and provide a centralization of standards that improve upon the scattered treaties found elsewhere. The recognition in Article 218 of port state jurisdiction could be significant in finally enabling states to enforce environmental standards. Articles 207-11 and Articles 65 and 120, referring to other treaties less widely ratified, could also be quite useful in leveraging in those other conventions. Article 210(6), for instance, would impose the standards of the London Dumping Convention on all parties to the Law of the Sea Convention whether or not they ratify the Dumping Convention. The United States has traditionally been a leader of the international environmental movement. Will the environmental provisions be given the full meaning they could have if the United States is not using the Convention's dispute resolution procedures to help interpret and enforce these provisions?

Chapter 8 looks at the dispute resolution procedures more directly and shows how innovative they are. Is there a possibility that nonsignatories could use these procedures? Will they be widely used in the absence of the United States?

Chapter 9 provides the opportunity for the participants to weigh the benefits and costs of the U.S. decision. Although no consensus is reached on these issues, the participants lay out the concerns that should be considered whenever the U.S. policy on this question might be reopened for reexamination. This chapter also looks at the U.S. isolation in the world community and prospects for the future, and closes with a summary of the themes developed during the workshop.

R.P. ANAND is professor of international law and head of the International Legal Studies Division of the School of International Studies, Jawaharlal Nehru University, New Delhi. Between 1978 and 1982, he was a research associate at the Culture Learning Institute of the East-West Center. He has served as consultant to the UN secretary-general on the law of the sea and has written extensively on all aspects of international law. A few of his publications are Legal Regime of the Seabed and the Developing Countries (1975), Law of the Sea: Caracas and Beyond (editor, 1978), Cultural Factors in International Relations (editor, 1981), and Origin and Development of the Law of the Sea (1982).

Professor Anand received his B.A. (1951), LL.B. (1953), and an LL.M. (1957) from Delhi University, and in addition he received an LL.M. (1962) and a J.S.D. (1964) from Yale University.

JOHN BARDACH is a research associate at the Resource Systems Institute of the East-West Center. He has worked on fisheries and aquaculture problems for much of his life, in Bermuda, Cambodia, Iowa, and at the University of Michigan, where he taught from 1953 to 1970 when he came to the University of Hawaii. He has written widely on fisheries issues, including, Harvest of the Sea (1968); Aquaculture (co-author, 1972); and Icthyology (co-author, 1977).

Dr. Bardach received his B.A. from Queens University, Kingston, Ontario (1946), and his M.Sc. and Ph.D. in Zoology from the University of Wisconsin (1948 and 1949).

ELISABETH MANN BORGESE is professor of political science at Dalhousie University, Halifax, Nova Scotia, Canada. She has spent much of the last twenty years working to build an international ocean regime that would serve the needs of all the peoples of the world. Among her many publications are The Ocean Regime (1981), The Drama of the Oceans (1976), and Seafarms: the Story of Aquaculture (1980). She is also co-editor of the Ocean Yearbook.

Ms. Borgese served as a senior fellow at the Center for the Study of Democratic Institutions at Santa Barbara, California, from 1965 to the early 1970s. She has been an active leader of the International Oceanic Institute, has organized many Pacem in Maribus conferences, and has been an adviser to the Austrian delegation at the Third United Nations Conference on the Law of the Sea since 1976. Ms. Borgese received her diploma from the Conservatory of Music in Zurich, in 1937.

WILLIAM T. BURKE has a joint appointment as professor at the School of Law and the Institute for Marine Studies at the University of Washington in Seattle. He has written extensively on problems related to fisheries and ocean law. Among his publications are the now-classic The Public Order of the Oceans (with M.S. McDougal, 1962), Ocean Sciences, Technology and the Future International Law of the Sea (1966), Contemporary Legal Problems in Ocean Development (1969), and National and International Law Enforcement in the Ocean (co-author, 1975).

Professor Burke holds a B.S. degree from Indiana State University (1949), a J.D. degree from Indiana University School of Law (1953), and a J.S.D. from Yale Law School (1959). He taught at Ohio State Law School from 1962 to 1968.

NIPANT CHITASOMBAT is professor of law at the Chulalongkorn University, Bangkok, Thailand. He was a research fellow in law of the sea at the Institute of South East Asian Studies in Singapore and was a fellow at the Environment and Policy Institute of the East-West Center in 1984. He has written a number of research papers and reports on law of the sea and maritime law.

Dr. Chitasombat received his LL.B. from Chulalongkorn University in Bangkok in 1969. He earned a certificate from the Hague Academy of International Law in 1974, a diploma in international studies from the Graduate Institute of International Studies at the University of Paris (Sorbonne) in 1976, and his Doctor of Laws from the University of Paris in 1978.

DAVID A. COLSON is assistant legal adviser for oceans and international environmental and scientific affairs, Office of the Legal Adviser, Department of State and deputy agent for the United States in the case between the United States and Canada concerning the delimitation of the maritime boundary in the Gulf of Maine area, argued before the International Court of Justice in 1984. He has been a member of the Legal Adviser's Office since 1975, and has served on U.S. delegations to several sessions of the Third UN Conference on the Law of the Sea.

Mr. Colson received his J.D. from the University of California at Berkeley in 1975 and his B.A. from California State College at Hayward in 1966. He served in the Peace Corps from 1966 to 1968 and the Marine Corps from 1969 to 1971.

JOHN P. CRAVEN is the director of the Law of the Sea Institute and a professor of ocean engineering and ocean law at the University of Hawaii at Manoa. He has worked as chief scientist with the U.S. Navy Special Projects Office (1959-71), as chief adviser on the Polaris system, project manager for the U.S. Navy deep submergence systems, and hydrodynamicist at the David Taylor Smith Model Basin. He has served as dean of marine programs at the University of Hawaii (1970-81) and as coordinator of marine affairs for the State of Hawaii. He promoted the first successful U.S. experiment in generating usable energy from the thermal gradient in tropical ocean waters. He has written widely on ocean engineering issues and recently co-edited Alternatives in Deepsea Mining (1979) and wrote The Management of Pacific Marine Resources: Present Problems and Future Trends (1982).

Dr. Craven has received a B.S. in civil engineering from Cornell University (1946), an M.S. in civil engineering from California Institute of Technology (1947), a Ph.D. from the University of Indiana (1951), and a J.D. from George Washington University (1959).

ANTHONY A. D'AMATO is professor of law at Northwestern University in Chicago. He has written extensively on customary international law and how it develops. Among his publications are The Concept of Custom and International Law (1971), Environment and the Law of the Sea (with Hargrove, 1974), Who Protects the Oceans? (1975), and the casebook International Law and World Order (co-author, 1980).

Professor D'Amato earned his A.B. degree from Cornell University (1958), his J.D. degree from Harvard University (1961), and his Ph.D. in political science from Columbia University (1968).

HASJIM DJALAL is Indonesia's ambassador to Canada. Until 1983, he was the deputy permanent representative of Indonesia to the United Nations and was vice-chairman of Indonesia's delegation to the Law of the Sea Conference. Previously he has served in diplomatic posts in Yugoslavia, Singapore, and Washington.

Ambassador Djalal has been a frequent contributer to the proceedings of the Law of the Sea Institute and the East-West Center and has written numerous articles on problems related to navigation and the deep seabed regime. He received his B.A. from the Academy of the Foreign Service of Jakarta and his M.A. and Ph.D. from the University of Virginia, 1959-61.

CRAIG HARRISON is an associate with the Honolulu law firm Goodsill, Anderson, Quinn, and Stifel. He was an East-West Center degree student from 1983-84 in the Environment and Policy Institute. Previously, he has held a number of positions in the Fish and Wildlife Service of the Department of the Interior both in Hawaii and Alaska. He has written widely on marine environmental problems, particularly on topics related to aquatic birds.

Mr. Harrison received his A.B. in biochemistry (1970) from the University of California at Berkeley, his M.A. in marine ecology from Humboldt State University, California, and his J.D. in 1984 from the Richardson School of Law, University of Hawaii.

BRIAN J. HOYLE has been the director of the Office of Oceans Law and Policy in the U.S. Department of State since 1982. In 1981, he served as special assistant to James L. Malone, assistant secretary for the Bureau of Oceans and International Environmental and Scientific Affairs and managed the Reagan admininstration's review of the 1982 Law of the Sea Convention. Between 1975 and 1981, he worked in the Office of the General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce. From 1973 to 1975, Mr. Hoyle served as an attorney in the law department of the Gulf Oil Corporation in Bala-Cynywd, Pennsylvania. Mr. Hoyle received a B.A. in political science and economics from the University of Missouri in 1966, a J.D. from the California Western School of Law in 1969, and an LL.M from New York University in foreign trade and investment in 1970. He conducted postgraduate research and taught international law at the University of Cambridge from 1970 to 1972.

ABU BAKAR JAAFAR is the principal assistant director of the Department of Environment in the Malaysian Ministry of Science, Technology, and Environment and the secretary-general of the Environmental Management and Research Association of Malaysia. He was an East-West Center degree student from 1980-84 in the Environment and Policy Institute. Before coming to Honolulu, he had been a member of Malaysia's delegation to several sessions of the Law of the Sea Conference. He has written a number of articles on environmental problems in Southeast Asia. Dr. Jaafar holds a B.En. in engineering from the University of Newcastle, Australia (1973), a M.En. in science from Miami University, Ohio (1976), and a Ph.D. in geography from the University of Hawaii at Manoa (1984).

TOMMY T.B. KOH was the second and final president of the Third United Nations conference on the Law of the Sea. He served as permanent representative of Singapore to the United Nations from 1968 to 1971 and 1974 to 1984, and was appointed as Singapore's ambassador to the United States in August 1984. From 1962 to 1968 and 1971 to 1974, he served as a member of the faculty and, later, dean of the Faculty of Law at the University of Singapore, and has written many articles for legal periodicals. He also served as legal adviser to trade unions in Singapore and had a position at the Institute of International Affairs in Singapore.

Ambassador Koh was educated at the University of Singapore, Harvard University, and Cambridge University. In May 1984 he received an honorary LL.D. degree from Yale University.

ANATOLY KOLODKIN is the president of the Soviet Maritime Law Association, vice-president of the International Maritime Committee (Brussels), deputy director of the State Scientific Research and Project Development Institute of the U.S.S.R. Ministry of Merchant Marine, and professor at Moscow University. He is the author of more than 100 publications including the book World Ocean which has been translated into a number of languages.

Professor Kolodkin graduated from the Law Faculty of Leningrad University in 1950, and earned the degree of Doctor of Legal Studies in 1971.

LUKE T. LEE is the director of planning and programs in the Office of the U.S. Coordinator for Refugee Affairs. Previously he was a senior policy adviser on the law of the sea and a member of the U.S. delegation to the Law of the Sea Conference. From 1970 to 1977, he was director of the Law and Population Program at the Fletcher School of Law and Diplomacy, and from 1963 to 1970, he was director of the New York office of Duke University's Rule of Law Research Center. He has written many books and articles on international law topics including the recent article The Law of the Sea Convention and Third States, 77 Am. J. Int'l L. 541 (1983).

Dr. Lee has an A.B. in economics from St. John's University in Shanghai, an M.A. in economics from Columbia, a Ph.D. from the Fletcher School of Law and Diplomacy, a certificate from the Hague Academy of International Law, and a J.D. from the University of Michigan School of Law.

IOSEFA A. MAIAVA is a lecturer in political science at the University of the South Pacific, Suva, Fiji, and will be in residence at the Pacific Islands Development Program at the East-West Center in 1985. He has published several articles and reports concerning political and economic development in the South Pacific.

Mr. Maiava is a Western Samoan citizen. He holds a B.A. in political science from the University of Papua New Guinea (1980) and an M.A. in international relations from the Australian National University (1982).

RABBIE NAMALIU is the Minister for Foreign Affairs and Trade in Papua New Guinea. Previously, he had worked in a number of other government posts in Papua New Guinea, including provincial commissioner for East New Britain Province (1975-76), chairman of the Public Services Commission (1976-79), and principal research officer in the Office of the Prime Minister (1979-80). He has lectured at the University of Papua New Guinea and has won a number of awards for his service including the Independence Medal (1975), the Queen's Silver Jubilee Medal (1977), and the Queen's Birthday Honours List (1979).

Minister Namaliu earned his B.A. from the University of Papua New Guinea (1970) and his M.A. from the University of Victoria, British Columbia (1972).

VED P. NANDA is professor of law and director of the International Legal Studies Program at the University of Denver College of Law. Professor Nanda has written extensively in the area of environmental law. A few of his publications are Water Needs for the Future (1977), Global Human Rights (co-author, 1981), The Law of Transnational Business Transactions (1981), and Global Climate Change (editor, 1982).

Professor Nanda was educated at Panjab University, India, where he received his B.A. (1952) and M.A. (1953) degrees. He then earned his LL.B. (1955) and LL.M. (1956) degrees from the University of Delhi and another LL.M. degree from Northwestern University (1962). Between 1962 and 1965 he was a graduate fellow at Yale University.

SATYA NANDAN is currently the special representative of the UN secretary-general for the law of the sea. During the Law of the Sea Conference, he served as Fiji's representative to the negotiations, and has also served as Fiji's ambassador to the European Economic Communities and as permanent secretary of the Fiji Foreign Ministry. At UNCLOS III, he served as rapporteur to the Second Committee, on the exclusive economic zone, he chaired the important Negotiating Group Four, which dealt with landlocked and geographically disadvantaged states, and he also chaired the negotiating group dealing with production policies for deep seabed mining. In these positions, he played a key role in negotiating many of the compromises in the Convention.

Ambassador Nandan holds an LL.B. from the University of London (1964), is a banister of law at Lincoln's Inn, and practiced law in Fiji from 1964 to 1970.

CAMILLUS NAROKOBI is the legal adviser to the Ministry for Foreign Affairs and Trade in Papua New Guinea. He travels extensively in this position, representing Papua New Guinea at numerous international conferences including the Preparatory Commission and the South Pacific organizations now developing a regional ocean program.

Mr. Narokobi was educated in Papua New Guinea and has a degree from the University of Washington in Seattle.

BERNARD H. OXMAN is professor of law at the University of Miami and a member of the Executive Board of the Law of the Sea Institute. He has served as a U.S. representative to the Third United Nations Conference on the Law of the Sea (1973-82) and chaired the English Language Group of the Drafting Committee. He was assistant legal adviser for oceans, environment and scientific affairs (1970-77) and previously served in the International Law Division of the Office of the Judge Advocate General of the Navy (1965-69). Professor Oxman's most noted publications are his annual progress reports on the Third United Nations Conference on the Law of the Sea since 1974 for which he won the Francis Drake Award in 1978 (see cites at page 59 infra). He is also a co-editor of The 1982 Convention on the Law of the Sea, 17 L. Sea Inst. Proceedings (1983) and Law of the Sea--U.S. Policy Dilemma (1983).

Professor Oxman received his A.B. degree (1962) and J.D. degree (1965) from Columbia College.

CHOON-HO PARK is professor of law at Korea University and director of the East Asia Law of the Sea Institute in Seoul. He was a senior fellow at the East-West Center in Honolulu from 1977-82 and also was an adjunct professor at the University of Hawaii School of Law and a member of the Executive Board of the Law of the Sea Institute during that period. Previously he was a senior researcher in East Asian Legal Studies at the Harvard Law School. Among his many publications are: Continental Shelf Issues in the Yellow Sea and the East China Sea (1972), Law of the Sea in the 1980s (editor), 14 L. Sea Inst. Proceedings (1980), and East Asian Law of the Sea Issues (1983).

Dr. Park holds a B.A. from Seoul National University (1959) and a Ph.D. in public international law from Edinburgh University (1969).

CHAD TANIGUCHI is a member of the class of 1985 at the Richardson School of Law, University of Hawaii at Manoa and a degree student at the Environment and Policy Institute of the East-West Center. He has worked in the Ethnic Studies Oral History Project at the University of Hawaii and will be joining the law firm of Paul, Johnson, and Alston in Honolulu upon graduation.

Mr. Taniguchi was born and raised on Kauai and did his undergraduate work at Stanford and the University of Hawaii.

JON VAN DYKE is professor of law at the Richardson School of Law, University of Hawaii at Manoa, a research associate in the Environment and Policy Institute of the East-West Center, and a member of the Executive Board of the Law of the Sea Institute. Previously he taught at the Hastings College of Law (University of California) in San Francisco (1971-76) and at the Catholic University School of Law (1967-69). His recent work has focused on ocean law issues, and he has written a series of articles on fisheries, deep seabed mining, and boundary problems with funding assistance from the University of Hawaii Sea Grant College Program. His previous books are North Vietnam's Strategy for Survival (1972) and Jury Selection Procedures: Our Uncertain Commitment to Representative Panels (1977).

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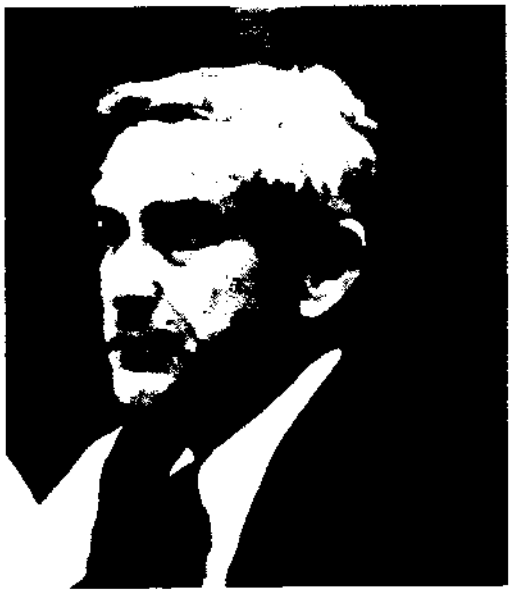

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Among the persons that should receive specific mention for the support and encouragement they provided throughout the project are Jack R. Davidson and Rose T. Pfund, director and deputy director of the University of Hawaii Sea Grant Program; Victor Hao Li, president of the East-West Center; William H. Matthews, director of the Environment and Policy Institute; and Richard S. Miller, dean of the Richardson School of Law. Some of the workshop sessions were chaired by key individuals who facilitated dialogue and assisted with arrangements but who appear only fleetingly in the edited dialogue that remains; these important persons are Richard W. Baker, a U.S. foreign service officer who was a diplomat-in-residence at the East-West Center and is now posted at the U.S. Embassy in Canberra, Australia; Filipe Bole, director of the Pacific Islands Development Program at the East-West Center (and formerly permanent secretary to the Fiji Foreign Ministry and one of Fiji's representative to the United Nations); and Maivan Lam, assistant director of the Law of the Sea Institute.

Serving as rapporteurs (in addition to Craig Harrison and Chad Taniguchi who also delivered papers) were Corianne Lau, Robert O'Brien, and Dennis O'Connor, Jr., all in the class of 1985 at the Richardson School of Law at the University of Hawaii. Francell Marquardt, in the class of 1986, provided important assistance with the footnotes and editing. Chad Taniguchi also took most of the photographs that appear in this volume.

Joining the discussions for at least some of the sessions were Honolulu attorney Sherry Broder; Professor David Callies of the Richardson School of Law; George Kent, professor of political science, University of Hawaii; member of the Hawaii House of Representatives Andrew Levin; Professor Jim Marsh of the University of Hawaii Business School; Joseph Morgan, associate professor of geography, University of Hawaii, and research associate at the Environment and

Policy Institute of the East-West Center; University of Hawaii fisheries biologist Linda Paul; Elizabeth Rodgers, the Dana Fellow at the American Society of International Law in Washington, D.C.; Young-sun Song, 1984 Ph.D. in political science from the University of Hawaii; John Vafai, visiting professor at the Richardson School of Law; Christopher Yuen, attorney in Hilo, Hawaii; Allen Clark, Jennifer Cook Clark, Jesse Floyd, Charles Johnson, Toufiq Siddiqi, and Mark Valencia, researchers at the East-West Center; George Davis; and William Tam.

Assisting admirably with the arrangements during the workshop were Glenn Yamashita, June Kuramoto, Jan Watanabe and Fanny Lee Kai of the Environment and Policy Institute; Scott Allen and Carol Stimson of the Law of the Sea Institute; and Charlotte and Irving Broder, Dorothy Craven, and Larry Kam. The diligent and talented typists at the East-West Center included Laura Miho, Carol Wong, Karen Ashitomi, Lyn Mukai, Betty Schweithelm, Joan Nakamura and Lois Bender, supervised by Lyn Moy and Susan Palmore. The editorial staff at the East-West Center, which also provided invaluable assistance, included Sherry Bryson, Lyn Garrett, Michael Macmillan and Mary Diane Henley. Janet Heavenridge at the University of Hawaii Press has also helped throughout with advice and assistance. April Kam prepared the three maps in this volume.

All members of this team worked in a supportive and cooperative way to bring these proceedings to publication rapidly to reach as wide an audience as possible. The participants at the workshop have uniformly reported how valuable they felt these discussions were. The papers presented in these proceedings were discussed in detail at the workshop and have been reviewed subsequently by their authors and edited for publication. The responsibility for their content rests with each individual author. It is hoped that this volume will aid the policy discussions that will take place in future years on ocean issues and will provide an aid to students trying to unravel the complexities of these controversies.

CHAPTER 2

THE CURRENT STATUS OF THE LAW OF THE SEA CONVENTION

INTRODUCTION

The opening papers and discussion provide an overview of the disputes that divide the United States from the vast majority of nations which have enthusiastically embraced the Law of the Sea Convention. Satya Nandan begins by reporting on the process of and prospects for ratification of the Convention, and he also gives a full report on the initial activities of the Preparatory Commission, which is preparing rules and regulations to implement the Convention. Ambassador Nandan has been working at the UN Law of the Sea Secretariat since the Convention's completion and has been monitoring all aspects of national responses to the Convention. He reports that he expects the 60 ratifications required to bring the Convention into force to be obtained during the next several years, and Rabbie Namaliu, the foreign minister of Papua New Guinea, adds that he expects all the Pacific island nations to ratify the Convention.

David Colson, assistant legal adviser for oceans and international environmental and scientific affairs in the U.S. State Department, then explains and defends the U.S. position rejecting the Convention from his perspective as a career civil servant involved during both the Carter and Reagan administrations. He contends that the historical development of U.S. policy has been guided by the desire to distinguish resource use of the oceans from traditional rights to navigation and overflight, and he provides some insight into the questions examined during the Reagan administration's review that ultimately led to rejection of the Convention.

Mr. Colson defends the U.S. intention to develop an alternative seabed mining regime while generally supporting the other provisions of the Convention. He responds to critics who contend that the United States is "picking and choosing" parts of the Convention it

approves while rejecting the seabed mining sections, and he notes that because of international ambiguities in the Convention text, the U.S. position on many questions would remain unchanged regardless of whether the United States signed the Convention or not.

Was There a "Package Deal"? Did the United States Act in Bad Faith?

The most controversial part of David Colson's initial presentation proved to be his rejection of the idea that a grand package deal had originally been made in which the maritime powers agreed to share the wealth of the deep seabed with the developing nations in exchange for a guarantee of free passage through the straits used for international navigation. Colson asserts that navigational rights were part of a smaller package in which the maritime powers agreed to recognize extended maritime jurisdiction over resources out to 200 nautical miles offshore and that the deep seabed was not involved in that agreement.

The next speaker, Ambassador Hasjim Djalal, expresses the feelings of disappointment, confusion, and anger at the United States of nations who believed they were formulating a comprehensive Convention in a grand package, with appropriate compromises and benefits for all states. Djalal is currently Indonesia's ambassador to Canada, was previously the deputy permanent representative of Indonesia to the United Nations, and was a major negotiator for the developing nations throughout the law of the sea negotiations.

Ambassador Djalal argues forcefully that the deep seabed resources were part of the original package deal and accuses the United States of negotiating in bad faith during 1981 and 1982, when the United States reassessed its position and decided not to sign the Convention. He argues that the United States is not free to "pick and choose" among the provisions of the Convention, accepting those it likes and discarding the rest. He then states that those nations that ratify the Convention can deny the benefits of the Convention to nonsignatories, and in particular that Indonesia and other straits' states can deny the right of transit passage to nations that do not join the Convention because this right of transit passage is a new right that did not exist prior to the Convention.

In the discussion that follows, Ambassador Tommy T.B. Koh joins Ambassador Djalal in accusing the United States of negotiating in bad faith and gives his own view of how the comprehensive package of the Convention was negotiated. Ambassador Koh was the last president of the Third United Nations Conference on the Law of the Sea, served for many years as permanent representative of Singapore to the United Nations, and is

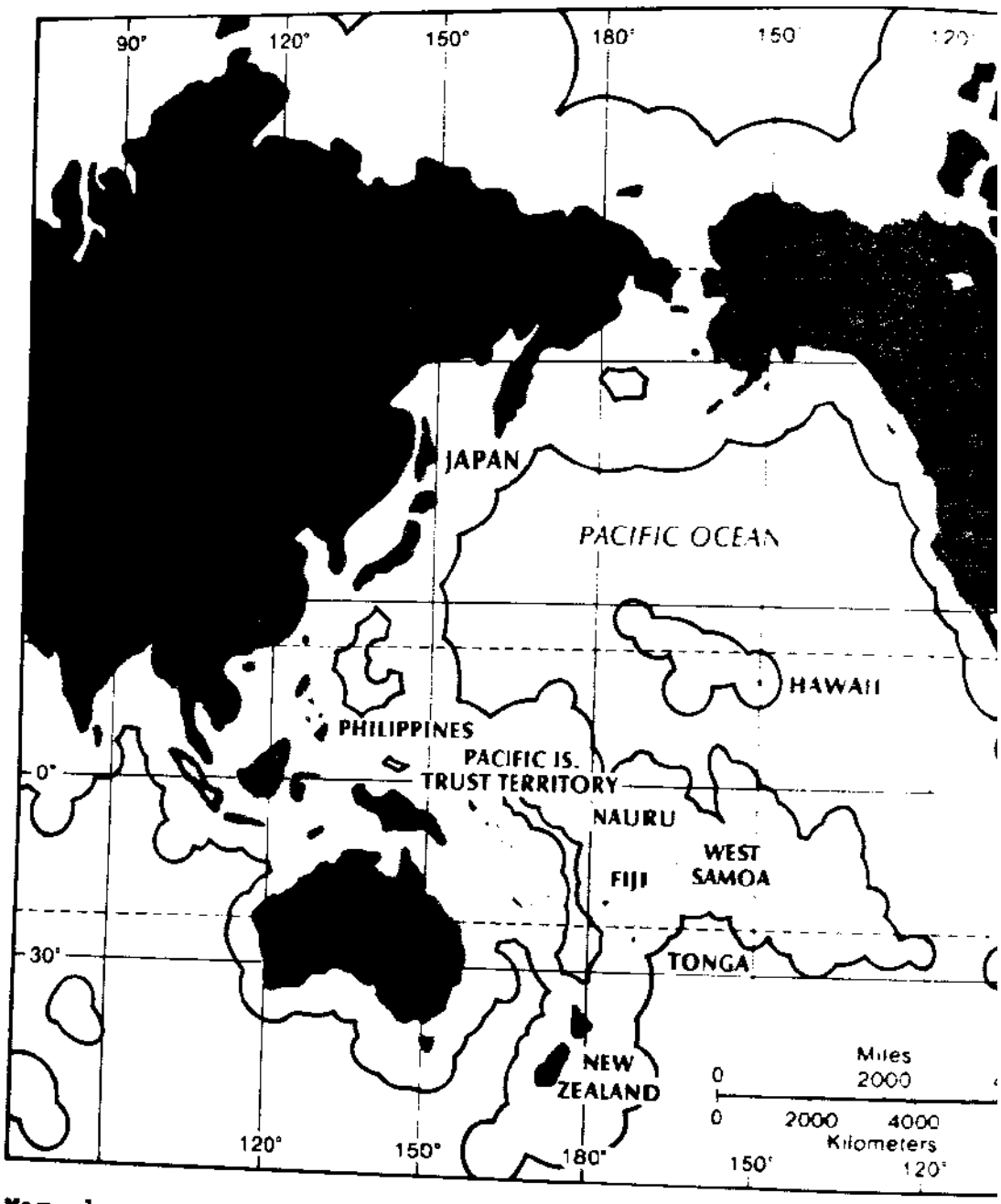
now Singapore's ambassador to the United States. He contends that the negotiations consisted of a series of mini-packages and trade-offs dependent on successful agreement on the total package.

Professor Bernard Oxman of the University of Miami School of Law, who was a member of the U.S. delegation to all of the negotiating sessions except the final one and who has chronicled the negotiations in the American Journal of International Law, then gives his view on whether there was an overall package. He describes the negotiations as complex and the trade-offs as subtle and mentions the agreement in Article 309 that no reservations be allowed as indicating a general understanding that the Convention was to be viewed as a whole.

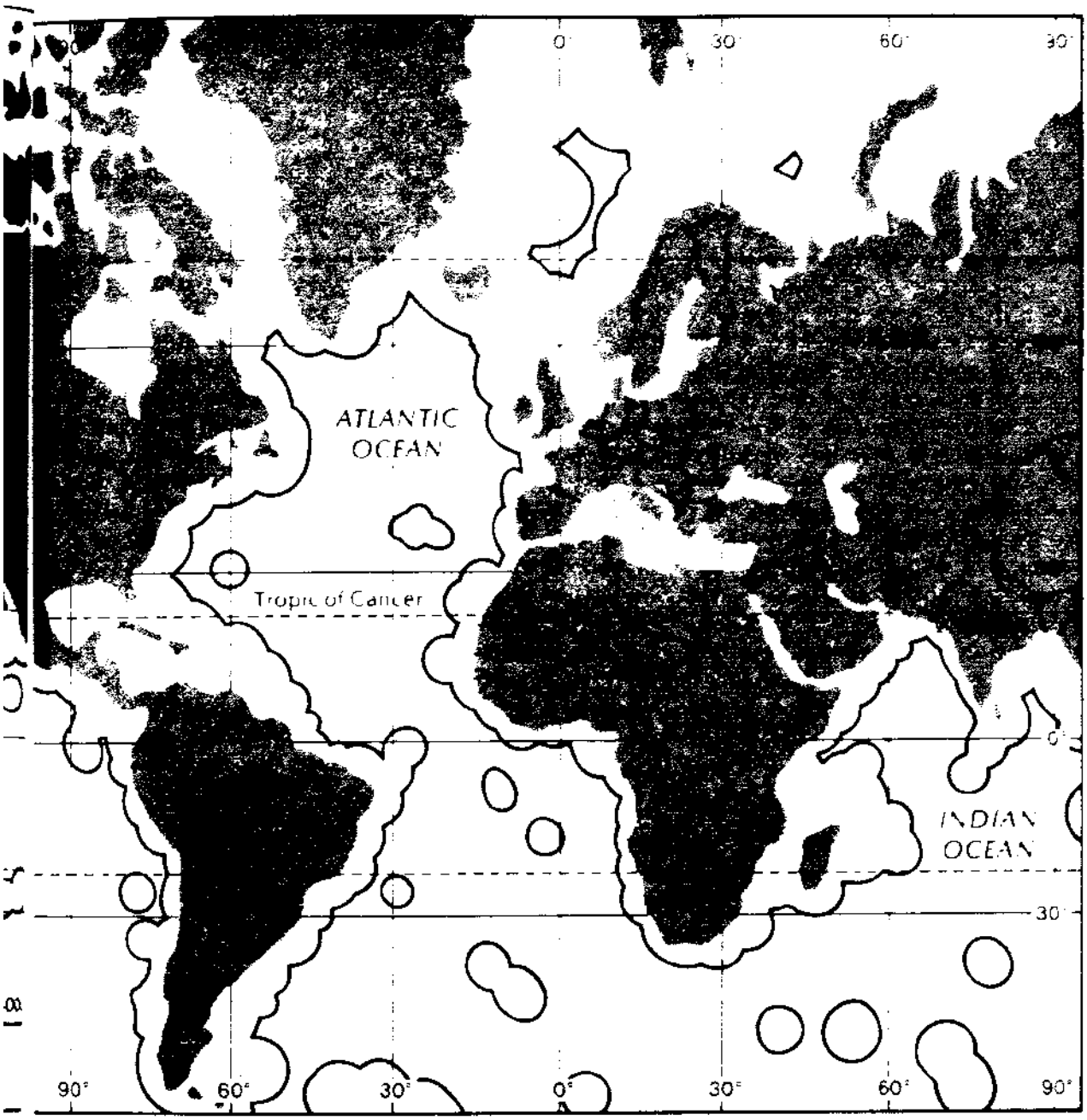
The final discussion concerns whether the U.S. Oceans Policy Statement of March 10, 1983 (reprinted in Appendix A *infra*) serves the U.S. interest of having all parts of the Convention, except Part XI on seabed mining, become accepted as customary international law binding on all nations. Ambassador Koh asks whether the Statement differs from the Convention in several important respects, and Mr. Colson responds by giving an analysis of the Statement and the goals of the United States for the future.

Unresolved Issues

This session raises a number of issues that are discussed in more detail in the sessions that follow: How serious are the U.S. concerns about the deep seabed mining provisions--are they substantive or more ideological or principled? What would be the practical and legal effect if the United States entered into a mini-treaty with other developed nations on deep seabed mining? What does the United States stand to lose by staying out of the Convention--particularly with regard to the navigational freedoms that have been so important to the United States? How much of the Convention will become accepted as customary law? If the Convention is not universally ratified, will the constraints imposed on coastal state jurisdiction begin to unravel? Are there some advantages to multilateral cooperation that should lead a nation to accept a treaty like the Law of the Sea Convention even if the treaty does not fully protect all the interests of that nation?



Map 1. An illustration of the ocean area whose resources may come under national jurisdiction in light



of the 200-nautical-mile exclusive economic zone authorized by the 1982 Law of the Sea Convention.

THE LAW OF THE SEA CONVENTION TODAY

by

Satya Nandan

Signatures and Ratifications Since Montego Bay

The Law of the Sea Convention was opened for signature at Montego Bay in Jamaica on December 10, 1982. On that day 119 signatures were appended to the Convention. Since then, the number of signatures has risen to 132, and nine instruments of ratification have been deposited. The ratification process has taken time for several reasons. In a number of cases, the Convention is not available in particular languages, as in the case of Scandinavian countries. They are translating it into their own languages before it is sent to their parliaments for consideration. In other cases, there are political reasons for deferring ratification. Some nations must update their national legislation before depositing their instruments of ratification.

In a number of countries, the legislatures have authorized the executive to proceed with ratification. It is hoped these countries will deposit instruments of ratification this year and will not wait too long, because we are waiting to gain the momentum and the next year will be very critical. The process is moving

quite well in comparison to the 1958 Territorial Sea Convention when approximately 18 months passed before the first instrument of ratification was deposited.[1]

Preparatory Commission Adopts Statement of Understanding

The resolutions adopted simultaneously with the Convention provided that the Preparatory Commission could be convened after 50 signatures had been appended. Because this number was reached on the first day, the UN secretary general immediately convened the Preparatory Commission, which held its first meeting in Kingston, Jamaica, in March and April, 1983. During its first session, the Commission dealt with organizational matters, rules of procedure, and rules for the implementation of Resolution II, dealing with the registration of pioneer investors.[2]

During this first four-week session, the Commission elected a chairman. I think most people have heard that the four weeks were spent in doing nothing but electing a chairman. This is not quite correct. Important substantive work was achieved in deciding on a consensus Statement of Understanding dealing with the basic organizational structure and the important question of the mechanics of decision making. These are very important considerations. In terms of organization, we are dealing with a political situation, and for the substantive work of the Commission the decision-making procedure is absolutely essential.

Qualifying the Different Delegations

The Preparatory Commission also prepared and negotiated the Rules of Procedure. These Rules of Procedure resolved a number of novel issues which arose for the first time because participation in the Commission requires specific qualifications. It is not the more usual kind of meeting, where all members of the United Nations are invited automatically by the secretary general to participate on equal terms. The Convention and its resolutions provide for categories

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1 Convention on the Territorial Sea and the Contiguous Zone, done April 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S., 205, T.I.A.S. No. 5639.

2 Resolution II in The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index 177-182 (U.N. Sales No. E.83.V.5, 1983).

of participation: those who sign the Final Act (but not the Convention) participate as observers and do not take part in decision making; those who actually sign the Convention become full members.

The question arose about entities that participated in the past as observers: would they be given rights equal to state entities that are no more than observers because they had signed only the Final Act? Among the matters resolved in the Rules of Procedure were: the role of observers who were the signatories of the Final Act; liberation movements; the manner for dealing with an objection raised against the representation of a delegation; the detailed elaboration of decision-making procedures; and the participation of international organizations.

Subsidiary Commissions Established

Another difficult task was to elaborate further the structure of the Preparatory Commission, including the number of its subsidiary bodies. Apart from the Plenary, the Commission will have four special commissions dealing with (1) the impact on land-based producers of minerals produced from the seabed, (2) the Enterprise, (3) the mining code, and (4) the International Tribunal for the Law of the Sea.

Registration of Pioneer Investors

In addition to its normal functions, the Plenary of the Commission will deal with rules and regulations for the establishment of the Authority and its organs and with implementation of Resolution II, concerning the registration of the pioneer investors. This caused problems because it involves the substantive work of the Preparatory Commission and to some extent it impinges on the work of the International Seabed Authority. The actions taken under Resolution II may prejudge the work of the International Seabed Authority.

This issue was very difficult and delicate, particularly because not all pioneer investors were ready to present their applications for registration. At least one country insisted on its application being registered immediately. It argued that Resolution II in itself was complete in prescribing all the required procedures, and that registration of the country as a pioneer operator should proceed.

The opposite view was that the Resolution created a framework that needed to be elaborated further before registration procedures could be invoked. After difficult consultations and negotiations, it was possible to agree on a set of guidelines to register the pioneer investors. These guidelines are to be further elaborated as a matter of priority at the next session. For the purposes of administering the pioneer

investors regime, the Commission decided that its Plenary Committee will act as an executive body on behalf of the Commission itself. This was again a matter of long discussion because no registration can occur until a decision-making body with decision-making procedures exists.

General Committee Given Authority

Other matters that arose out of Resolution II included selection of reserved sites. The question was who will exercise this authority and how it can be dealt with in the most practical and convenient way. A number of ideas were discussed. One suggestion was to limit the executive body to no more than five representatives of countries. Another suggestion was to install an independent expert group to deal with this matter. Eventually it was more convenient politically and practically to allocate the responsibility for deciding who should be on the executive body to the General Committee.

In summary, the ratification process has begun, but the Convention is not yet in force; we need 51 more ratifications to bring that about. In the meantime, it is quite clear that for the majority of states the Convention reflects the current international law of the sea, and many of them are updating their national legislation to reflect the Convention provisions.

The Preparatory Commission is not likely to complete its work for another three years at least. As for the time frame for the Convention to come into force, I think this should happen within four years. Much depends on how the Preparatory Commission proceeds with its work. I think many countries would like to wait to see the developments in the Preparatory Commission before they ratify the Convention. The Commission is now ready to deal with the substantive issues and address itself to the various problem areas that have caused some difficulties for some states.

DISCUSSION

Drafting a Mining Code

Bernard Oxman: If one lesson has been learned, I think personally and painfully by you, me, and some others in this room, it is that public international lawyers and diplomats (including those employed by the UN Secretariat) have little in their backgrounds to prepare them for writing mining codes. Has an
y consideration been given this time to hiring as consultants a law firm or private lawyers with expertise in drafting mining codes for developing countries, giving them some criteria, and asking them to come up with drafts or alternative drafts? It would seem to me one might get a better code, and one could save some money both for the UN system and for delegates.

Satya Nandan: I think the suggestion you are making is a very valid one. Although we were not able to do so in the past, it may be possible to obtain the assistance of experts to draw up the mining code, at least the rules and regulations for the deep seabed mining part of the Convention. In the Secretariat we are trying to see how we can obtain this kind of expertise to provide the information and working papers to meet this important need. Whether such undertakings can be done on behalf of particular groups of countries, such as developing countries alone, is a very difficult question because whatever the Secretariat does, it does on behalf of everyone and not for particular sections of the Commission. We are mindful of the need for some expert advice, particularly at this stage when the broad political principles and the framework have been established. We hope we can obtain that kind of expertise.

Promoting the Ratification Process

Jorge Vargas: Every time we talk about the ratification process, lawyers tend to think in terms of sovereign nations. I realize the ratification process is closely linked with the sovereignty of states. But because the United Nations has expended considerable effort to develop this Convention and because many developing countries need orientation, information, and some legal expertise in technical areas, would it be appropriate for the United Nations to launch some type of campaign to accelerate the process of ratification without affecting the sovereignty of the global community?

Nandan: The United Nations Secretariat is trying to give all the information we can to states. We have recently begun to publish a bulletin on law of the sea to disseminate information available to us. In specific cases where states have requested assistance we have tried to assist. We are not able to draft legislation for each state. This would be a tremendous task; it has to be done by the states alone. Where specific requests of this kind have come in, we have tried to direct these requests to implementing agencies within the UN, such as the United Nations Development Programme, which may have the necessary funding to provide an expert to deal with these technical matters.

As for launching a campaign, we have already begun this process. It is very important for the UN to provide the necessary information to guide states so they can speed up this process of understanding the Convention and then ratifying it. As a first step, we have published a copy of the Convention with an index to the text and resolutions.[1] This will be very useful in foreign ministries and in academic circles.

Why Have Some Nations Not Signed the Convention?

John Bardach: There are other parts of the Convention about which a number of nations are "at sea." What other important questions are there (aside from the deep seabed mining question) that are at present very unclear and need clarification?

Nandan: I know of no other questions that need clarification. I take it you mean what other questions can be dealt with in a manner that perhaps would remove any reservations that some states might have. Four countries voted against the Convention. The United

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[1] The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index (U.N. Sales No. E.83.V.5, 1983).

States voted against it because of the deep seabed part. In the case of Israel, there is a specific political problem which I do not think we can in any way alter, because it is the question of participation by the Palestine Liberation Organization that poses difficulties for them. For Venezuela and Turkey, the provisions relating to delimitation of boundaries seem to have created problems for them. I do not know whether it is possible at this time to do anything to bring them back into the fold; I do not think there is anything we can do because it was one of the most difficult issues, which had to be dealt with in a very general manner. At some point, they may decide that their interests will not be in any way compromised if they sign the Convention. But for the moment, there is very little that we can do to bring them back.

Argentina has not signed the Convention because of Resolution IV, which talks about dependent territories. I believe they are studying it again to see whether this is a real problem for them and whether that Resolution may not bind them if they sign the Convention itself. Recently they have tried to get information on the background to the Resolution from us and also on the particular article that deals with those entities that can become parties to the Convention. Other than that, we have not heard of any special problems of any countries.

Rabbie Namaliu: I think that almost all the Pacific states are likely to sign and ratify the Convention. In fact, Fiji was the first country not only to sign but also to ratify the Convention in Jamaica when it was open for signature. Most of the countries are in the process of identifying gaps in their legislation to insure that when the time for ratification comes the legislation is already in place.

Choices of Dispute Settlement Mechanisms

David Colson: In connection with the instruments of ratification deposited to date, have any patterns emerged on the choice of dispute settlement mechanisms under the Convention?

Nandan: No, unfortunately the instruments that have been deposited so far do not identify a choice of dispute settlement procedures. I take it that the nations reserve their positions on this question.

Tommy Koh: If you look at Article 287 of the Convention, nations are not obliged to make that choice at the time of ratification. They may make that choice at the time of signing, ratifying, acceding, or at any time thereafter.

Nandan: Also, if they do not make a choice, then it is deemed that they have accepted arbitration, as in subparagraph 3 of that article.

John Craven: Can they accept arbitration and then later change?

Nandan: Yes.

Colson: Except during a dispute.

Nonsignatory Observer States

Anatoly Kolodkin: Mr. Nandan, could you give your assessment of the activity of the United Kingdom and other unsigned states represented by observers in the Preparatory Commission? And what is the situation for the Federal Republic of Germany? The Convention says that the International Tribunal for the Law of the Sea must be created in Hamburg (Annex VI, Article 1). What happens if the F.R.G. does not sign and ratify the Convention?

Nandan: The nonsignatory countries that are interested in deep seabed mining, apart from the United States, have all turned up at the meetings of the Preparatory Commission as observers. They participate in the substantive work, and this was one of the reasons for the difficulty in trying to work out our rules of procedure to enable them to participate up to the point where decision making begins. A lot of work is done in informal consultations and in small groups. These observer countries will have the possibility for full participation in the substantive work except for the formal adoption or decision making on substantive issues.

The United Kingdom has been rather different from others in that the U.K. has said, "We need certain things to be changed in the Convention." In private discussions we have said to them, "The Convention is already adopted; the only way you can change it is through amending procedures and for that you have to use procedures quite clearly prescribed." Perhaps the changes they are seeking could be achieved by the Preparatory Commission, as long as it is within the framework of the Convention.

As far as the F.R.G. is concerned, they have also attended the meetings of the Preparatory Commission. They are keen to participate and were very keen to insure that they received proper recognition as observers, enabling them to participate in the substantive work. As far as the headquarters of the Tribunal is concerned, the understanding is clear that Hamburg can be the site for the Tribunal only if the F.R.G. becomes a party to the Convention.

THE UNITED STATES, THE LAW OF THE SEA, AND THE PACIFIC

by

David A. Colson

One of the central reasons for the current interest in the relationship of customary law and the Law of the Sea Convention is the attitude the United States has taken toward the Convention. I have been asked to address these attitudes, with specific attention to matters of interest to the countries of the Pacific.

I should stress that I am here in my personal capacity; however, having served in the Legal Adviser's Office of the Department of State since 1975 and having been associated with the development of U.S. law of the sea positions throughout the intervening period, I feel competent to describe the government's position and offer comments on the course the United States has taken.

I have organized my remarks into three parts: (1) a review of the facts; (2) a review of the principles of the international lawmaking process; and, (3) comments on the new United States Oceans Policy announced on March 10, 1983.

A REVIEW OF THE FACTS

Freedom of the Seas--Individual Use

Since the earliest debates between Grotius and Selden, there has been a tension between the freedom of the seas for all and the appropriation of the seas for individual use.

Over the years, the legal regime of the territorial sea became the mechanism by which the international community balanced these two interests. On the one hand, beyond the territorial sea was the regime of the high seas, in which all states had the right to navigate freely and to use its resources. On the other hand, within the once narrow territorial sea, restrictions were put on the international community's use of the sea in order to accommodate the legitimate interests of the coastal states. Other states had the right to innocent passage through the territorial sea, but no rights to its resources.

In the 1930s and 40s, however, it began to slip away. Foreign fishing fleets began to appear far from home, damaging fisheries resources relied upon by coastal communities. The development of offshore oil and gas technology made possible a new resource use of the sea. The fixed rigs that were needed to develop those resources raised new security concerns for the coastal states.

Resource Jurisdiction Beyond the Territorial Sea

In 1945, the United States took what is widely recognized as the first step in modern international law toward asserting resource jurisdiction beyond the territorial sea. The Truman Proclamation claimed sovereign rights and jurisdiction for the United States over the resources of its continental shelf. In taking this step, the United States advocated a distinction between the particular resource use of the oceans at issue and their other uses. The United States sought to meet its resource needs without affecting the traditional rights and freedoms of navigation of the high seas. The Truman Proclamation stated that "The character of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

This distinction between ocean resource use and use of the oceans for other purposes, which found its way into the law in 1945, continues to play an essential role in the law of the sea. The history of the law of the sea since 1945 consists of the creation of such distinctions, their erosion or abandonment, and the creation of other distinctions, the net result being further limitations on freedom of navigation of the seas.

The Gradual Growth of Maritime Jurisdiction

The protection of traditional freedom of navigation and overflight provided by the Truman Proclamation did not satisfy some states. Slowly, claims (not solely resource related) to maritime jurisdiction beyond a narrow territorial sea began to grow.

The First United Nations Conference on the Law of the Sea met in 1958. It recognized the continental shelf regime in a multilateral convention, accepting for this purpose the distinction between resource use and other uses of the sea.

The Second Conference met in 1960. It considered whether there could be a resource zone in the water column beyond the territorial sea within which there would be no infringement on navigation and overflight freedoms. The international community struggled with the question of the appropriate breadth of the territorial sea and the definition of the limit of coastal fisheries jurisdiction. Agreement did not emerge, not because the distinction between a fisheries zone and the territorial sea was rejected, but because of disagreement on their breadth. (We sometimes forget that it was only 20 years ago that the extension of fisheries jurisdiction to 12 nautical miles was controversial.)

Enlargement of the Territorial Sea: The Problem of Straits

As international practice moved forward in the 1960s, the United States acquiesced in the extension of fisheries jurisdictions to 12 nautical miles, hoping that this accommodation of coastal resource interests would forestall the extension of the territorial sea beyond the traditional 3-mile breadth. The United States vigorously maintained that the extension of fisheries jurisdiction in no way affected the traditional freedom of navigation and overflight beyond the 3-mile limit.

The 12-nautical-mile fishing zone was, however, just the first step. The distinction between the fisheries zone and the territorial sea that we and others sought slipped away, and soon international practice moved toward a 12-nautical-mile territorial sea. As this practice emerged, the United States and other maritime states found the prospect that international straits could be brought under coastal state controls by the extension of the territorial sea to 12 nautical miles particularly unacceptable. Those straits had been open to world commerce and the world's navies for centuries. It was the U.S. position that these straits could not be subjected to the regime of the territorial sea without the consent of all concerned. The United States and others sought to ensure that the traditional navigational rights and freedoms exercised in international straits would not be affected by the extension of the territorial sea to 12 nautical miles.

This was the essential reason for U.S. support for the convening of the Third United Nations Conference on the Law of the Sea.

The Original Package Deal: EEZ for Navigational Rights

Other states entered the Conference with a different perspective. They sought confirmation and, indeed, a broadening of their coastal state powers. Thus, even in the early days of the Conference and during the days of the Seabed Committee a trade-off began to emerge. The 200-nautical-mile economic zone would be accepted by the United States and other maritime states in return for the recognition of the maintenance of navigational rights and freedoms in a changing world. Specifically, those navigational rights and freedoms included the freedom of navigation and overflight in international straits, the traditional innocent-passage regime in a 12-nautical-mile territorial sea outside of international straits, and the maintenance and confirmation of high seas rights and freedoms in the economic zone. This was the original package deal put together during the Law of the Sea Conference.

The United States Decides Not to Sign the Unratifiable Convention

After the 1980 Geneva session, the United States left the Conference indicating that although progress had been made in the deep seabed mining provisions, important work remained to be done. The Carter administration's position was that the treaty as it then stood was not yet fully acceptable. Another ingredient in the U.S. attitude up to 1981 was the willingness to accept ambiguity in certain deep seabed mining provisions of the Convention text, anticipating that matters could be worked out satisfactorily in the Preparatory Commission that was to be established prior to the Convention's entry into force. An integral part of the U.S. government's attitude at that time, which it made clear to the Conference and publicly, was that the Convention would not be submitted by the President to the Senate unless and until satisfactory rules, regulations, and procedures had been finalized at the Preparatory Commission and would automatically enter into force with the treaty.

In mid-1982, after failing to secure the changes deemed necessary, the President announced that the United States would not sign the Convention that was to be opened for signature in Jamaica in December of that year. This decision followed nearly a year and a half of extensive intra-agency, interagency, and public debate within the United States.

The United States has been roundly criticized for its decision not to sign the new Law of the Sea Convention. It is ironic that some of the more vocal critics of this decision come from states that participated in the First United Nations Conference on

the Law of the Sea and--feeling that their interests were not served by the 1958 Conventions that emerged--signed but never ratified those Conventions. The reason the United States decided not to sign is straightforward--the government considered the treaty in its final form unratifiable under U.S. constitutional processes, notwithstanding the steps the Preparatory Commission might have taken within its mandate. Thus, the United States made its position clear and did not sign a convention it could not ratify.

The decision not to sign and seek ratification of the 1982 Convention required a change in the U.S. approach to the law of the sea. U.S. oceans policy since the late 1960s had been predicated on the assumption that a satisfactory treaty would emerge. In the absence of a satisfactory treaty and following the Presidential decision not to sign the Convention, the U.S. government embarked on an examination of U.S. oceans interests, to define an oceans policy outside the strict terms of the Convention. The Oceans Policy Statement was announced by the President on March 10, 1983.[1]

THE INTERNATIONAL LAWMAKING PROCESS

Before outlining the Oceans Policy Statement, I would like to discuss the international lawmaking process as it pertains to customary international law.

Influencing Customary Law Outside the Convention

The position the United States has taken is neither a hindrance to the exercise of its legal rights nor a disservice to the international community. Outside the Convention, the United States remains free to define the parameters of its acceptance of jurisdictional assertions by others consistent with its legal rights and obligations, and is in a position to influence the development and definition of customary international law.

Article 38 (1)(b) of the Statute of the International Court of Justice refers to "international custom, as evidence of a general practice accepted as law." This provision is widely quoted by commentators as the definition of customary international law. A rule or customary law binds states because they have accepted it as a practical matter. To be accepted as law the general practice must be widespread and include the states with the most directly affected interests.

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[1] See Appendix A infra.

As such, customary international law must be distinguished from general legal principles, judicial opinions, and legal writings that may give rise to certain norms and may be applied in the resolution of a dispute in a judicial context but do not necessarily govern the actions of states in their daily affairs.

Customary Law Requires Consent or Acquiescence

For there to be customary law there must be a general practice, and this practice must contain elements of the familiar principles of acquiescence and estoppel before it can be said to be "general practice accepted as law." One may imagine numerous instances where there is no general practice, or where the practice is so variable it only frames the legal issues in dispute.

There may be other instances where there is consensus on a broad principle, and thus applicable customary law to that extent, but there is no semblance of agreement on specific rules. The fact that there may not be customary international law to govern every aspect of state activity should not be surprising. In international law there are few judicial settlements, there is no legislative activity in the usual sense, and custom is generally slow to develop and difficult to ascertain and apply.

Because customary law ultimately depends on and relates to the consent of states, a state may object to or remove itself from the acceptance of customs in the process of their formation.[2] Conversely, states may acquiesce in another state's actions, which may be at variance from the norm, and by doing so over time create a new rule of customary law. Norway, for instance, argued in the Fisheries Case that it had persistently objected to the formation of a rule and therefore was not bound by it. The International Court of Justice turned Norway's argument around, however, and considered that Norway's straight baselines may have departed from the customary norm, if one existed, but that other states had acquiesced in Norway's practice.[3]

The Asymmetrical Treatment of States

In examining the practice of states in order to ascertain the rules of customary international law, the question arises whether equal weight or emphasis should be given to the practice of all states. I submit that

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[2] Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 286-90 (Gros, J., separate opinion).

[3] Fisheries (U.K. v. Nor.), 1951 I.C.J. 116.

the answer is no. This is not to question the sovereign equality of states--that principle is clear. But it is also clear that at least at some levels international law establishes asymmetrical treatment of states. For example, note the five permanent seats on the UN Security Council; note also that it is common practice in international environmental agreements, such as the London Dumping Convention and the Stockholm Declaration Relating to the Environment, to create double standards of responsibility.[4] (Note further Article 194 of the 1982 Convention.) The formation of customary international law clearly requires something other than a straight mathematical comparison between the total number of states in the world and the number engaging in a particular practice. Before one may speak of a "general practice accepted as law," some account must be given of who is doing what.[5]

"Common Heritage" Is Not Jus Cogens

A discussion of customary law would not be complete without mentioning its relationship to jus cogens, from which it must be clearly distinguished. As defined in Article 53 of the Vienna Convention on the Law of Treaties, jus cogens is

> A peremptory norm of general international law. . . accepted and recognized by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general law having the same character. (Emphasis added.)

Such a rule is overriding. It cannot be set aside by treaty, and the normal rules of acquiescence and estoppel do not apply. In this category are the prohibitions on aggressive war, genocide, racial

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[4] International environmental agreements tend to place greater environmental burdens on developed countries than on developing ones. For example, Article II of the 1972 London Dumping Convention, 26 U.S.T. 2403, T.I.A.S. 8165, requires contracting parties to take effective measures to prevent marine pollution by dumping "according to their scientific, technical and economic capabilities...."

[5] This theme was developed by Judge Tanaka and Judge Lachs in their dissenting opinions in North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 172 (Tanaka, J., dissenting) and 219 (Lachs, J., dissenting).

discrimination, crimes against humanity, piracy, and slavery. The proponent of a new rule of jus cogens bears a heavy burden of proof. It is universally accepted by legal commentators that jus cogens must be based on virtually unanimous support for the principle on the part of all affected states. Any suggestion that the common heritage of mankind as expressed by Part XI of the 1982 Convention has attained the status of jus cogens fails for this reason alone. It also fails because Part XI of the 1982 Convention establishes an international organization to manage deep seabed mining. Membership in international organizations surely can only be consensual in nature.

Balancing Competing Interests: Coastal States vs. Other Users

The freedom of the seas was perhaps the first principle of customary international law. Over the years, the body of rules making up the law of the sea has changed to reflect the claims, practices, and expectations of states as the world community dealt with new social, economic, technological, and political conditions. However, the simple assertion of a new claim over waters that have always been high seas has not been sufficient to change the existing legal regime. There must be general consent to change the regime--it cannot be done unilaterally. A diversity of opinion does not mean that no rules or rights exist, but that new ones have not yet been accepted. Thus, the evolution of the law of the sea has been not so much through a body of agreed rules or rigid legal dogmas but a decision-making process wherein states, on a bilateral and multilateral basis, have weighed, appraised, and sometimes resolved competing claims and interests.

Every aspect of the law of the sea relates to the determination of jurisdiction between users. Accordingly, the competing sovereignty rights of states are implicated in each decision. All issues in the law of the sea boil down to whether one state or another (or perhaps no state) has a right to control. Only where acceptance by one state of the exercise of jurisdiction by another is clear and unmistakable is there governing conventional or customary law to deal with a law of the sea problem. In all other cases, we must accept that there is a difference in point of view and that we are embarked upon a decision-making process to determine the relationship between the states involved.

The policy dominating this process and affecting the exercise and restraint of power has been to encourage, not restrict, the use of the seas. In accordance with this policy the law of the sea has sought to balance the competing interests of the

coastal states and other users of the seas. In defining over the years what was reasonable from this policy perspective, the pattern has been to defer to the resource interest of the coastal state and to the navigational and other nonresource-related interests of all users of the seas.

U.S. OCEANS POLICY

The United States Oceans Policy enunciated on March 10, 1983 consists of three parts.[6]

EEZ Already International Law: A Response to the "Pick and Choose" Argument

First, in a proclamation reminiscent of the Truman Proclamation, the President declared an exclusive economic zone for the United States. Critics have charged that in this proclamation the United States is "picking and choosing" from those parts of the Convention it likes and discarding the rest. Other elements of the Oceans Policy Statement, representing in some respects radical changes in U.S. law of the sea positions, have gone largely unnoticed.

Let us examine the "pick and choose" charge for a moment. As we have seen, the law of the sea is ultimately founded upon the consent and practice of sovereign states. It is law in which state practice and the acceptance by one state of the act of another has played an important role in shaping accepted behavior. I would be surprised if any government would accept the proposition that as a matter of law an international conference can adopt a treaty that in and of itself creates legal obligations for a state over that state's objection.

When the United States proclaimed its economic zone, approximately 50 other states had already declared such zones or a broader 200-nautical-mile territorial sea. The International Court of Justice in the Tunisia/Libya case had already commented that the exclusive economic zone had become part of international law.[7] This had occurred before the 1982 Convention was even opened for signature. Thus, it is an error to assume that the economic zone is a benefit of the 1982 Convention. The U.S. action is in the

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6 See Appendix A infra.

7 Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 74 (judgment) and 115 (separate opinion of Judge Jimenez de Arechaga).

mainstream of state practice, and has nothing to do with "picking and choosing" from the Convention.

The United States Accepts the Convention as a Guide

The President expressed the second element of the United States Oceans Policy as follows:

> [T]he United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans--such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.[8]

Thus, the United States has announced its willingness to respect the rights of others as reflected in the Convention, so long as its own rights and freedoms are also respected. The United States has therefore accepted the text, not as binding law (even in a customary-international-law sense) but as a guide for conduct and as the measure of the rights of others that we will recognize. This means that in our bilateral relations as they pertain to the law of the sea, the United States is willing to abide by the package deal--the original package deal--that was negotiated at the Conference.

U.S. Position on the Archipelagic Regime

This decision has important implications for Pacific island countries, a number of which entered the Conference seeking to confirm the regime of the archipelago and then qualified for archipelagic status under the Convention. The United States has long opposed this juridical concept and even at the end of the Conference had not announced a willingness to accept it except in the context of an otherwise acceptable comprehensive treaty. It is now prepared to accept such jurisdictional entities, as long as they are consistently implemented within the terms of the Convention. This means that navigation and overflight rights and freedoms of all states must be respected.

Critics might once again raise the "pick and choose" argument and say that the United States has no right to enjoy the navigation and overflight rights described in the Convention, as they pertain to straits

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[8] See Appendix A infra at 552, para. 6.

and archipelagoes, for instance, if it is not willing to accept all the Convention's provisions. Such an argument, however, distorts the customary lawmaking process, particularly as it has been applied in the law of the sea. The Convention does not create international law binding upon the United States; the customary law of the sea has been and will be developed by states not bound to apply the text of the Convention.

The United States Promotes the Original Package Deal

The Oceans Policy Statement simply indicates the U.S. intention to promote in its international actions the pattern that has marked the law of the sea in recent years. This pattern is embodied in the Convention--deference to the resource interests of coastal states and the maintenance of navigational rights and freedoms. Accordingly, the Oceans Policy Statement announced U.S. willingness to act so that the very essence of the original package deal formulated at the Conference can be incorporated into state practice.

This marks a significant change in the U.S. position. It indicates a willingness, for instance, to modify the traditional U.S. position on the breadth of the territorial sea. The United States is prepared to change its position in order to promote international stability in oceans use. To achieve this, it is essential that all states recognize the balance of interests that were incorporated into the 1982 Convention. It is important for the maritime states to respect the legitimate needs and interests of the coastal states that have been recognized in the Convention. At the same time, the coastal states must respect the internationally recognized rights and freedoms of all states to navigate in and to overfly international straits, archipelagoes, and exclusive economic zones. If this mutual recognition does not occur, there are serious prospects for conflicts. In addition, I submit, we are looking at the prospect of further erosion (in a legal sense) of the regime of the high seas.

The United States Will Assert Its Navigational Rights

The third element of the Oceans Policy Statement is a reaffirmation that the United States will exercise and assert its navigational freedoms and rights consistent with the balance of interests reflected in the 1982 Convention, and will not acquiesce in the acts of other states designed to restrict these rights and freedoms.

This is not particularly new, nor would the U.S. attitude on this score have been different if we had signed the Convention with the intention to ratify it.

If the original package deal negotiated at the Conference is to hold, states inside and outside the Convention must be vigilant in maintaining their rights. This duty has both international and domestic components. We must assert our rights internationally, not acquiescing to unreasonable assertions of jurisdiction by others. Domestically, in internal bureaucratic processes, we must ensure that our interest in the maintenance of the traditional freedoms of the seas is not overshadowed by coastal interests.

Unresolved Questions in the Convention: Tuna

The 1982 Convention is not a panacea. Had it entered into force for all states it would have clarified and narrowed the differences between them, but in important areas it would not have resolved those differences. There are deliberate, built-in ambiguities in the Convention--a case in point might be Article 64, the provision dealing with highly migratory species. The United States and others would have had differences over tuna no matter what attitude the United States might have adopted regarding the Convention. Everyone knew that Article 64 did not resolve long-standing differences between the United States and other states concerning jurisdiction over tuna. On this issue, our posture and our differences with others are no different today than they would have been had we signed the Convention. The United States looks to the negotiation of mutually acceptable regional tuna arrangements for the satisfactory resolution of these problems.

Unilateral Declarations on Naval Maneuvers

There are other important provisions with no apparent ambiguity, where we thought there was a meeting of the minds. Two recent statements indicate otherwise. Brazil, one of the leading Conference participants, made a statement at the signing ceremony in Jamaica that the prior knowledge and consent of the coastal state is required before naval maneuvers can occur in the 200-nautical-mile economic zone.[9] This one item alone would have made the treaty unacceptable from the U.S. point of view. Also, despite rejection of the many efforts to include a provision on the prior notification (or authorization) of warships in the territorial sea into the text, some states upon signing are making unilateral declarations and interpretations to the same effect. These statements cannot change the text nor can they affect the rights and freedoms of other states outside the Convention.

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9 See pages 304-05 infra.

Would these statements have been made had the United States signed the Convention? I believe the answer is yes. The consensus negotiating approach, an important ingredient in promoting the work of the Conference over its many years, may have lent itself to accommodation. It did not, however, always encourage clear statements of fundamental principles. Thus, either inside or outside the Convention the United States would have needed to ensure that acquiescence to the unreasonable claims of others does not occur.

Deep Seabed Mining Provisions Unacceptable

A statement of the direction of U.S. oceans policy would not be complete without a word about deep seabed mining, a matter of particular interest to the Pacific area.

At the Third Conference, the world community struggled to give meaning to the phrase "the common heritage of mankind." That phrase has no universal legal content unless, in the words of the Vienna Convention on the Law of Treaties (Article 53), it is "accepted and recognized by the international community as a whole." Surely that includes the state with perhaps the major economic interest at stake.

The United States declined to sign the 1982 Law of the Sea Convention because the provisions dealing with deep seabed mining were deemed unacceptable. In the absence of universal concurrence in a treaty regime, the United States has consistently maintained that the resources of the seabed beyond national jurisdiction may be exploited by anyone as a lawful use of the high seas.

We have been criticized for upsetting what is called a package deal, but this is a new package deal, which has been in the making only for the last few years, and was not the original package deal we and several other states looked for when we entered the Conference. Certainly the establishment and maintenance of rules and regulations governing deep seabed mining were anticipated as part of a comprehensive treaty, but I submit to you that the navigation and coastal state jurisdiction issues were always dealt with independently at the earlier stages of the Conference. As I entered into this process in 1975 it was the U.S. position that the agreement on deep seabed mining had to be one that stood alone--that the trade-offs were not ones with other parts and other uses of the oceans. The original package--coastal state jurisdiction for navigational rights and freedoms--did not include as part of the deal the acceptance of a far-ranging bureaucracy that would govern the exploration and exploitation of all seabed resources beyond national jurisdiction.

The United States Will Develop an Alternative Regime

In the Oceans Policy Statement the President noted that

> [T]he United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful use of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.[10]

Thus, the United States seeks to develop an alternative deep seabed mining system. There should be nothing disturbing about the fact that there may ultimately be two seabed mining systems. The criticism directed at the United States is not likely to deter us as long as we see our interests in deep seabed mining better served by operating outside the framework of the Convention. We believe that if such resources are to be developed, those who are prepared to invest the enormous amounts of money to do so must not be burdened with what can only be characterized as an ambiguous and costly system under the Convention.

I hope I have provided some insight into the present approach of the United States. I recognize that many may not agree with it. Despite the differences that exist, the United States remains committed to the rule of law. We look forward to playing a constructive role in the development of the rules and practices that will govern the use of the oceans by and for all people.

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[10] See Appendix A infra at 553, para. 13.

THE EFFECTS OF THE LAW OF THE SEA CONVENTION ON THE NORMS THAT NOW GOVERN OCEAN ACTIVITIES

by

Hasjim Djalal

I shall discuss this subject in several sections: (1) the general nature of the present norms, assuming the Law of the Sea Convention is not yet legally in force; (2) the specific characteristics or features of the Convention; (3) the effects of the Convention on the norms; and (4) the effects of the Convention on activities in the oceans. I will try to draw one or two major conclusions.

THE PRESENT NORMS GOVERNING OCEAN ACTIVITIES

Mr. Colson stated earlier that the norms of international law dealing with ocean activities could be derived from Article 38 of the Statute of the International Court of Justice. In examining that article we find that the norms or the sources for international law are conventions, customs, judicial decisions, and teachings of publicists. In practice, these norms are ambiguous and it is not easy to discern specific norms for the specific ocean activities of states. This ambiguity exists because there are so many conventions, state practices, and judicial decisions, and practically every publicist has a different opinion on what the norms of international law should be. For

this reason, it requires a special effort for us to reach agreement on what the existing norms are.

The norms themselves are changing according to developments in technology and in the economic and political relations among states, and from time to time we must adjust the norms to suit the present world situation. It is difficult to believe that once norms have been established on the basis of state practices they remain eternal--that the world community could not change them once they have become established. There is a need for the modification of norms that are no longer consistent with present needs. Norms that are accepted as rules must have general acceptability by states and by mankind as a whole, either in content or in the process of creation.

The Law of the Sea Convention is not yet legally in force, because it requires a certain number of ratifications. Some basic norms of international law can be found in the four 1958 Geneva Conventions; in other conventions formulated by various international organizations, such as the International Maritime Organization (IMO); and in various decisions of the International Court of Justice dealing with the development of the law of the sea.

FEATURES OF THE 1982 LAW OF THE SEA CONVENTION

A Comprehensive Grand Package

What are the major characteristics of the Convention on the Law of the Sea? The 1982 Law of the Sea Convention is a comprehensive convention that covers all of the aspects that we have agreed to cover in the Convention. Its comprehensiveness is fundamental to me because the basic understanding we reached in 1970 was to write a comprehensive convention. We would not be writing a piecemeal convention. We would not be agreeable to a piecemeal conference. We could not agree to a convention dealing only with navigation, or one that met only the specific requirements of a specific country. This was clearly stated and understood in 1970 when it was decided to convene a comprehensive conference covering all subjects related to ocean affairs. It took us more than two years to decide upon the subjects and issues that should be covered by the Law of the Sea Convention.

As a result of the comprehensiveness of the Law of the Sea Convention, another basic feature was that the solution we would be arriving at in the Convention would be a grand package. We would not have been able to agree, for instance, that "in the regime of navigation, the trade-off is..." and then in seabed mining "there's no trade-off." That was not our

understanding. Our understanding was that the whole Law of the Sea Convention is a grand package in which every one of us gives something and gains something. The Convention must be considered as a whole, in its totality. It is not a Convention from which states can choose what they want and discard what they do not like--a "pick and choose" principle cannot be applied.

No Picking and Choosing

Picking and choosing in this way would be a breach of an understanding we have had since 1970--from our point of view, it is a breach of good faith in negotiation. Now, after ten years of negotiating this grand package, suddenly we were told by the United States, "No, this was not what was intended. We are going to pick only what we want." This leads other nations that have given up things during the ten years of negotiations to find themselves "at sea" or to find themselves "nowhere", to find themselves in a state of confusion. In my mind that is a breach of good faith and is one of the good reasons why the principle of "pick and choose" cannot be permitted.

We all knew that in formulating this comprehensive grand package there would be a quid pro quo system applied to the whole Convention--you cannot have your quid but then refuse to release the quo. If you give up something, you get something else. This was understood during the process of negotiation. If you breach the basic understanding, you negate your right to claim any benefit from it.

Restatements, Clarifications, Reinterpretations, and Modifications

The provisions of the Law of the Sea Convention differ in their relationships to pre-existing norms. Some articles are simply a restatement of the existing law (the Geneva Conventions of 1958). Others clarify or adjust the existing law to present conditions. The continental shelf doctrine (Articles 76-85), for instance, is, I believe, a clarification of the existing law; I know, however, that Tommy Koh would not agree with this view.

Some articles reinterpret the existing or developing law on ocean affairs. I consider the archipelagic state provisions (Articles 46-54) an interpretation of developing law, because we have practiced the concept of archipelagic states prior to the Law of the Sea Convention. I think of it as an interpretation of the developing practices of states.

Some articles constitute a modification of the existing law, as with the regime on straits used for international navigation (Articles 34-45). In Article 16(4) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, to which many of us are

signatories, the regime of navigation through straits used for international navigation is a regime of nonsuspendable innocent passage. Nobody heard about this concept called "transit passage" until the Third UN Conference, when Professor Oxman brought it to our attention. We even argued about what to call it for a very long time. Therefore, in my mind, the pre-existing regime of navigation through straits used for international navigation, one of nonsuspendable innocent passage, was modified by the Law of the Sea Convention. Others may disagree, but this is my opinion.

The Formulation of New Norms

The 1982 Law of the Sea Convention includes new laws--one of the less controversial new laws covers enclosed and semi-enclosed seas. The regime on seabed mining is also a formulation of new laws, as are to some extent the regimes on scientific research and the preservation of the marine environment. Thus the UN Convention on the Law of the Sea is developing into the definitive law with regard to some aspects of ocean matters in the world today. This result is being achieved because the Convention's contents are acceptable to the large majority of nations. The process of its creation has taken long years of negotiations among representatives of states with the aim of devising a comprehensive Convention that covers all pertinent subjects and issues. From the beginning, the spirit behind it has always been to create a package deal, a solution arrived at through compromises and *quid pro quo* culminating in a grand package--the comprehensive Convention.

WHAT IS THE EFFECT OF THE CONVENTION?

I suppose it can be stated very simply. In some cases the Convention maintains existing norms that are still broadly acceptable to the community of nations; in others, it expands existing norms to suit new developments where the existing norms are no longer sufficient. It also creates new norms to handle completely new situations, the results either of progress in science and technology or economic and political changes. Finally, in some cases it replaces old norms that are no longer suitable for the present world situation.

What Are the Effects of the Law of the Sea Convention on Ocean Activities?

There are two categories of effects resulting from the Law of the Sea Convention--effects on the activities of signatory states and effects on the

activities of nonsignatory states. The signatory states' activities in ocean affairs will be guided and governed from now on by the provisions of the Law of the Sea Convention. For the signatory states, the Law of the Sea Convention replaces the Geneva Conventions of 1958, as stated in Article 311(1) of the Convention itself. Practically all states in the Pacific Ocean region are signatories to the Convention except the United States. For that reason we would confidently see, whether or not the United States is a party to the Convention, that the territorial sea of 12 miles and the contiguous zone of 24 miles will be applied by states in the Pacific Ocean region. Clearly, more archipelagic states will come into being and will apply the principle of archipelagic states. The regimes of the exclusive economic zone and the continental shelf will be applicable in accordance with the Convention. States will cooperate in the enclosed and semi-enclosed seas; pollution control and scientific research will be regulated in accordance with the Convention. And finally, so will seabed mining.

The other effect would be that signatory states parties may not and cannot conclude or participate in any "mini-treaty" with other states, particularly with nonparties, whose purpose is clearly to conduct activities outside the scope of the Convention. To do so would be a violation of Article 311(3), which provides that states parties shall not take actions prejudicial to the implementation of the Convention as a whole. We know there are signatories to the Convention that are thinking of writing a competitive regime on seabed mining; if they do so, they would be violating the Convention. They cannot do so, from my point of view.

What Will Be the Effect of the Convention on the Nonsignatory States?

Nonsignatory states, in my mind, cannot pick and choose from among the provisions of the Convention. Selective application of the Law of the Sea Convention will be challenged by the states parties, as it was by the Group of 77 in the last meeting of the Preparatory Commission to establish the International Seabed Authority and the Law of the Sea Tribunal.

The parties to the Convention are free to decide whether or not they will grant the specific rights and privileges prescribed in the Convention to the nonsignatories. Why should we, who are parties to the Convention and have given up many of our positions to achieve agreement on the Convention text, now grant the rights and privileges of the Convention to nonsignatories? We signatories need not grant these privileges to nonsignatories because they are not living by the general agreements in the Convention that

we have been living by for the last ten years. This would mean, from Indonesia's point of view, that we will not grant nonparties the right of transit passage, because this right of transit passage is granted in the Convention and is a modification of existing rules. Perhaps we may not grant them the right of scientific research, either in the economic zone or on the continental shelf.

Problems with "Mini-Treaties"

Another basic principle is that nonsignatory states cannot create or develop new arrangements outside the context of the Law of the Sea Convention if their purposes are clearly to undermine the Convention. Thus, from our point of view, the mini-treaty is completely out of the question.[1] It is our view that it would not be practical or workable in any case. If a mini-treaty is worked out in the Pacific region, there would be competing claims by the parties to the Law of the Sea Convention and the parties to the mini-treaty. Parties to the Convention are under an obligation to protect the views enunciated in the Convention--we are obligated, therefore, to reject and to deny the validity of the mini-treaty on the exploitation of seabed resources. The reason is very simple: The mini-treaty is against prevailing international law as perceived by the large majority of states in the world, and I do not see any legal basis for such activities under international law, either customary or conventional. If it is conventional, I would like to see which convention permits seabed mining by a few states against the Convention. If it is customary, I would like to see what the practices of states have been in the past with regard to seabed mining. If we are going to admit that customary law derives from the practices of states, I would like to know what practices of states have involved seabed mining. I am not aware of any practices of states so far dealing with seabed mining.[2] A mini-treaty outside the Convention simply has no place in the present development of ocean affairs.

CONCLUSIONS

The Law of the Sea Convention is replacing the old norms that governed ocean activities and is becoming

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[1] See page 49 *supra* and 120-22, 182, 231, 250-51, 256-57, 490-91, and 522-23 *infra.*

[2] See David Colson's response at 57 *infra.*

the sole and dominant norm governing present and future ocean activities. The Convention must be accepted in its totality, as a whole, in a grand package. Nonsignatories have no right to pick and choose from it, especially if their choices interfere with the goals of the Convention. In addition, the signatory states may choose not to grant specific rights or privileges provided in the Convention to nonsignatory states.

The Law of the Sea Convention is intended to create law and order in ocean affairs. The large number of states that have signed the Convention indicates that it is broadly and widely acceptable. That, in my mind, is a guarantee that it will be effective in governing present and future ocean activities. One or a few states cannot exercise a veto to decide what is and what is not international law. International law should be decided by the entire community of nations and not by the veto power of a few states.

DISCUSSION

Seabed Mining/Customary Law

David Colson: It is difficult to find a bridge between the position stated by Ambassador Djalal and the one I have described, but let me make a few additional comments.

There certainly is a significant body of practice relating to deep seabed mining. A great deal of activity is going on, and an enormous amount of money is being spent on it by both U.S. and foreign-based companies. Exactly what will be the ultimate rules and regulations governing that mining is the problem we face. The current activities are not in an exploitation mode, but there is a great deal of money being spent on exploration. Such activity will influence the customary law on this subject.

Can One Nation Veto Customary Law?

Whether one state can exercise a veto power in the development of customary law is an issue we can talk about for days. It is a difficult question, because we can all probably come up with examples of situations where we would concur on either side of the issue. For instance, when the issue is being put to one's own government and it is said that "You have been outvoted by the international community 150 to 1, therefore, you must modify your actions," most governments will not accept that proposition. They will say, "We remain a free and sovereign state; we will determine our own actions and our own national interests. We cannot have these things imposed upon us from outside."

On the other hand, when one is in the majority, one sees an unreasonableness in that attitude. The state in the minority position is seen as not cooperating with the international community's

interest. This is a difficult problem not solely related to the law of the sea. We find it in many of our international activities. It is a problem that we are going to have to deal with as long as we remain a world of sovereign states.

The Original Package Deal

Jon Van Dyke: The crux of David Colson's presentation may turn on his depiction of what he calls the "original package deal," which he characterizes as the trade-off of navigational rights against expanded coastal state jurisdiction. I always had the impression that the common heritage and the deep seabed mining questions were included in the original understanding.[1] What was the understanding in the early 1970s? Was the package viewed narrowly? Or was it a broader package encompassing the question of seabed mining?

Colson: There is a distinction between negotiating a comprehensive treaty and negotiating packages. I do not think there is any question that, from the Seabed Committee forward, the effort was to negotiate a comprehensive treaty that would govern all aspects of oceans use. I find it difficult to believe, however, that the basic and fundamental negotiating deal struck at the very outset of the conference was contingent in all respects upon the ultimate deal that would be negotiated on deep seabed mining.

I went back in the annals of Professor Oxman, who has recorded all of this in the American Journal of

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[1] See, e.g., Edward L. Miles, director, Institute of Marine Studies, University of Washington, speaking at Annual Meeting of American Bar Association in San Francisco, Aug. 9, 1982:

> ". . .since 1974, concessions by others in the Conference on navigational issues were linked to U.S. concessions on the EEZ and the seabed area beyond national jurisdiction...The Treaty is explicitly a package . . .
>
> "It is worth noting that the 'common heritage' principle was accepted by the Nixon Administration in 1970 as a trade-off for settling the issues of the outer limits of the territorial sea, the continental shelf and securing free transit through straits used for international navigation."

International Law,[2] and the first reference I found to the package deal was the deal coming out of the Seabed Committee to the effect that there would have to be a package negotiated between coastal resource jurisdiction and navigational rights and freedoms if there was to be a successful conference.[3] That was the first reference, at least to my knowledge, of that term, and then later on after about the second session of the Conference people began to refer to the comprehensive treaty negotiations as a package. The interest driving the U.S. position throughout this period was to maintain navigational freedoms. I think it is quite clear that no one had a very good perception about what the deep seabed mining provisions would ultimately lead to, and I think when people say that "the whole treaty is a package and one cannot separate its parts," they are really saying that everyone bought a pig in a poke in 1975 when the basic compromise was struck between the navigation issues and the coastal resource issues. The United States is prepared at this time to continue to maintain that original deal struck at the earliest parts of the Conference.

A Series of Compromises Leading to a Comprehensive Treaty

Tommy Koh: As a matter of historical accuracy, I

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2 Stevenson and Oxman, The Preparations for the Law of the Sea Conference, 68 Am. J. Int'l L. 1 (1974); Stevenson and Oxman, The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session, 69 Am. J. Int'l L. 1 (1975); Stevenson and Oxman, The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session, 69 Am. J. Int'l L. 763 (1975); Oxman, The Third United Nations Conference on the Law of the Sea: The 1976 New York Session, 71 Am. J. Int'l L. 247 (1977); Oxman, The Third United Nations Conference on the Law of the Sea: The 1977 New York Session, 72 Am. J. Int'l L. 57 (1978); Oxman, The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978), 73 Am. J. Int'l L. 1 (1979); Oxman, The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979), 74 Am. J. Int'l L. 1 (1980); Oxman, The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980), 75 Am. J. Int'l L. 211 (1981); Oxman, The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981), 76 Am. J. Int'l L. 1 (1982).

3 Stevenson and Oxman, id., 68 Am. J. Int'l L. at 9.

think David Colson's memory is faulty. From the very commencement of the Third UN Conference, it was very clearly understood among the negotiators that what we were negotiating would be one comprehensive treaty. Although it is true that various chapters, mini-packages, were negotiated, none of these mini-packages was regarded as having been concluded until all the other mini-packages were concluded.

It is true that trade-offs were made within the constraints of a specific subject matter, for example, trade-offs between the breadth of the territorial sea and the nature of the regime of passage through, under, and over straits used for international navigation. It is also true that there were trade-offs made across different subjects. I remember one in particular, one negotiating group which took place in 1977, in which trade-offs were made between the status of the economic zone, marine scientific research, and the settlement of disputes.

I do not think it is true that there was one package, one deal struck early in the Conference between navigation and overflight rights for the great maritime powers and resource rights for the developing countries, and that this package stood on its own, transcending all other issues. It was clearly understood that this package was not to be regarded as finalized until all the other packages had been negotiated.

United States Acting in Bad Faith

I think Hasjim Djalal's point is also true, that it was in the spirit of the negotiation that trade-offs made in one area and trade-offs made in the other area would at the end of the day all be honored as part of a "package deal." Many of us from developing countries have been severely criticized by critics in our own countries for having made major concessions to the great maritime powers with respect to passage rights, for example, only to find at the end of the day that a great maritime power like the United States is not standing by concessions it made in other areas. So I think Hasjim Djalal is right in saying that the attitude of the United States to the Convention is nothing less than an act of bad faith.

Van Dyke: Was there a package deal agreed upon by the mid-1970s, and if so, what was the content of that package deal?

Smaller Packages Within the Grand Package

Koh: I think I can do no better than to recall the words of Hasjim Djalal. We started the Conference on the understanding--in which every delegation joined--that we were negotiating a grand package

containing generally acceptable compromises on every subject on the agenda of the Conference. Within this grand package there are smaller packages. And within the smaller packages, there are even smaller packages still. And there are also linkages between one package and another package.

Separate Negotiations But Interlinked

The negotiations were extremely complicated. Let me give one example. We had separate negotiations on straits used for international navigation, co-chaired by Fiji and the United Kingdom. We had Satya Nandan doing one of his famous shuttle diplomacies on the archipelagoes. We had one negotiation on the exclusive economic zone and a separate negotiation on the continental shelf. But these mini-packages were interlinked.

I remember very clearly that when the negotiations on the rights of landlocked and geographically disadvantaged states in the exclusive economic zones of neighboring states were wrapped up, the coastal states said to us that this agreement was contingent upon the successful completion of the negotiations on the continental shelf. So, we had these linkages. But when all the subjects and issues on the agenda of Committee Two were successfully wrapped up, the delegations nevertheless said, "Listen, we had agreed that there would be a grand total package. So, although we have successfully wrapped up the Committee Two negotiations, these agreements are contingent upon our successfully concluding the negotiations in Committee One [on the deep seabed]."

Colson's View Too Narrow

In that sense, Hasjim Djalal is right--the conclusion of every negotiation is contingent upon and dependent upon the successful negotiation of every other subject and issue. And that is why I disputed David Colson's view--that in the beginning, the understanding was that all we were seeking to negotiate was a small package containing resource rights for coastal states and navigational and overflight rights for the great maritime powers. True, there was that package, but that was only one of the many interrelated packages forming the grand package that is the Convention.

Van Dyke: Professor Oxman, are you able to think back into the mid-1970s and recreate what the understanding was at that time on the package deal?

United States Favored Package Deal to Avoid the Pick and Choose Approach Taken Toward the 1958 Conventions

Bernard Oxman: The United States proposed that

the issues of the law of the sea be addressed sequentially in manageable packages. This approach was rejected not because of deep seabed mining but because the Latin American states were fearful that addressing the issues sequentially would limit their ability to gain support for a comprehensive 200-mile zone of jurisdiction. Of course, different states had different priorities. In the end, there was a decision to have a comprehensive conference. The United States itself came to favor a package deal approach to the comprehensive conference because of its experience with the 1958 Conventions: Those Conventions were not widely ratified, and the Convention that gave benefits to the coastal state, the Continental Shelf Convention, was much more widely ratified than those that tended to put restraints on the coastal state.

Cross-Bargaining Was Subtle

There was no package deal in the sense of cross-bargaining between issues that were not substantively related. In other words, nobody said, "I will give you straits transit if you will give me a seat on the Council of the Seabed Authority." That kind of bargaining almost never occurred overtly. It may have occurred on a more subtle level in terms of atmosphere, attitude, and general relations among delegations.

There were some exceptions. Certain behavior in the Second Committee with respect to certain issues would result in penalties to the United States in the First Committee. The penalties usually took the form of Third-World-oriented ideological speeches by certain South American states. Innocent, uninstructed delegates from other areas sometimes had no idea they were being manipulated in this manner. Thus, the United States was effectively restrained by its interests in the First Committee from supporting more actively the objectives of landlocked and geographically disadvantaged states in the Second Committee. But aside from situations like that, nothing much in the way of cross-issue linkage occurred.

Whether Reservations Should Be Allowed

A key test of the perceptions of the Conference occurred when we reached the issue of reservations in 1981 and 1982. It is my guess that a majority of delegates attending the negotiation of final clauses were not in favor of a blanket prohibition on all reservations. Each would have preferred one or two reservations but on different things, depending upon what bothered that delegation.

The four delegations that pressed for a virtually total prohibition on reservations were Mexico, Peru,

Singapore, and the United States. It was an interesting group because each had influence among different factions. These delegations successfully opposed reservations because they realized that if the reservation game got going, they or groups with which they were associated would have to start tearing apart the package. This leads me to believe that there was no real sense that the total Convention involved a total commitment to every article in terms of the actual preferences of states. In the end they yielded to holding the total package together for fear that if they started pulling it apart, it would all fall apart--the point that Professor D'Amato makes about customary law as well.

Everyone Wanted a Comprehensive Package Deal

Hasjim Djalal: I talked earlier of the 1970 UN General Assembly Resolution.[4] When we began the process of negotiation, we decided that the Law of the Sea Conference would be a comprehensive one. Those of us who were involved know very well that the original impetus was from the United States and the Soviet Union. Some say that both of them were cooperating with each other.

The original idea for the Conference was to deal with the matters of straits, fisheries, and the continental shelf. That was around 1967 or 1968. Seabed mining was added later on. At that time we thought, "What is in it for us?" Many nations were not particularly concerned about navigation. Certain nations did have fisheries problems at that time. Most nations were induced to come to the conference table by the idea of having a comprehensive conference dealing with all ocean problems facing the world. That is why we included about a hundred problem areas in the list of issues to be considered.

There were attempts during the negotiation to have a piecemeal conference. But these attempts were not generally accepted, and a comprehensive conference did take place.

The United States came to the Conference with the specific objective of having navigational rights guaranteed. Fine, every country had an objective. The developing countries' objective in the Conference was to insure that seabed mining was no longer a colonial issue. Our objective was that the seabed resources beyond the limit of national jurisdiction would not be exploited solely by those who have the means to do so, who would be colonizing the seabed. Our objective was

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[4] See Appendix B infra.

that the seabed resources should benefit mankind as a whole. That is why we put forward the common heritage principles. That is why we promoted the idea of a moratorium on mining. That is why we established an international regime for the seabed. We believed that by constructing appropriate compromises and by using the package deal approach, an equitable solution could be reached on all issues.

United States Acted in Bad Faith

Some people here will not agree, but I think there is an element of bad faith on the part of the United States. I would withdraw this statement if the United States or any nonsignatory said, "We do not like the Convention. We do not accept any of its provisions." The bad faith here is because the United States accepts only those provisions that are good for them and rejects the rest of a treaty negotiated as a package.

The United States Did Not Act in Bad Faith; the U.S. Political Process Prevents Ratification

Colson: I would like to comment on the charge made by Ambassadors Djalal and Koh that the United States negotiated in bad faith. All states enter a negotiation, whether it is the Third United Nations Conference on the Law of the Sea or a bilateral boundary agreement with their neighbors, not knowing whether they are going to ultimately succeed in the negotiations. Most states have a political process where their negotiators have to take that negotiation back home to their respective parliaments and see if they can sell it. If they succeed, then that state becomes bound to the provisions of that agreement; if they fail, that state is not bound.

The United States did not negotiate throughout the Conference in bad faith. The United States is unable to sign and to ratify this Convention. Maybe we were not good enough negotiators, but we were not able to attain a Convention that would meet the requirements of our own political processes. I do not know that it does anyone any good to try to identify where all of us--or if you want to simply point the blame at the United States--where we failed. But the fact of the matter remains that we were not able to look the Convention in the eye in 1982 and say: "This is an agreement that will achieve the advice and consent of the United States Senate." The answer was quite clearly, "No."

We have a problem today because many people are thinking, "Well, if the administration in the United States changes in another year, then possibly the United States will be able to modify its law of the sea views." I do not really believe that this issue should be examined in this manner because the problems

identified are fundamental ones. The problems in the United States Senate are going to remain whether we have a Republican or Democratic administration in the United States in 1985.

Does U.S. Position Parallel Convention EEZ Text?

Koh: I want to ask David Colson: If it is the position of the United States that, apart from Part XI of the Convention, the remaining provisions either reflect existing international law or reflect emerging international law, then is it not in the interest of the United States to enact domestic legislation or issue unilateral proclamations that follow faithfully the provisions of the Convention? In this respect, I want to ask him whether, in his view, the presidential proclamation on the exclusive economic zone (of March 10, 1983)[5] faithfully conforms to the provisions of the Convention on the EEZ or not? From what I have read, it seems to me that in at least three important respects the presidential proclamation deviates from the text of the EEZ in the Convention: the criteria of delimitation, the U.S. attitude on highly migratory species, namely tuna, and the provisions on marine scientific research.

The U.S. EEZ Proclamation

Colson: It was our intention to draft a proclamation that was consistent with the U.S. position respecting the economic zone provisions of the Convention. We have been criticized by some in the United States for going too far on several provisions in the economic zone proclamation policy statement. Specifically, with respect to the marine scientific research provision[6] and the provision on protection and preservation of the marine environment,[7] the criticism is that we did not attach all of the safeguards we might have to those two provisions. It was our intention to draft something consistent with the economic zone provisions of the 1982 Convention.

With respect to the boundary delimitation statement,[8] this statement reflects precisely the language in the original Truman Proclamation concerning the maritime boundaries of the United States, which has been our fundamental boundary position since 1945. We

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5 See Appendix A *infra*.

6 *Id.* at 553, 556, paras. 10, 25-26.

7 *Id.* at 551, 553, 557, paras. f, 11, 27.

8 *Id.* at 550-51, para. e.

would expect that the boundary provisions in Articles 74 and 83 of the LOS text are a gloss, a very superficial gloss, on international law as it pertains to maritime boundaries.

Some states, particularly some of our neighbors, might criticize us for our precise boundary statement in the economic zone proclamation. It is a statement of national position entirely consistent with the very general language of the LOS text.

Highly Migratory Species Issue Unresolved

The highly migratory species statement[9] was one of those provisions on which we had very detailed negotiations in 1975-76 to develop an article that would go a long way toward resolving the jurisdictional issues inherent in this problem. Those negotiations did not succeed, and we ended up again with a very general provision (Article 64). I would submit there was not a meeting of the minds at all concerning the exact obligations states would be undertaking concerning highly migratory species under Article 64.

It was well known that our views were not accepted by many other states that had very different views. Those states knew that the United States had a different interpretation of Article 64. We all struggled during the Reagan administration's review process with the question whether one could take the issue of the proper interpretation of Article 64 to the dispute settlement mechanisms under the Convention. We were never able to come up with the precise answer to that--although I concluded that one probably could take that issue to dispute settlement and, therefore, that the United States might have to submit its particular position to dispute settlement if it ratifies the Convention. That again would be something that politically would be very difficult to sell to the constituency that has a fond attraction to our position on the tuna issue.

With respect to marine scientific research,[10] we have not claimed research jurisdiction within our 200-mile economic zone, but we have stated quite clearly that we are prepared to accept the research jurisdiction exercised by other coastal states. I think we included some language to the effect that if a state exercises its jurisdiction in a "reasonable" manner generally consistent with the economic zone provisions and the marine scientific research provi-

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[9] Id. at 551, 553, paras. g, 9.

[10] Id. at 553, 556, paras. 10, 25-26.

sions of the Convention, the United States will have no problem with that.[11]

Possibly our pollution statement goes a little bit further than some would like to see it go and it arguably has gone beyond the Convention in some respects.[12] If we were to enact domestic legislation, which is the only way we could effectively implement any pollution standards within the 200-mile exclusive economic zone, we would clarify that particular point to insure that the jurisdiction the United States was asserting with respect to the marine environment would not go beyond that provided for in the 1982 Convention.

Effect of Congruence Between U.S. Proclamation and UN Convention

John Craven: I gather that Ambassador Koh would be less upset if the United States follows faithfully the limitations imposed by the Convention with regard to its exercise of jurisdiction within its exclusive economic zone.

Koh: John, it's not a question of my being more or less upset. The purpose of my question about the presidential proclamation on the exclusive economic zone and its congruence with the provisions of the Convention on the EEZ is this: It seems to me that it is in the interest of the United States itself to ensure that its national laws and legislation on various aspects of the Convention other than Part XI faithfully conform to the provisions of the Convention in order to justify its general view that apart from Part XI the rest of the Convention either is or reflects emerging customary law. To the extent that

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11 Id. at 553, para. 10.

12 The language in id. at 551, para. f does not include the qualifying language found in Article 56(2) of the Convention:

> In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions in this convention.

This language incorporates by reference the navigational rights, for instance, which limit the ability of a coastal state to exercise jurisdiction to control vessel-source pollution.

the United States adopts domestic laws that are different from the provisions of the Convention, it makes its general position even less credible.

Anthony D'Amato: I completely agree with the statement Ambassador Koh made. It would seem to me totally consistent for the United States to express approval in a unilateral declaration or statute of those parts of the Convention that it approves of in terms exactly the same as the Convention. I do not understand why the United States does not do this. I have suggested that if the United States were to sign a mini-treaty that includes all of the Convention except Part XI, that would accomplish the same thing.[13] If the United States does not want to sign such a mini-treaty, then it should pass legislation adopting the provisions of the Convention other than those on deep seabed mining. This action would reinforce the U.S. position that those aspects of the treaty are consistent with customary international law.

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[13] D'Amato, An Alternative to the Law of the Sea Convention, 77 Am. J. Int'l L. 281 (1983).

CHAPTER 3

CUSTOMARY INTERNATIONAL LAW AND THE LAW OF THE SEA CONVENTION

INTRODUCTION

This chapter examines the theories on the development of customary international law to determine whether part or all of the Convention is likely to become binding even on those nations that do not ratify it. Although a long shelf of literature has been written on how customary international law develops, the basic idea behind it is the relatively simple notion--essential for any legal system--that mandatory rules can come into existence without any formal agreement and without being put down in words. In every legal system, patterns of behavior are repeated over time so often that they become the expected way in which activities are carried out. If the behavior involves something of value, such as a transfer of goods, then others develop the expectation that the pattern will be followed faithfully for each transaction. Persons engaged in barter soon realize that they are obliged to follow the established pattern to meet the expectations of others about the transfer.

Nations similarly develop expectations based on past relationships with other nations and soon begin to rely on their expectation that the other nations will behave as they have in the past. When such repeated patterns of behavior are followed because of a belief that the nation is required to follow the pattern, then a rule of customary international law has emerged.

The challenge presented to scholars and diplomats looking at the present state of the law of the sea is to determine the impact of a decade of multinational negotiations and the Convention text that emerged on the customary international law of the sea. Must we wait and see what nations are going to do? Or can we look at this treaty--which has not achieved universal ratification--and say that certain parts of it--or even all of it--represent customary international law, because its rules represent a set of compromises that

achieved a near-consensus after years of deliberation and dealing?

There can be no question but that a multinational diplomatic conference can assist us in determining what is customary international law. Many principles will be discussed without controversy, and the debates can indicate that all nations agree that certain principles are obligatory rules they must follow.

But can one go further and argue that a treaty text developed over a long course of time, in a conference in which all major nations participated, is presumed to be the best evidence of customary law on the subject, and therefore that the burden of persuasion would be on a nation that seeks to argue that the rule is something other than what is in the treaty? Can one nation prevent a norm that all other nations agree upon from becoming a binding principle? Can some nations do so, but not others? What types of statements or actions are necessary for a nation to register its dissent from a principle that is generally accepted by all other nations? Can detailed rules become customary norms, or is the customary international law regime limited only to broader and less subtle principles?

Background and Theory

This chapter opens with three formal papers, each tackling aspects of this subject. Dr. R.P. Anand, dean of International Legal Studies at Jawaharlal Nehru University in New Delhi, presents an analytical review of how U.S. policy developed and eventually turned against the Convention. He focuses on the stated policy concerns of the Reagan administration and then comments on the law that we are left with at present by examining the nature of the customary law process. Dr. Anand also discusses an idea that Professor Anthony D'Amato has promoted--that the United States might achieve its goals by signing a treaty with like-minded allies that was identical to the Law of the Sea Convention in all respects other than the provisions on the deep seabed.

Professor D'Amato, of the Northwestern University School of Law, then gives his introductory paper, which examines in some detail how customary international law develops and how the doctrinal theories of customary international law apply to the present situation involving the law of the sea. Professor D'Amato is a leading scholar of customary law, and his insights guided the other participants throughout the workshop.

The next paper is given by Professor Bernard Oxman of the University of Miami School of Law, focusing on the exclusive economic zone. This expanded zone of coastal state jurisdiction is one of the major innovations that has achieved acceptance over the past

decade. The Convention describes and defines this zone in substantial detail, however, and Professor Oxman asks whether customary international law can absorb all these details. He speculates that the claims of coastal states may become customary law, but the restraints imposed by the Convention to protect navigational interests may not.

Professor Anatoly Kolodkin and Dr. Anatoly Zakharov of the Soviet Maritime Law Association then present a short paper on the Soviet position, which is similar to that expressed by the developing nations: The United States should not be permitted to benefit from the Convention through the backdoor of customary international law and should instead be required to accept the burdens of the Convention in order to obtain its benefits.

In the discussion that follows, the participants discuss the dynamics by which customary international law develops. Do some nations have more impact in this development than others? Can one nation "veto" a norm of international law from coming into existence? Must a certain amount of time pass before a norm can become accepted as binding through the customary law process? Will the United States achieve its goals by relying on customary law, or would it be better off by having its view of the navigational regime confirmed in a formal ratified treaty? Professor William Burke of the University of Washington School of Law comments on the "irony" of having a meeting on customary law because of the U.S. decision, since the United States fought so hard for so many years for a treaty because of its concerns about the vagueries of customary law (page 170 infra). Professor D'Amato then expands upon his paper by responding to the remarks of the other participants.

The Chinese Position

Professor Paul Yuan, now a visiting professor at the McGeorge School of Law in Sacramento, California, next presents a paper on the Chinese position. This position is also one of supporting the developing countries and the Convention, but China has some of its own special concerns regarding boundary delimitations. China has been reluctant to accept the idea of customary international law because of its view that this customary law is largely the product of Western nations without substantial input from the other nations of the world.

After a discussion on the implications of the Chinese position, David Colson gives his analysis of the articles in the Convention on boundary delimitations.

Drs. Kolodkin and Zakharov then give a short paper on the practices of the Soviet Union on the development

of ocean resources on the continental shelf and the exclusive economic zone, which is followed by an analysis by Brian Hoyle on the U.S. position on sharing the resources of the continental shelf beyond 200 miles.

All of these papers produce a lively discussion, which was perhaps best summarized by Professor Oxman, who said that a nation's view on how custom is created turns on what the nation's objective is (pages 159-60 and 178-80 infra). No one definition of how custom is created could be agreed upon, in part because the speakers' definitions were colored somewhat by their stance on the Convention itself. Professor D'Amato's definition appealed to some through its logic and simplicity, but he was unable to convince all participants to agree with his model. The discussion provides a rich collection of ideas on how custom is created, but the session closes with Ambassador Tommy Koh of Singapore pointing out that many important topics have yet to be discussed in the detail they demand (page 221 infra).

ODD MAN OUT: THE UNITED STATES AND THE UN CONVENTION ON THE LAW OF THE SEA

by

R. P. Anand

COMPREHENSIVE CONSTITUTION FOR THE OCEANS

On April 30, 1982, after nine years of intense, arduous, sometimes bitter, and protracted negotiations, the Third United Nations Conference on the Law of the Sea adopted "a comprehensive constitution for the oceans,"[1] a Convention that was said to be "the most significant international agreement since the Charter of the United Nations,"[2] providing a legal regime for nearly 70 percent of the Earth's surface. The Convention was put together through compromises and consensus in a Conference that was in session for 93 weeks, from December 1973 until

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1 U.N. Conference on the Law of the Sea, December 1982, Montego Bay, Jamaica, Sess., at 1, U.N. Doc. No. Sea/MB/Rev. 1 (1982) (opening statements of Tommy T.B. Koh, President of the UN Conference on the Law of the Sea) (hereinafter Koh statements).

2 U.N. Doc. SEA/MB/2 (1982) at 1 (statement of Edward Seaga, Jamaican Prime Minister); see also U.N. Doc. SEA/MB/15 (1982) at 2 (statement of Hugh L. Shearer, Jamaican Dep. Prime Minister and Foreign Minister) (hereinafter Shearer statements).

September 1982. It was the largest conference in history, in which 157 countries participated and 11 delegations attended as observers.[3] A consensus procedure was used during all the deliberations, requiring all delegations to make good-faith efforts to accommodate the interests of others. No votes were taken until the end, when--at the insistence of the United States--the Conference adopted the Convention by a vote of 130 for to 4 against, with 17 abstentions.[4] Based on numerous "mini-packages"--balanced compromises on at least 25 different contested subjects and issues, ranging from seabed production policies to rules for marine scientific research in offshore waters, negotiated in different fora--the Convention was accepted in the end as "a package" and "an integral whole."[5] The president of the Conference, Dr. Tommy Koh, explained:

> The Convention does not provide for reservations. It is therefore not possible for States to pick what they like and disregard what they do not like. In international law, as in domestic law, rights and duties go hand in hand. It is, therefore, legally impermissible to claim rights under the Convention without being willing to assume the correlative duties.[6]

The Convention was opened for signature on December 10, 1982, and 119 delegations signed immediately, the largest number ever to sign a treaty on the first day

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3 The Conference involved some 165 states and territories, eight liberation movements, 12 specialized agencies and other organizations, 19 intergovernmental organizations, and 57 non-governmental organizations. See The Law of the Sea, Official Text of the U.N. Convention on the Law of the Sea, with Annexes and Index (U.N. Sales No. E.83.V.5, 1983).

4 Voting against were Israel, Turkey, the United States, and Venezuela. The nations that abstained were Belgium, Bulgaria, Byelorussian SSR, Czechoslovakia, German Democratic Republic, Federal Republic of Germany, Hungary, Italy, Luxembourg, Mongolia, Netherlands, Poland, Spain, Thailand, Ukrainian SSR, USSR, and United Kingdom.

5 Koh statements, supra note 1, at 3-6.

6 Id. at 6.

it was opened for signature. These included 117 nations (15 from the developed countries, all of the Eastern bloc, and 92 developing countries) and delegations from two entities that are not full states (the Cook Islands and the U.N. Council for Namibia). Since then Japan, Mozambique, and Antigua have also signed and nine ratifications have been deposited with the U.N. secretary-general.

Background: The Concept of Freedom of the Seas

For a long time, the uses of the oceans were few--they were used as an avenue for communications, for fishing, and occasionally for fighting wars. The main concerns of the coastal states were security, protection of their near-shore areas for fisheries, and their commercial fleets. The law of the sea was the special concern of a few seafaring nations, and the shape and content of that law was determined largely by the dominant interests of the maritime powers. This "law" could be summed up in a general and rather vague concept called "freedom of the seas."[7] Although accepted as an undisputed principle--almost a dogma--that no one challenged for 200 years, the principle of the freedom of the seas was and is imprecise and uncertain. It provides merely that the "high seas" are open and cannot be subjected to sovereign control by any state, and that all states

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[7] Although the principle of the freedom of the seas had been propounded by a 17th century Dutch jurist, Hugo Grotius, it came to be accepted only in the late 18th or early 19th century in the wake of industrial revolution in Europe.

Grotius got his cue for the freedom of the high seas doctrine from Asian maritime practices during the 16th and 17th centuries. R.P. Anand, Origin and Development of the Law of the Sea: History of International Law Revisited 82-89 (1983).

Grotius was rejected as a false prophet, and Mare Clausum, written by John Selden at the behest of the English Crown in 1625, continued to be the most authoritative work on maritime law in Europe until the late 18th century. It was not until then that Grotius' Mare Liberum was reviewed and accepted. See Anand, Freedom of the Seas: Past, Present, and Future, in R.G. Girardot, H. Ridder, M.L. Sarin, T. Shiller (eds.), New Directions in International Law: Essays in Honour of Wolfgang Abendroth 220-21 (1982) (hereinafter Girardot).

must exercise the freedom of the high seas with reasonable regard for the interests of other states.[8] The hallmark of this law was nonregulation and laissez faire.[9]

POST-1945: A NEW WORLD

A phenomenal change occurred in international society after the Second World War. Colonialism collapsed and numerous independent states emerged in Asia and Africa that had not had any role in the formulation of international law. Comprising a large majority of the new extended world society, the Asian-African states--along with the equally disgruntled Latin American states--acquired a new influence in postwar society.[10] Law could not remain immune to all these changes. Unlimited freedom of the seas, which had served the interests of a few maritime powers in an age with limited uses of oceans, could not remain unchallenged or unchanged.

Change in the Old Law

The first serious challenge to the concept of the freedom of the seas came from the largest maritime power, the United States. In a proclamation made on September 28, 1945, President Truman claimed exclusive jurisdiction and control over the continental shelf and its resources off the coasts of the United States.[11] Other countries followed suit, and still others claimed wide fishing zones as well. Some of the Latin American states went even further and sought to extend their sovereignty to wide areas of the sea, up to a distance of 200 miles, claiming them as territorial seas.[12] In

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8 See 1958 Geneva Convention on the High Seas, done April 29, 1958, art. 2, 450 U.N.T.S. 82, 13 U.S.T. 2312.

9 See Henkin, Politics and the Changing Law of the Sea, 89 Pol. Sci. Q. 46 (March 1974).

10 See R.P. Anand, Legal Regime of the Seabed and the Developing Countries 7-30 (1975).

11 See 4 M. Whiteman, Digest of International Law 756-58 (1965).

12 See Girardot, supra note 7, at 226.

1958, four conventions[13] were concluded, which reasserted the traditional freedoms of the sea and also accepted coastal states' jurisdiction over the continental shelf.[14] Coastal states were permitted to extend maritime zones and adopt fishery conservation measures over adjacent waters, but no agreement could be reached about the limits of the territorial sea or fisheries jurisdiction.[15]

THE RENEWED CHALLENGE TO THE FREEDOM OF THE SEAS AFTER 1960

In 1967, Arvid Pardo of Malta argued before the UN General Assembly that the current law governing the sea was inadequate and that the freedom of the seas approach would encourage the appropriation of vast ocean areas found to contain untold wealth by those with the technological competence to exploit them. A new principle was needed to avoid such a scramble. He

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13 1) 1958 Geneva Convention on the Territorial Sea, done April 29, 1958, 516 U.N.T.S. 205, 15 U.S.T. 1606.

2) 1958 Geneva Convention on the High Seas, supra note 8.

3) 1958 Geneva Convention on Fishing and Conservation of Living Resources, done April 29, 1958, 17 U.S.T. 138, 599 U.N.T.S. 285.

4) 1958 Geneva Convention on the Continental Shelf, done April 29, 1958, 499 U.N.T.S. 311, 15 U.S.T. 471.

For all four conventions, see also 52 Am. J. Int'l L. 830, 834, 842, 851, 858 (1958).

14 A state has an exclusive right under the 1958 Convention on the Continental Shelf to exploit its resources up to a depth of 200 meters, or beyond that limit to wherever the depth of the superjacent waters admitted of exploitation of natural resources. Geneva Convention on the Continental Shelf, supra note 13, at art. 1.

15 Another attempt was made in 1960 to reach agreement on the territorial sea, but it also failed. See Anand, Winds of Change in the Law of the Sea in Law of the Sea: Caracas and Beyond 41 (R.P. Anand ed. 1978).

suggested that the seabed area be viewed as the "common heritage of mankind . . . not subject to national appropriation in any manner whatsoever, to be used and exploited for the exclusive benefit of mankind as a whole".[16] The General Assembly accepted Pardo's suggestion and established a Seabed Committee to prepare for the Third United Nations Conference on the Law of the Sea. In 1970 the Assembly unanimously adopted a Declaration of Principles Governing the Seabed and Ocean Floor, declaring that the seabed beyond national jurisdiction was not subject to national appropriation or sovereignty but was instead a common heritage that must be "exploited for the benefit of mankind as a whole...taking into particular consideration the interests and needs of the developing countries."[17] Earlier in 1969, the General Assembly had declared that the seabed must be exploited "under an international regime including appropriate international machinery." This declaration came over the objections of the technologically advanced countries, which wanted to maintain a legal right to exploit the new-found precious resources of the seabed. The General Assembly declared a moratorium on all exploitation activities in the seabed beyond national jurisdiction until such a regime became established.[18]

The Trend Toward Wider National Jurisdictions

As the Seabed Committee began preparing for the upcoming UN Conference between 1970 and 1973, nations accelerated their claims for broader jurisdictions over coastal waters to protect their security and economic interests.[19] Despite some nagging questions, the

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16 U.N. Doc. AC.1/PV.1516 (1967) at 6 (statement of Arvid Pardo).

17 G.A. Res. 2749(XXV), 25 GAOR Supp. (no. 28) 24, U.N. Doc. A/8028 (1970). The resolution was adopted by a vote of 108 to 0, with 14 abstentions from the Soviet bloc.

18 G.A. Res. 2574 D(XXIV), 24 U.N. GAOR Supp. (no. 30), U.N. Doc. A/7630 (1969); adopted by a vote of 68 to 28, with 28 abstentions.

19 Between 1967, when Pardo spoke out, and 1973, when UNCLOS III formally opened, the speed and frequency with which the nations asserted unilateral claims to the sea were almost dazzling. No less than 81 states are said to have asserted over 230 new jurisdiction claims of varying degrees of importance during this period. Swing, Who Will Own the Oceans?, 54 Foreign Aff. 527 (1976).

general trend toward extending the territorial sea to 12 nautical miles and creating exclusive economic zones of 200 nautical miles was confirmed at Caracas in 1974 and in the UNCLOS sessions that followed.20

Strategic Navigational Interests of the Maritime Powers

The maritime powers became increasingly concerned about the numerous unilateral extensions of jurisdictions, which were bound to affect the concept of the freedom of the seas. They were deeply worried about the danger of "creeping jurisdiction" threatening navigation, fishing, the laying of submarine cables and pipelines, and scientific research. An even more important and serious concern of the maritime powers related to the extension of the territorial sea to 12 nautical miles and its effects on freedom of navigation, especially through the nearly 116 strategic straits that would come completely within the coastal states' problematic jurisdiction and discretion. During negotiation the maritime powers left no doubt that unless "unimpeded passage on, over, and under straits used for international navigation was conceded to all commercial vessels and warships, including submarines, there was simply no possibility of coming to an agreement on the subject of national jurisdictions and other issues."21 The uncertain, restrictive, and subjective application of the "innocent passage" regime was not acceptable to the maritime powers.22 They indicated that to achieve

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20 Encouraged by this consensus, several developed countries--the United States, the Soviet Union, Norway, Canada, and the EEC countries--passed national legislations in 1975 and 1976 extending their fisheries jurisdictions or economic zones to 200 nautical miles. Several developing countries also gave legal form to their claims of a 12-nautical-mile territorial sea. See Anand, supra note 15, at 216-17.

21 See Stevenson and Oxman, The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session, 69 Am. J. of Int'l L. 5 (1975).

22 Under the innocent passage regime as it was then understood, passage of warships was not beyond dispute: Submarines had to navigate on the surface and show their flag; coastal states had the discretion to decide, at least initially, whether passage by certain ships, such as nuclear-powered ships or oil tankers, was or was not innocent; and aircraft had no freedom of innocent passage.

their navigational goals they were prepared to make concessions on other issues, like exploitation of deep seabed resources,[23] and would accept broad coastal state jurisdictions over resources and the claims of archipelagic states.[24] The maritime powers achieved their goals, in spite of the misgivings and apprehensions of some smaller coastal states and strong protests by a few strait states that their security was no less important.[25] Guaranteed nonsuspendable transit passage through straits and archipelagic waters came to be accepted, subject only to the power of the coastal state to make certain rules for the safety of navigation, regulation of marine traffic, and prevention of pollution and fishing (see Articles 37-44).[26]

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23 The Nixon administration was prepared to go through with this trade-off. See Ratiner, The Future of Seabed Mining in 1 Minerals Economic Symposium, Materials and Society 461 (1983).

24 Most of the objections to wide archipelagic claims of countries like the Philippines and Indonesia were raised because these claims threatened international navigation. See Anand, Mid-Ocean Archipelagos in International Law: Theory and Practice, 19 Indian J. Int'l L. 250 (1979).

25 For a very strong objection by Spain, see 1 The United Nations Third Conference on the Law of the Sea Official Records 172-73. For another by El Kohen of Morocco, see id. at 178-79.

Besides Spain and Morocco, Egypt, Iran, Oman, Malaysia, and Yemen opposed the maritime powers on the straits navigation issue. See Anand, Origin and Development of the Law of the Sea: History of International Law Revisited 213 (1982).

26 The maritime powers appear to have obtained even more concessions on transit passage than they expected. They were mainly concerned about the 116 straits that were more than six miles wide, which under the traditional three-mile rule had a central belt of high seas. High seas freedoms would be lost in such straits with coastal state territorial seas of 12 miles. Under the Convention, however, free transit was guaranteed not only in straits wider than six miles, but in all straits, irrespective of their breadth or importance, "which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." (Article 37)

The Seabed Beyond the Limits of National Jurisdiction

The issue that continued to divide the conferees was the mining of the deep seabed manganese nodules. It is important to note that all nations accepted the idea that the resources of the deep seabed are the common heritage of humankind. This principle was iterated and reiterated by the UN General Assembly in numerous resolutions.27 It not only symbolized the interests, needs, hopes, and aspirations of the developing countries, but had been endorsed by all the developed countries including the United States.28

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27 See Van Dyke and Yuen, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?, 19 San Diego L. Rev. 493, 526-27 (1982).

28 As early as 1966, President Johnson wanted to "ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings". Address by President Lyndon Johnson at the Commissioning of the ship Oceanographer, July 13, 1966 (cited in E. Wenk, The Politics of the Ocean 258 (1972)). In 1970, President Nixon, renouncing all sovereign rights to the seabed and its resources and announcing the American policy of helping to establish an international machinery to administer the licensing of exploration and exploitation of the resources of the seabed, declared:

> The International Seabed Area would be the common heritage of mankind and no state could exercise sovereignty or sovereign rights over this area or its resources.

Summary of Provisions of the Draft Proposed by the United States for a 'U.N. Convention on the International Seabed Area' Aug. 3, 1970, 65 Am. J. Int'l L. 179, 180 (1971) (emphasis added). Even after the United States became frustrated with the slow progress in UNCLOS III and decided to enact an interim legislation for the exploration and exploitation of deep seabed resources to prod the Conference into expediting its work, it acknowledged the commitment of the United States to the principle of the "common heritage" in the U.S. Deep Seabed Hard Minerals Resources Act of 1980:

> (7) On December 17, 1970, the United States supported (by affirmative vote) the United Nations General Assembly Resolution

(Footnote continued)

However, although the seabed beyond the limits of national jurisdiction had come to be unanimously accepted as the common heritage of mankind, there was much dispute and little agreement about how this area should be exploited for the benefit of all.29

The U.S. Initiative on Deep Seabed Mining

The United States proposed in April 1976 a parallel system of exploitation by both the International Authority and private companies. This proposal was coupled with indications that the developed world would finance the operating arm of the Authority and provide the technology for its operations.30 These U.S. proposals were included in the Revised Single Negotiating Text of May 1976. By

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28 (continued)

2749 (XXV) declaring inter alia the principle that the mineral resources of the deep seabed are the common heritage of mankind, with the expectation that this principle would be legally defined under the terms of a comprehensive international Law of the Sea Treaty yet to be agreed upon.

See U.S. Deep Seabed Hard Minerals Resources Act of 1980, 30 U.S.C. § 1401 et seq (1982) (emphasis added).

29 See Anand, The Legality of Interim Seabed Mining Regimes, 29 Foreign Aff. Rep. 36-37 (New Delhi, Feb. 1980).

30 Secretary of State Henry Kissinger suggested a system under which each potential "contractor would propose two mine sites for exploitation." The Authority would then select one of these sites, which would be kept in a "bank" to be "mined by the Authority directly or made available to the developing countries at its discretion. The other site would be mined by the contractor on his own".

The United States also offered a contribution on September 8, 1976, so that the international enterprise would have the financial resources and technological means to proceed with the exploitation of the resources of the deep seabed almost on a par with the technologically developed countries. As part of the package approach, it proposed a review, perhaps in 25 years, to determine if the provisions of the treaty regarding the system of seabed

(Footnote continued)

the end of the Ninth Session of the Conference in August 1980, a consensus seemed to be emerging on almost all issues and the Draft Convention was produced by the delegates "with a sense of accomplishment and high expectations that they were entering the home stretch".31

The Reagan Administration Demands a Review of the Draft Convention

This optimism proved unjustified, because on March 2, 1981, the Reagan administration called for a halt in the treaty negotiations in the Tenth Session until it could review the Draft Convention. Smelling "an ideological rat"32 in the establishment of the International Sea-Bed Authority, which was described as "nothing less than a new Socialist international economic order,"33 the new administration expressed strong reservations about the precedents that might be set by establishing the International Sea-Bed Authority.34 The treaty process came to a grinding

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30(continued)
exploitation were working adequately. Kissinger, The Law of the Sea: A Test for International Cooperation, 75 Dept. of State Bulletin 395 (1976) (Speech of April 8, 1976, in New York); Oxman, The Third U.N. Conference on the Law of the Sea: The 1976 New York Session, Am. J. Int'l L. 247, 254 (1977).

31 Richardson, The Politics of the Law of the Sea, 11 Ocean Dev. & Int'l L. 10 (1982). Elliot Richardson was the U.S. ambassador to the Law of the Sea Conference in 1977-80.

32 Nossiter, Under Water Treaty: The Fascinating Story of How the Law of the Sea Was Sunk, Barron's, July 26, 1982, at 10.

33 See Larson, The Reagan Administration and the Law of the Sea, 11 Ocean Dev. & Int'l L. 289 (1981).

34 See generally id. at 300 (quoting Congressman John B. Breaux of Louisiana), Law of the Sea: Hearings Before the House Subcommittee on Oceanography and the House Committee on Merchant Marine and Fisheries on the Status of the Law of the Sea Treaty Negotiations, 97th Congress, 1st and 2d Sess. 20-21 (1982) (hereinafter LOS Hearings) (statement of John Breaux).

See also Ratiner, The Law of the Sea: A Crossroads for American Foreign Policy, 60 Foreign Aff. 1008 (1982).

halt. "The reaction to the U.S. policy review was characterized by bewilderment and frustration."[35]

U.S. Conditions for Acceptance of the Draft Convention

After a ten-month policy review, President Reagan announced on January 29, 1982, that the United States would return to the negotiating table and try to achieve an acceptable treaty. He stated that "while most provisions of the draft convention are acceptable and consistent with U.S. interests, we will seek changes" in the deep seabed mining regime so that the treaty would

> (1) not deter development of any deep seabed mineral resources;
>
> (2) assure national access to these resources...to avoid monopolization of the resources by the operating arm of the international authority;
>
> (3) provide a decision-making role in the deep seabed that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
>
> (4) not allow for amendments to come into force without approval of the participating states...;
>
> (5) not set other undesirable...precedents for international organizations; and
>
> (6) be likely to receive the advice and consent of the Senate. In this regard the Convention should not contain provisions for the mandatory transfer of private technology and participation and fundings for national liberation movements.[36]

In preparation for a complicated negotiation, the United States delegation circulated an informal working paper on February 24, 1982, outlining all of the U.S. problems and suggesting a wide variety of solutions. Both the Third World and the Soviet group rejected this

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35 Larson, supra note 33, at 383.

36 2060 Dept. of State Bulletin 54 (March 1982).

paper and demanded that the United States prepare concrete textual proposals. The U.S. delegation then produced a 68-page booklet with a splendid green cover, which proposed amendments to more than half of the seabed provisions. The Group of 77 described this "green book" as an outrage and rejected it as a basis for discussion in less than 24 hours. "[N]ot a single Western industrialized country even gave consideration to supporting the 'Green Book' of amendments-- and all cautioned that the 'Green Book' might overload the Conference circuits."[37] Deeply concerned about the U.S. move and uncertain about its motives, the Conference delegates did not want to wait indefinitely to complete their work. They wanted to finish the task on schedule, with or without the United States. The Conference was busy resolving the three outstanding issues: the participation of non-state entities in the Convention, the creation of a Preparatory Commission to create the new International Sea-Bed Authority, and the issue of protection of preparatory investments, or "grandfather rights."[38]

Pioneer Investors

A number of Western industrialized countries whose private consortia had already invested heavily in exploring the deep seabed area were concerned with securing "grandfather rights" to protect these investments. The Conference adopted a resolution that provided for states and private investors to register with the Preparatory Commission as "pioneer investors."[39] This registration will entitle them to explore--but not exploit--a selected area of the seabed until the Convention comes into effect. It will guarantee them priority over all other miners--except the Authority's own Enterprise--once the Authority permits commercial production of the deep seabed.[40]

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37 U.S. Foreign Policy and the Law of the Sea, Hearings Before the House Committee on Foreign Affairs, 97th Congress, 2d Sess. 193-95 (1982) (hereinafter House Hearings) (statement by Leigh S. Ratiner, Dept. Chairman of the U.S. Delegation to the 11th Session to the Third UN Conference on the Law of the Sea).

38 See id. at 195-96 (statement of Ratiner).

39 Res. II, Law of the Sea Convention, supra note 3, at 177-82.

40 To qualify as a pioneer investor an applicant must have spent at least $30 million on seabed activities

(Footnote continued)

Preparatory Commission

Resolution I established the Preparatory Commission to prepare for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea. The Preparatory Commission is also empowered to draft the rules, regulations, and procedures necessary to enable the Authority to commence its functions and to exercise the powers and functions

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40 (continued)
by January 1, 1983. However, developing countries (other than India, which is provided for separately) will have until January 1, 1985, to qualify. Currently, only eight entities can qualify for pioneer status. The first group consists of France, Japan, India, the Soviet Union, and their state enterprises and corporations. The second group consists of entities made up of firms having the nationality of or controlled by one or more of the following: Belgium, Canada, the Federal Republic of Germany, Italy, Japan, the Netherlands, the United Kingdom, and the United States.

During the pre-Convention period, pioneers are to be confined to exploration or prospecting for polymetallic nodules in an allocated area. The applicant has to present an area large enough for two commercial mining operations. The Preparatory Commission will then allocate one part to the pioneer investor and reserve a commercially equivalent second part for development by the Enterprise. Once the Convention enters into force, these pioneer investors will be guaranteed entry into the seabed mining area, but only if their certifying states have ratified the Convention. For consortia from North America and Western Europe, the Resolution requires that all the states whose firms comprise a given consortium must have ratified the Convention before that entity can receive a contract from the Authority. In the event of nonratification by a certifying state, a pioneer can alter its nationality and sponsorship. The pioneers must apply to the Authority for a mining contract within six months from the entry into force of the Convention. Each pioneer will obtain the right to produce up to a specified amount of minerals according to a production control formula aimed at linking seabed production to a share of the increase in world nickel consumption, so as not to harm land-based producers.

(Footnote continued)

assigned to it in Resolution II on the treatment of preparatory seabed investments. The Preparatory Commission began meeting in early 1983.41

Participation

After years of discussion, the Conference agreed on participation by intergovernmental organizations and reached compromises on participation by national liberation movements, by governments that are not fully independent, and by Namibia. A compromise resolution was adopted to protect the rights and interests of peoples in non-self-governing and disputed territories with regard to matters covered by the Convention.42

New Initiatives and Frustrations

Meanwhile, the United States and its allies, the Group of 77, and the Conference leadership tested each other's nerves and resolve. Eighteen pages of formal amendments were submitted by the United States and six other industrialized countries.43 Eleven smaller industrialized countries of the West,44 concerned that

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40 (continued)
The resolution also spells out the commitments a pioneer investor must undertake to ensure that the Enterprise can efficiently carry out seabed activities. These commitments include the obligation to transfer seabed technology as well as assurances from the certifying states that funds will be made available to the Enterprise in a timely manner. The four Western Consortia are: 1) Kennecott Consortium, 2) Ocean Mining Associates, 3) Ocean Management Corporation, and 4) Ocean Minerals Company. The French consortium that could qualify is the Association Francaise pour l'etude et la recherche des nodules. The Japanese consortium that could qualify is the Deep Ocean Minerals Association. 19 U.N. Chronicle 10-11 (June 1982).

41 See pages 28-31 supra.

42 19 U.N. Chronicle, supra note 40, at 9.

43 Belgium, France, FRG, Italy, Japan, and the United Kingdom. See U.N. Doc. A/Conf.62/L.12 (1982).

44 Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden, and Switzerland. U.N. Doc. A/CONF.62/L.104 (1982); see also Mazzafero, Law of the Sea: Convention on the Law of the Sea, U.N. Doc. A/CONF.62/125, adopted April 30, 1982, 23 Harv. Int'l L. J. 459 (1982).

the U.S. opening position was too extreme but feeling that its participation was important, submitted a package of informal proposals addressing some of the U.S. concerns. The Group of 77 remained quiet for nearly four weeks and waited for the U.S. response to the eleven-nation amendments. The U.S. delegation was under intense pressure from Washington, and "rejected the package even as a basis for negotiation."[45] The Conference, and particularly the developing countries, began to feel that the U.S. appetite was too great and could not be satisfied by any changes to the Convention.

When the impasse became apparent, the U.S. delegation sought new instructions from Washington, and on April 13 they submitted a streamlined 24-page set of formal amendments. Because the U.S. demands remained "quite long and extreme," the Conference was convinced the United States was not a serious negotiating partner. The Group of 77 did not formally reject the latest U.S. package, but the negotiations were effectively over.[46]

A Dissatisfied United States Rejects the Convention

Even in this "desultory and pessimistic atmosphere" Conference President Tommy Koh made a last-ditch attempt to organize negotiations to satisfy the United States beyond the Resolution II "grandfather rights" agreement, which was widely believed to be generous.[47] As the largest consumer of metals mineable from the seabed, the United States was guaranteed a seat on the governing Council of the Sea-Bed Authority. Some changes in the process for amending the seabed mining provisions and approving contracts for mining entities were also made;[48] however, none of these changes even remotely satisfied the "ideologically rigid" stand taken by the United States.[49] In the end all of these efforts to arrive at a consensus failed.

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45 House Hearings, supra note 37, at 199 (Ratiner statement); see also LOS Hearings, supra note 34, at 233 (Ratiner statement).

46 House Hearings, supra note 37, at 199-200 (Ratiner statement).

47 Ratiner, supra note 34, at 1016. See also House Hearings, supra note 37, at 201 (Ratiner statement).

48 Id.

49 See House Hearings, supra note 37, at 201 (Ratiner statement).

On April 30, the United States called for a vote and voted against the Convention along with Israel, Turkey, and Venezuela. The smaller countries that opposed the Convention did not share the U.S. views on the treaty, but had entirely different reasons for their negative votes.[50] The Soviet group, Thailand, and the West European countries abstained but kept their options open to sign the Convention. On July 9, 1982, President Reagan said that the Convention "contains many positive and very significant accomplishments. Those extensive parts dealing with navigation and overflight and most other provisions of the Convention are consistent with U.S. interests, and, in our view, serve well the interests of all nations," but "the deep seabed mining part of the Convention does not meet U.S. objectives." For this reason, he declared that the United States would not sign the Convention.[51]

The U.S.-Perceived Flaws of the Convention

According to the President's announcement, the Convention was seriously flawed. James L. Malone, the leader of the U.S. delegation, later stated that these flaws related to (1) production limitations; (2) transfer of technology; (3) the decision-making process through majority rule, especially in the amending process; and (4) the possibility of national liberation movements like the P.L.O. sharing in its benefits.[52]

1. Production Limitations

Many observers, including several American negotiators, have pointed out that most of these perceived flaws either did not exist or were easily

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50 Israel voted against the Convention because it gave the P.L.O. official standing. Turkey wanted to make reservations to certain provisions, which is not allowed under the Convention. Venezuela voted no because of its opposition to provisions on the delimitation of marine and submarine areas between states with opposite or adjacent coasts. 19 U.N. Chronicle, supra note 40, at 16, 22.

51 President Reagan, Law of the Sea and Ocean Policy, 416 Current Policy 1 (Bureau of Public Affairs, U.S. Dept. of State 1982).

52 Id.; See also House Hearings, supra note 37, at 84-89 (statement of Ambassador James Malone, asst. sec. of state for oceans and int'l env. and sci. affairs).

manageable. Thus, despite the Sea-Bed Authority's power to control mineral production on the basis of a complicated "nickel formula,"53 virtually all experts agree that, based on any plausible prediction about future markets, the production ceiling would not be reached. A recently published study by the U.S. Department of Commerce stated that

> While the principle of production limit is objectionable, in practice the limit is unlikely to come into effect or affect free market forces within the next 20 years.54

2. Transfer of Technology

Similarly, the provisions relating to transfer of technology, which have generated outrage in the U.S. mining industry and have been subjected to bitter attack by the Reagan administration, are not really of much consequence.55 The Convention stipulates that contractors shall make technology available to the Authority "on fair and reasonable commercial terms and conditions" for the first ten years of the Enterprise. Only if the same or equally efficient and useful equipment is not available in the open market and the contractor is legally entitled to transfer will it be obliged to do so. In the case of technology owned by a third party and used by the contractor under a special agreement, the contractor will be bound under certain circumstances to acquire the right to transfer such technology to the Enterprise. Those same technology transfer options will be available to a developing country the Authority has authorized to exploit a

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53 Article 151(4) (devised by American economists) limits production by tying it to projected growth in the world demand for nickel.

54 It is estimated that a total of ten seabed mining entities may be entitled to all the mineral production likely or possible from the seabed for the next 40 or 50 years. The metal market projections indicate that the demand for minerals available from manganese nodules (manganese, copper, cobalt, and nickel) is unlikely to reach, much less exceed, the production capacity of these guaranteed miners during that period. House Hearings, supra note 37, at 171 (statement of Paul N. McCloskey, Jr.); LOS Hearings, supra note 74, at 225; see also Whitaker, Washington Outside the Mainstream, Atlantic 22 (Oct. 1982).

55 See Ratiner, supra note 34, at 1015.

reserved area of the seabed.[56] According to studies conducted by the U.S. Department of the Interior, the seabed technology is now or will be available on the open market. Therefore, the practical impact of these provisions is minimal.[57] Another study by the U.S. Department of Commerce concludes that the Convention, "while having burdensome and undesirable features, can provide a stable business environment."[58] The technology transfer provisions apply only to the recovery of nodules from the seabed, and not to their transportation, processing, or marketing. Moreover, obligations in this regard will cease 10 years after the Enterprise has itself begun commercial production.

3. The Decision-Making Process

Given the vast differences among states in political power, economic strength, geographical size, and population count, decision-making processes in international organizations have always been a subject of intense controversy and bitter dispute. The Convention defines the Sea-Bed Authority's one-nation-one-vote Assembly as "the Supreme Organ," but the real responsibility for conducting business on a day-to-day basis is explicitly given to the Authority's 36-member Council, on which the United States is guaranteed a seat if it signs the treaty. On virtually all important issues the United States would either have veto power or would need only to obtain eight concurring votes in the Council to prevent an adverse decision. In any case, the chief U.S. concern was to get guaranteed access to seabed mining. This was assured, as we have seen earlier, under Resolution II Governing Preparatory Investment in Pioneering Activities Relating to Poly-metallic Nodules (PIP Resolution). The resolution guarantees automatic access for all existing U.S. mining companies to their first mine site and highly probable access to future mine sites should market conditions warrant.[59]

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56 Law of the Sea Convention, supra note 3, at Annex III, art. 5; see generally Van Dyke and Teichmann, Transfer of Seabed Mining Technology: A Stumbling Block to U.S. Ratification of the Law of the Sea Convention?, 13 Ocean Dev. & Int'l L. J. 427 (1984).

57 See Whitaker, supra note 54, at 22.

58 House Hearings, supra note 37, at 171 (quoted by McCloskey).

59 See LOS Hearings, supra note 34, at 225-26 (Ratiner statement).

4. The Review Process

One major irritant for the United States was related to the provision for review of the parallel mining system. This review is to take place 15 years after the start of the first commercial production authorized under the Convention (Article 155). It was included at the insistence of the developing countries, which did not want to commit themselves indefinitely to the parallel system. Under this article, if agreement on changes is not reached by a Review Conference within five years after its commencement,[60] the Conference may decide during the ensuing 12 months, with a three-fourths majority of the parties, to adopt and submit to the parties for ratification such amendments changing or modifying the system as it determines necessary and appropriate. These amendments become binding if ratified by three-fourths of the parties (Article 155(4)). This provision was strongly opposed by the United States because such amendments to a deep seabed mining regime

> could automatically enter into force for the United States upon approval by three-fourths of the states parties and thus effectively bypass U.S. approval, including Congressional advice and consent. Our only recourse would be denunciation of the Convention, an unacceptable choice.[61]

The amendment process has been couched in a drawn-out procedure and hedged with many precautions. It is impossible to imagine that the Review Conference could ever adopt amendments that would be so strongly opposed by the United States, with all its influence and power, that it would have to abandon the Convention.[62] No commercial mining of the seabed is expected before 1995, and the PIP Resolution protects the entire first generation of mining. Part XI of the Convention relating to the seabed regime (including the amendment process) is not expected to become applicable until

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60 Decisions will be made in the review process in much the same way they were made in the Conference. All efforts will be made to reach consensus and there will be no voting until all efforts to reach consensus have been exhausted. See Article 155(3).

61 House Hearings, supra note 37, at 87 (Malone statement).

62 See Whitaker, supra note 54, at 23.

2020 at the earliest, that is, at the end of the interim period.

5. The Status of National Liberation Movements

The United States is emotionally opposed to a provision allowing "peoples who have not attained full independence or other self-governing status" to be recipients of benefits accruing from the "common heritage of mankind" (Article 140). This provision, it is feared, "would allow funding of national liberation groups, such as the PLO or SWAPO."[63] This fear appears to be unfounded, because if the United States joins the Convention, it will have a guaranteed seat on the Council of the Sea-Bed Authority and an absolute veto power over the distribution of benefits to various nations and "peoples".[64]

6. Other Objections

The treaty has also been criticized by its opponents in the United States because:

(a) It establishes the common heritage principle, under which the developing nations claim "a right to share some of the resources produced by others' capital, effort, intelligence, and spirit of adventure." This amounts to "declaring a right to steal--nothing more or less."[65]

(b) Although the U.S. companies' interests as pioneer investors have been protected, the PIP Resolution also allows the Soviet Union, Japan, and other countries to achieve pioneer investor status, even though their seabed mining activities have been limited.

(c) Pioneer investors will have to assume heavy financial obligations in addition to those contained in the Convention.

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63 House Hearings, supra note 37, at 87 (Malone statement).

64 See Article 161. LOS Hearings, supra note 34, at 225 (Ratiner statement).

65 LOS Hearings, supra note 34, at 278 (Gary Knight statement, The Impact of the Third Law of the Sea Conference on Ocean Industry: Or There is Such a Thing as a Free Lunch and Capitalism is Paying for It).

(d) The Convention creates a supranational mining company called the Enterprise.

(e) The United States will give subsidies to the Enterprise, which will operate in unfair competition with U.S. companies.

(f) The totality of the system appears to be bureaucratically oppressive.[66]

(g) The so-called "guaranteed seat" for the United States on the Council was not designated by name, but rather assigned to the largest consumer of the minerals coming from the seabed. It is not, therefore, a "legal guarantee." The Soviet bloc was guaranteed three seats on the Council by name.[67]

(h) Even with a guaranteed seat on the Council, the decision-making process of the Council was unacceptable.[68]

(i) It is also argued that the Convention will not be ratified by the Senate.

All of these concerns could probably be tolerated by private companies from a strictly business point of view or could have been modified. The basic objection of the Reagan administration was ideological. As deputy chairman of the U.S. delegation, Leigh Ratiner said:

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66 For support of such views from several witnesses in their statements before a Congressional Committee, see House Hearings, supra note 37, at 4-21, 70 ff (Kronmiller), 181-83; Bandow. Sink the Floating OPEC, Reason 29-32 (Oct. 1982); Safire, Son of Law of Sea Sellout, N.Y. Times, May 3, 1982, at A19; Meese, Seabed? No Bed of Nails, N.Y. Times, Feb. 21, 1983, at A17.

67 House Hearings, supra note 37, at 181 (Kronmiller statement).

68 Id. at 182; Hearings on the Law of the Sea Negotiations Before the Senate Committee on Foreign Relations Subcommittee on Arms Control, Oceans Int'l. Operations, and Env., 97th Congress, 1st Sess. 108-09 (1981) (hereinafter Senate Hearings) (statement of Kronmiller).

> The primary U.S. objective, in fact, was the eradication of ideological impurity. As a result, when the time came for compromise, the United States did not make ideological concessions to the Third World in exchange for pragmatic improvements.69

According to some American observers, UNCLOS III was "a process of governments establishing more government" and inhibiting production.70 They felt that "to the extent the majority legislates that the minority must contribute excessive sums of money, technology and expertise, to be redistributed to the non-contributing majority. you have a system of stealing under the guise of a democratic process--nothing more, nothing less."71 According to this view, the avowed purpose of establishing a seabed mining regime was the establishment of a new international economic order; but this really meant "how to get something for nothing on a global scale." It was "simply a plan for stealing from those who create and distributing to those who do not create."72

A Reciprocating States Agreement as an Alternative?

Before the Eleventh Session of UNCLOS III, it seemed no one had seriously considered the possibility of a Law of the Sea regime that did not include the United States. Throughout the long years of negotiations the deepest fear of advocates of a comprehensive treaty was that no treaty would ever emerge. The Reagan administration strongly opposed the deep seabed mining provisions of the draft Convention. Staunch opponents of the treaty in the administration apparently assumed that America's European allies would not join the regime without the United States.

Arguing that seabed mining should be considered one of the traditional freedoms of the sea, they

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69 Ratiner, supra note 34, at 1012. For similar views, see House Hearings, supra note 37, at 90 (Richardson) and 83-84 (Leach); see also Curtis, Sign the Sea Law Treaty, N.Y. Times, Feb. 21, 1983, at A17.

70 LOS Hearings, supra note 34, at 279 (Knight statement).

71 Id.

72 Id.

counted on Europeans to join a mining regime with the United States for seabed mining. Before the Tenth Session of the Conference, Reagan officials campaigned actively to draw the British, Germans, and French into a compact to organize seabed mining outside the Law of the Sea Treaty. By the end of February 1982, the United States and its three principal European allies had virtually completed negotiations on a reciprocating states agreement, but they refrained from signing it during the Conference. Once the United States decided it would not sign the Convention, it sought to "sabotage" it by signing "in semi-secrecy" on September 2, 1982, "interim arrangements" with Britain, France, and West Germany.[73] The new four-power pact is intended to resolve conflicts over overlapping claims by pioneer deep seabed mining operators.[74] Although aimed at safeguarding "investments made in exploration, research and other pioneer activities relating to the polymetallic nodules of the deep seabed," it emphasizes that the agreement is "without prejudice" to any sea-law treaty signed by any of the parties. It also provides that additional states may be invited to accede to the agreement, but only with the consent of the original four members.[75] The United States expected or at least wanted the agreement to be a viable alternative mini-treaty.[76] It is equally clear that its European allies wanted to keep their options to sign the Law of the Sea Convention open. Shortly before the Jamaica signing of the Convention, President Reagan sent a representative to the U.S. allies to explain "to them once more the unwisdom of turning the U.N. into a global business enterprise with a death grip on an important new technology."[77] There was undoubtedly a lot of arm twisting before the Jamaica session in December 1982. Out of 142 countries that participated, 25 countries did not sign the Convention, including Britain, West Germany, Japan, Italy, and Belgium; however, France signed and in February 1983 so did Japan. France, with its island possessions, has the third largest economic zone in the world, which it

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[73] Marello, Semi-Secret Sabotage, Far E. Econ. Rev., Oct. 8-14, 1982, at 62.

[74] Id.

[75] Id. at 62-63.

[76] House Hearings, supra note 37, at 98-99.

[77] Victory at Sea, Wall Street Journal, Jan. 11, 1983, editorial sec., at 30.

does not want jeopardized. Despite the pressure on Britain, its industry generally backs the Convention. Britain can best safeguard its main interests of navigation and oil on its vast continental shelf from within the Convention. Germany supports the United States, perhaps partly because it is almost entirely deprived of coastal resources. Germany came under particular pressure when the Conference selected Hamburg as the site for the treaty's dispute settlement tribunal. This is the first time since the Second World War that Germany has attained this kind of international acceptance.[78] President Reagan reaffirmed his rejection of the Convention on December 20, 1982, by announcing that the United States would withhold its pro rata share of the UN budget that funded the Preparatory Commission.[79]

The Negative Role of the U.S. Mining Interests

Several U.S. mining consortia have been guaranteed access as pioneer investors to seabed mining sites under the PIP Resolution, but U.S. mining companies have nonetheless strongly opposed the Law of the Sea Convention.[80] The mining interests suspect that the

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78 See Whitaker, supra note 54, at 26.

79 Victory at Sea, supra note 77, at 30.

80 Conrad Welling's argument against the Convention to Congress on behalf of the American Mining Congress included the following:

(1) It would create a government controlling an area that exceeds half the globe with legislative powers and a huge bureaucracy able to approve or deny access to seabed resources, dedicated to the principles of the New International Economic Order, in "which the voting arrangements would reduce the voices of the United States and other Western nations to bare whispers."

(2) It would strip the United States of any status in the Sea-Bed Authority commensurate with its international stature, influence, and activities, and bestow on it the dubious privilege of paying for 25 percent of the budget of this new government for an indefinite period, as well as financing the establishment of a supranational mining company, the Enterprise, that could even-

(Footnote continued)

Law of the Sea Treaty "would demand that the developed nations of the world supply the know-how and the capital to develop deep-sea mining, but leave the ownership and control of the resources to the developing nations."81 They assert, therefore, that the present Convention is "unfavorable to ocean mineral development, biased against private capital, and unacceptable to the free world mining industry."82 In the spring of 1982 the four consortia, which include the U.S. companies and the French group, signed a private arbitration agreement that would provide a means to resolve possible overlapping claims among them. In July 1982 they signed a secrecy agreement to

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80 (continued)
tually monopolize production of seabed minerals. This is fundamentally a bad idea that could lead to many difficulties in the future.

(3) It does not provide a basis for U.S. industry to invest in commercial-scale mining operations because (a) the treaty does not provide U.S. firms with assured and nondiscriminatory access, under reasonable terms and conditions, to seabed minerals; (b) the PIP Resolution creates doubtful and costly rights for the existing consortia, freezes out all new entrants from the United States, and provides special protection for Third World consortia not yet formed; (c) application procedures place too much discretion in the hands of the Sea-Bed Authority; (d) security of tenure is lacking; (e) the treaty establishes an array of inflationary and market-distorting production controls; (f) it compels sale of proprietary information and technology now largely in U.S. hands. LOS Hearings, supra note 34, at 326-28 (statement of Conrad Welling on behalf of American Mining Congress) and 335 ff (other mining consortia representatives' statements).

81 LOS Hearings, id. at 328 (Welling), 24-25, 34-36 (statement of Marne A. Dubs, Director of Technology for Kennecott Co.) and 50-64 (statement of George M. Whitney, Pres. Am. Patent Assoc.).

82 LOS Hearings, id. at 69 (statement of Jeffery Amsbaugh, Pres. Ocean Mining Assoc.).

protect the confidentiality of the information they exchange. On July 13 they exchanged coordinates on the areas for which they seek licenses to pursue exploratory and developmental work.83

Interim Seabed Mining Legislation

Dissatisfied with the pace and direction of the UNCLOS negotiations between 1980 and 1982, some of the developed states--the United States, West Germany, the United Kingdom, France, and later the Soviet Union and Japan--enacted unilateral legislation to license their nationals to mine the deep seabed mineral resources.84 Serious doubts have been raised about the legal validity of such municipal legislations, which are in violation of the universally recognized principle of the common heritage of humankind. The details negotiated at UNCLOS III, are now incorporated into the Law of the Sea Convention.85 One of the chief architects of such legislation in the United States was former Ambassador Elliot Richardson. In his testimony before a Congressional committee he expressed doubts that the exploitation of deep seabed resources by private persons and nations could be regarded as a legitimate form of the freedom of the high seas. He said it was never the U.S. position that it could confer on its nationals a right to engage in deep seabed mining on terms that another country would be required to respect. He pointed out that when a U.S. Steel Corp. subsidiary filed with the State Department in 1976 for recognition of a defined area of the seabed, the U.S. government refused to recognize the claim. Even if it were universally agreed that deep seabed mining was a high seas freedom, he went on, "such agreement would not provide a secure legal foundation for investment; it would merely grant to everyone the right to jump everyone else's claim." Only a few leading industrial countries have claimed that deep seabed mining is a high seas freedom.

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83 Brown, The Law of the Sea Conference: A U.S. Perspective, Lib. of Cong., Congressional Research Service on Major Issues System 11 (Brief No. 1 B 81153, Oct. 4, 1982).

84 The first to enact such legislation was the United States in June 1980; it was followed almost immediately by West Germany (1980), the United Kingdom (1981), France (1981), the Soviet Union (1982), and Japan (1982).

85 See Anand, supra note 29, at 41-44.

Having accepted the jurisdiction of the International Court of Justice, these countries "would accordingly face the ever present risk--the likelihood, indeed--that the Court will eventually declare illegal any deep seabed mining activity that does not conform with the treaty."[86] The whole purpose of the U.S. legislation, in Richardson's view, was "to try to wedge out some limited negotiating leverage for the United States." He added:

> Unless other countries thought that we were prepared to go forward outside the treaty, we would have no negotiating leverage at all, a fact which is not well understood with respect to the conduct of negotiations in a multilateral forum like this. So if I was disingenuous, so be it.[87]

He repeated later that "it was for that reason and that reason alone I encouraged the enactment of deep seabed legislation."[88] That was the position of the Carter administration.[89] He thought that Congress had performed a useful role through the enactment of this legislation even if he might be blamed for "trying to manipulate the functions of the Congress."[90] The September 2, 1982, Reciprocal States Agreement between the United States and its three European allies was not a mini-treaty, nor did it lead to one. In fact, according to some observers, the chances of concluding a mini-treaty are "zero".[91] Because deep seabed mining is still almost a decade away, West Europeans and the Soviet bloc can afford to sit on the fence and wait for the future to unfold while keeping their options open. Following the United States and other West European countries, the Soviet Union in April 1982 also passed internal seabed mining legislation. The "Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources" of the

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86 House Hearings, supra note 37, at 91 (Richardson statement).

87 Id. at 107-08.

88 LOS Hearings, supra note 34, at 210 (Richardson).

89 Id. at 211.

90 Id. at 210.

91 Id. at 220 (Richardson statement) and 224 (Ratiner statement).

deep seabed was passed to protect Soviet interests.[92] It seems, however, that the Europeans were not serious about recognizing each other's claims relating to deep seabed exploitation because they did not wish to jeopardize the possibility of obtaining a guaranteed mine site under the PIP Resolution.[93] If signed, a mini-treaty would be in violation of Article 137(3), which provides that

> No state or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

Thus, once the Convention enters into force, a license or permit issued by any state outside the Law of the Sea Convention would be of questionable legal validity.

If the matter is referred to the International Court of Justice, as Conference President Tommy Koh has threatened to do,[94] the United States might refuse to accept the jurisdiction of the World Court or try to avoid its jurisdiction in a contentious case under the "Connally reservation" of its declaration accepting compulsory jurisdiction of the Court.[95] It is doubtful whether the United States can avoid reference of the issue to the Court as an advisory opinion, or whether the United States could afford to ignore even a "nonbinding" opinion of the Court declaring seabed mining activities outside the Law of the Sea Convention to be illegal.[96] Protracted litigation is bound to have a chilling effect on seabed mineral investment.

Conference President Tommy Koh and Drafting Committee Chairman Alan Beesley pointed out that "where the four-power agreement might avert disputes among its signatories, it would be of no use in resolving

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92 21 Int'l Legal Materials 551-53 (May 1982).

93 House Hearings, supra note 37, at 189 (Ratiner statement).

94 Ratiner, supra note 34, at 1017. See pages 232 and 253 infra.

95 House Hearings, supra note 37, at 109 (Malone statement).

96 See references to the "nonbinding" nature of the International Court of Justice opinions, id. at 168-69 (Kronmiller statement).

conflicts between the four and those who accede to the Law of the Sea Treaty."[97] The agreement has the potential to bring the four into conflict with such technologically advanced rivals for seabed mineral riches as Canada, Australia, Japan, and the Soviet Union. The European industrialized countries share the U.S. ideological views, but they are more interested in assured access to strategic raw materials and in retaining influence in global decision making.[98] Japan imports 100 percent of its minerals. Because Japan appears to be guaranteed access to two or three minesites under the PIP Resolution,[99] it cannot afford to sacrifice access to these precious resources to principle or ideology.

Mining Outside the Convention Is Not Possible

With the uncertain conditions outside the Convention, where every national permit to exploit the deep seabed resources could be questioned before the World Court or even in domestic courts, no company is likely to be able to raise the $1.5 to $2 billion needed to exploit a minesite.[100] According to Ratiner, a license or permit issued outside the Law of the Sea Convention "is a worthless piece of paper which no commercial, publicly owned bank could use as a basis for extending credit since such a license or permit would be in conflict with a widely accepted international juridical proceedings."[101] Richardson also believes that deep seabed mining outside the treaty is not a "bankable proposition," especially since "the prospect of an adverse determination by the World Court is a realistic prospect."[102] Whatever the final outcome of the legality of mining operations under a mini-treaty, the threats of company boycotts, seized assets, attached ore shipments, legal entanglements, and delays should be enough to deter any

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97 Morello, supra note 73, at 63.

98 Ratiner, supra note 34, at 1017.

99 LOS Hearings, supra note 34, at 230 (Ratiner statement).

100 See House Hearings, supra note 37, at 108-09. See also Ratiner, supra note 23, at 47.

101 LOS Hearings, supra note 34, at 227 (Ratiner statement).

102 House Hearings, supra note 37, at 104 (Richardson statement).

but the most imprudent investor.[103] It is therefore not surprising that U.S. industry representatives have lately begun to revive the idea of a government guarantee against loss. Apart from the fact that the U.S. Congress previously rejected all ideas of guarantees, it would indeed "be anomalous if, having given free market principles precedence over all the main benefits of the treaty, the United States were then to sacrifice those same principles for the sole sake of access to deep seabed minerals."[104] Because the Law of the Sea Convention is the "only means of assured access to the strategic minerals of the deep seabed," U.S. companies wishing to engage in deep seabed mining operations will have no choice but to proceed under the flag of a country that has adhered to the treaty.[105] Therefore, even if the seabed provisions are found "ideologically offensive," the United States appears to "have more to lose by staying outside the treaty than by joining it."[106]

The Convention Is a Comprehensive Code on the Law of the Sea

It is important to remember that the Law of the Sea Convention is not a code on deep seabed mining alone. It is a comprehensive "constitution" of the oceans, embodying hundreds of legal rights and obligations for virtually all uses of oceans. This Convention was accepted as a whole by the vast majority of states after being developed through cumbersome and time-consuming rules of procedure. It contains numerous compromises on various controversial issues, which have all been adopted as a "package", to be accepted or rejected as a whole. As the Indonesian Minister of Foreign Affairs, Mochtar Kusumaatmadja said:

> This was a monumental achievement in multilateral negotiations under the auspices of the UN....It is conceivable that, taken

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103 Senate Hearings, supra note 68, at 62 (Kimball statement).

104 Id. at 92 (Richardson statement); LOS Hearings, supra note 34, at 203 (Richardson statement).

105 Senate Hearings, id. (Richardson statement); LOS Hearings, id. at 202-03 (Richardson statement) and 227 (Ratiner statement).

106 LOS Hearings, id. at 228 (Ratiner statement).

> separately, all provisions of the LOS Convention are not acceptable to a particular country. But taken as a whole, being a compromise text in a package, the text is obviously acceptable to the world community.[107]

The international community, perhaps for the first time in history, has reached agreement on a large part of the law of the sea. Most of the compromises arrived at during long years of negotiations at UNCLOS III have already been adopted by states in their national legislation and state practice. It is indeed the rare case of a convention that has come to be implemented even before it was formally concluded, signed, and ratified. Even if the Conference had failed to conclude a convention, or if the Convention does not obtain 60 ratifications, it would still not mean that the Conference had failed in the sense in which the 1930 and 1960 conferences did. The process of UNCLOS III lasted more than 15 years and aided the adoption of numerous usages that have hardened into custom through the concordant practices of most states, acquiesced in by others. The Convention as finally adopted had therefore largely codified an emergent customary law that had become binding on all the states.[108]

Customary International Law: Theoretical Aspects

It is generally agreed that a customary rule of international law grows, in the words of the classic definition by Judge Manley O. Hudson, out of "concordant practice by a number of states...over a considerable period of time," with a conviction "that the practice is required by, or consistent with, prevailing international law" and is generally acquiesced in by other states.[109] Custom has, there-

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[107] See 8 Soundings (Jan. 1983 supp.).

[108] For similar views, see Howard, The Third U.N. Conference on the Law of the Sea, 16 Tex. Int'l L. J. 321, 332-33 (1981).

[109] Hudson, Article 24 of the Statute of the International Law Commission, 26 Y.B. of the Int'l L. Comm. 26 (19); see also Reutar, International Institutions 115 (1958), cited in Fleming, Customary International Law and the Law of the Sea: A New Dynamic in T. Clingan (ed.), Law of the Sea: State Practice and Zones of Special Jurisdiction, 13 L. Sea Inst. Proc. 491, 504 (1979).

fore, "two constitutive elements: (a) a general practice of states, and (b) the acceptance by states of this general practice as law (opinio juris)."[110] The first element is mere usage, which by itself does not make law; the second is an intellectual conviction and a sentiment that such actions are juridically necessary to maintain and develop international relations.[111] At what point a usage becomes binding as a general custom is one of those mysteries of law that has never been fully unraveled. "Mystery and illogic accompanies the discussion of customary obligations."[112] D'Amato correctly points out that the criteria of custom raise more questions than they answer. For instance, how many states make a general practice? Are two states sufficient, or must we have one hundred?[113] According to Judge R.R. Baxter,

> The practice of five or ten states, not on its face wholly consistent, may be sufficient to establish that the asserted rule constitutes a general practice creative of legal rights and duties for states and individuals.[114]

There is considerable controversy over the length of time over which a custom becomes binding; it could range from a century to a month. According to some writers, customary international law can be created "instantly."[115] As the International Court of Justice said in the North Sea Continental Shelf judgment:

> ...the passage of only a short period of time is not necessarily, or of itself, a bar to

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[110] See 1 G. Schwarzenberger, A Manual of International Law 115 (4th ed. 1960).

[111] See 1 D.P. O'Connell, International Law 15 (Indian ed. 1970).

[112] D'Amato, Wanted: A Comprehensive Theory of Custom in International Law, 4 Tex. Int'l L. J. 29 (1967).

[113] Id. at 30-31.

[114] Baxter, Multilateral Treaties as Evidence of Customary International Law, 41 Brit. Y.B. Int'l L. 275 (1965-66).

[115] Bin Cheng, United Nations Resolutions on Outer Space: 'Instant' International Customary Law, 5 Indian J. Int'l L. 23 (1965).

> the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule.116

The traditional requirement of duration is not an end in itself, but is essentially a means of demonstrating the generality and uniformity of a given state practice.117 The evidence of unambiguous and consistent state practice may be obtained easily today from other than traditional sources. As Judge Koretsky said in his dissenting opinion in North Sea Continental Shelf cases:

> Where it used to be considered indispensable, for determining certain general principles of international law, to gather the relevant data brick by brick, as it were, from governmental acts, declarations, diplomatic notes, agreements and treaties, mostly on concrete matters, such principles are now beginning to be crystallized by international conferences which codify certain not inconsiderable areas of international law.118

Writers have also been quibbling over the degree of universality or the kind of proof required of the practice or custom. Must an "act" by a state be shown or is a mere "claim" sufficient?119 Is acquiescence enough? What is the effect of protests by a few states over a rule accepted by the vast majority of states?120 There is little doubt that universal acceptance of a rule could not be a condition precedent for its acceptance as a binding custom. As Judge Lauterpacht wrote, "If universal acceptance is the hallmark of the

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116North Sea Continental Shelf (W. Ger. v. U.K.), 1969 I.C.J. 3, 43.

117Archega, International Law in the Past Third of a Century, 159 Recueil des Cours 25 (1978-I).

1181969 I.C.J. at 156-57 (emphasis added).

119Akehurst, Custom as a Source of International Law, 48 Brit. Y.B. Int'l L. 1 (1974-75); A. D'Amato, The Concept of Custom in International Law 88 (1971).

120See MacGibbon, Some Observations on the Part of Protest in International Law, 3 Brit. Y.B. Int'l L. 293 (1953).

existence of a rule of international law, how many rules of international law can there be said to be in effective existence?"[121] It is equally clear, however, that no customary rule can emerge over the strong and effective protests of even a minority of states whose interests are directly and specifically affected;[122] however, such states must have unambiguously and persistently rejected the rule from the outset.[123] According to some writers, like Kopelmanas,[124] Kelsen, and Guggenheim,[125] if the practice in favor of some rule by a large number of states is proved, then the psychological element of the opinio juris is superfluous. There is a jurisprudential dilemma if both the objective element of practice and the subjective element of opinio juris must be proved. How can existing rules be changed or new ones created when "custom" seems to require as a condition of its legality that conduct be in conformity with existing customary rules? Professor Kunz called this "a challenging theoretical problem which has not yet found a satisfactory solution."[126] Kelsen and Guggenheim contend that state practice is sufficient to produce a rule of customary law, and the psychological element does not have to be proved. By contrast, a few writers, like Professor Bin Cheng, have argued that the opinio juris, if generally held, is sufficient without any need for practice in support. The corpus of state practice is only required to prove the animus or opinio juris, and is therefore unnecessary if the latter can be proved by other means:

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[121] H. Lauterpacht, The Development of International Law by the International Court 191 (1958).

[122] See J. Brierly, Outlook for International Law 99 (1944); G. Tunkin, Theory of International Law 128-30 (W. Butler tr. 1974). According to Kunz, a custom cannot come into existence against the resistance of even a single leading state, Kunz, The Nature of Customary International Law, 47 Am. J. Int'l L. 662, 666 (1953).

[123] Archega, supra note 117, at 30.

[124] See Kopelmanas, Custom As a Means of the Creation of International Law, 18 Brit. Y.B. Int'l L. 129-30 (1937).

[125] Fleming, supra note 109, at 492 (quoting Kelsen and Guggenheim).

[126] Kunz, supra note 122, at 667.

> Not only is it unnecessary that the usage should be prolonged but there need also be no usage at all in the sense of repeated practice, provided that the opinio juris of the states concerned can be clearly established. Consequently international customary law has in reality only one constitutive element, the opinio juris. Where there is opinio juris, there is a rule of customary international law.[127]

He concedes that "in the case of a rule without usage, objection might be taken to the term custom or customary," but he dismisses this objection by saying that "whether in such a case one speaks of international customary law or an unwritten rule of international law becomes purely a matter of terminology."[128] Dr. Cheng sees the possibility of the emergence of such "instant" customary law by formulation of opinio juris in resolutions of the UN General Assembly like the 1963 Declaration on Outer Space:

> ...the possibility of international customary law without usage becomes obvious if it is remembered that in international society states are their own law-makers. From the analytical point of view, the binding force of all rules of international law ultimately rests on their consent, recognition, acquiescence, or the principle of estoppel. If states consider themselves bound by a given rule as a rule of international law, it is difficult to see why it should not be treated as such in so far as these states are concerned.[129]

The type of customary law that Cheng would contend can be created by General Assembly resolutions is purely local or regional customary law. It binds only those states that have expressly accepted it by voting for the resolution or otherwise.

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[127]Bin Cheng, supra note 115, at 36; for a similar view, see Goedhuis, Reflections on the Evolution of Outer Space, 13 Nedlands Tyd Schrift 113 (1966).

[128]Bin Cheng, supra note 115, at 36.

[129]Id. at 37; see also Lachs, The International Law of Outer Space, 113 Recueil des Cours 98 (1964-III).

Without going into the controversy about the legal effectiveness of General Assembly resolutions, it may be stated generally that the quasi-legislative role of international organizations in the codification and formulation of international law is being increasingly recognized.[130] It is true that the General Assembly cannot legislate for the world nor do its decisions constitute an independent source of law. But it has been pointed out that "as the 'town meeting of the world,' it is a center where states may express their consensus on an existing or emerging rule of international law or provide the basis and the starting point for a progressive development of that law through the uniform conduct of states."[131] Several scholars agree that the basis of obligation in international law has been transformed from "consent" to "consensus,"[132] which is variously described as "substantial majority," "substantial unanimity," or "near unanimity," but not complete unanimity.[133]

As Professor Herbert McClosky writes: "No one can say how close one must come to unanimity before consensus is achieved, for the cutting point as with any continuous variable, is arbitrary."[134] Professor D'Amato argues that international law develops through "consensus," which may emerge from General Assembly resolutions, and such law will be binding on all states that voted for the resolution. It will also bind states that abstained in the relevant vote, but not states that voted against the resolution. He emphasizes that "consensus" is not "consent," and that

> Consensus is <u>not</u> a law-creating process, even though it is conveniently referred to as such. Consensus -- the inference we draw from the process of international communication about norms -- <u>is</u> international

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[130]See R.P. Anand, <u>New States and International Law</u> 78-82 (New Delhi, 1972).

[131]Archega, <u>supra</u> note 117, at 34.

[132]Falk, <u>On the Quasi-Legislative Competence of the General Assembly</u>, 60 Am. J. Int'l L. 782, 784-85 (1966); see also Archega, <u>supra</u> note 117, at 28-29.

[133]Wright, <u>Custom As a Basis for International Law in the Post-War World</u>, 2 Tex. Int'l L. For. 147, 158 (1966).

[134]McClosky, <u>Consensus and Ideology in American Politics</u>, 63 Am. Pol. Sci. Rev. 363 (1964).

law. What states believe to be law is law.[135]

The Treaty/Custom Dichotomy

Another significant, though not fully appreciated, custom-creating process occurs through "generalizable provisions in bilateral and multilateral treaties that generate customary rules of law binding upon all states."[136] D'Amato states that such treaty provisions not only

> carve out law for the immediate parties, but they also have a profound impact upon general customary law for nonparties. For a treaty arguably is a clear record of a binding international commitment, that constitutes the "practice of states" and hence is as much a record of customary behavior as any other state act or restraint.[137]

Although a codifying treaty normally presupposes a fair amount of the established customary law it seeks to codify, a treaty that breaks entirely new ground may stimulate the crystallization of customary rules binding even on nonparties to the treaty. This process was recognized and described by the International Court of Justice in the North Sea Continental Shelf cases. The Court stated:

> There is no doubt that this process is a perfectly possible one and does from time to time occur.[138]

The 1969 Vienna Convention on the Law of Treaties also clearly recognized this phenomenon. After dealing with the pacta tertiis problem in Articles 34 to 37, Article 38 states that

> Nothing in Article 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such.

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[135] D'Amato, On Consensus, 8 Can. Y.B. Int'l L. 104, 121 (1970) (emphasis in original).

[136] D'Amato, supra note 119, at 104.

[137] Id.; see also Gamble, The Treaty/Custom Dichotomy: An Overview, 16 Tex. Int'l L. J. 305 (1981).

[138] 1969 I.C.J. at 38.

It is important to remember that it

> is not that treaties bind non-parties, but that generalizable provisions in treaties give rise to rules of customary law binding upon all states. The custom is binding, not the treaty.139

The theory underlying the fact that treaties generate customary law is, according to D'Amato, simple:

> Customary law contains a quantitative element and a qualitative one. With respect to the former, treaties clearly supply the necessary commitment to act, as well as, in most cases, subsequent implementation...The other component of custom, the qualitative element, is if anything more evident in treaties, than in ordinary acts of states.140

It must be mentioned that not all treaties can give rise to a rule of customary law, nor can all the provisions in a particular treaty be generalizable as customary norms. "Only those bilateral or multilateral treaties that have generalizable rules can have that effect."141 In the North Sea Continental Shelf cases, the Court said:

> With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that...a very widespread and representative participation in the Convention might suffice of itself provided it included that of States whose interests were specially affected. In the present case, the Court notes that...the number of ratifications and accessions so far secured is, though respectable, hardly sufficient.142

The Court did not specify what number would be sufficient before a treaty might be said to become part of customary law. However, because "a treaty may be

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139D'Amato, supra note 119, at 107 (emphasis added).

140Id. at 160 (emphasis in original).

141Id. at 105.

1421969 I.C.J. at 43-45.

taken as evidence of state practice," the weight a "treaty will carry is roughly proportionate to the number of parties to the treaty."[143] Thus Professor Baxter believed that

> If fifty states are parties to a treaty that represents itself as reflecting customary international law. the treaty has the same persuasive force as would evidence of the state practice of fifty individual states. Moreover, since the treaty speaks with one voice rather than fifty, it is much clearer and more direct evidence of the law than the conflicting ambiguous and multitemporal evidence that might be amassed through an examination of the practice of each of the individual states. Having regard to the limited amount of state practice which is generally regarded as sufficient to establish the existence of a rule in customary international law, a treaty to which a substantial number of states are parties must be counted as extremely powerful evidence of the law.[144]

According to some writers, because a treaty comes into force formally when it is ratified, treaties pass into customary law "at the moment they are ratified."[145] It has been rightly pointed out, however, that this process may begin even earlier:

> The newly concluded codification treaty (in the strict sense) that has not yet entered into force carries weight as a carefully worked out statement of existing customary law, even though it may not yet have drawn any ratifications or accessions. It derives its authority from the careful consideration that has been given to the text, from the fact that it has gained a certain degree of acceptance by those who participated in its drafting, and from the hope that states will in the fullness of time ratify or accede to it.[146]

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[143]Baxter, supra note 114, at 277.

[144]Id. at 277-78, 286.

[145]D'Amato, supra note 119, at 164.

[146]Baxter, supra note 114, at 292.

carefully considered rules of interstate conduct, "having been subjected to the scrutiny of states and having been adjusted to take account of the political demands of states," when they emerge as a draft treaty open to ratification and accession, are bound to have considerable influence and weight. Indeed, it is suggested that a treaty not yet in force may be employed as evidence of state practice of the individual state that participated in drafting the agreement and was willing to sign it. It is felt that "a sort of estoppel might be created against the state that has signed but has not yet ratified the treaty whereby the state is precluded from denying that the treaty reflects an accurate statement of the customary international law by which it is willing to be bound."[147] Strong dissent to a treaty by a small number of states whose interests are directly affected, especially if they have consistently and openly maintained their dissent, would detract from the authority of the treaty and adversely affect the emergence of customary law on the subject. The dissent of certain states may, however, be ineffective if there is general acceptance of a practice "as law," or if the dissenting states have not made their views heard until the rule has been crystallized into practice and become firmly established, or the dissent is contrary to some fundamental principle (jus cogens). It is believed that although "a state may acquire an exceptional position with regard to some general rule of customary law, there is no such right for the state to isolate itself from the impact of a fundamental principle."[148] In other words, it is submitted that no state can evade a treaty or the operation of a rule that is so bound up with the essential nature of a concept of international law that it has become universally binding.[149] When a treaty seeks to codify a general, fundamental norm and affects the sudden acceleration of usage, the position of a small minority of dissenting states is made more difficult. The state that declines to accept an emerging rule of general law has to object to its application to itself consistently and openly from the time the rule begins to be established. If the dissenting state itself has been a party to the emer-

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[147] Id.; see also Vienna Convention on the Law of Treaties, done May 22, 1969, art. 18, U.N. Doc. A/CONF.39/27 at 289.

[148] H.W.A. Thirlaway. International Customary Law and Codification 110 (1972).

[149] Id.

gence and acceptance of the general norm of international law sought to be codified, it cannot decline its acceptance by refusing to sign and ratify the treaty. It also may find it difficult to resist the application of the general rule to its own interests at a subsequent stage.[150]

The Law of the Sea Convention Generates Customary Law

Even this perfunctory discussion of the emergence of customary international law leaves us in no doubt that the Third Law of the Sea Conference has helped tremendously in the emergence of customary law of the sea, which has already been adopted and applied in state practice by a large number of states. The Law of the Sea Convention has largely codified this emergent law and has helped to further its formulation and acceptance. Accepted by a vast majority of states, a large part of the Convention has become part of customary international law even before its formal ratification, and as such it is binding on signatories and nonsignatories alike.[151] Even the United States, which refuses to accept the final version of the Convention, agrees with this view. The United States believes that a large part of the law of the sea is codified in the Convention's provisions relating to coastal state jurisdiction over the territorial sea, the EEZ, and the continental shelf. The rules relating to navigation and overflight through territorial seas and straits have, in the U.S. view, also become part of customary law.[152] As Ambassador Malone said,

> The Convention does not make the navigation and overflight provisions parochial to just the Convention...they apply to all parties and non-parties...Whether you have customary international law on navigation and overflight as it now exists imported into the treaty or whether the treaty is establishing

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[150] Id. at 116.

[151] See T. Clingan (ed.), supra note 109, at 512-13 (presentation of Hasjim Djalal, Indonesian ambassador to the Conference) and 516-24 (further discussion on this point).

[152] The Reagan administration's policy was based on this unquestioned assumption--"it was taken for granted." Ratiner, supra note 34, at 1011-12.

> something new. it would apply to non-parties.[153]

proclaiming a 200-mile exclusive economic zone on March 10, 1983, President Reagan also declared that in addition to deep seabed mining provisions objected to by the United States, "the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states."[154]

The Issues of Deep Seabed Mining and the Freedom of the Seas

Claiming the benefit of these various rules laid down in the Convention as customary law serves a wide array of U.S. national interests--mobility of air and naval forces, commercial navigation, fisheries, environmental protection, scientific research, marine mammal conservation, dispute settlement, and more. President Reagan asserted that

> Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore and, when the market permits, exploit those resources.[155]

Ambassador Malone also stated that although the navigation and overflight provisions apply to parties and nonparties alike, "under Article 137, your deep seabed provisions are parochial to the Convention and only parties would take advantage of those."[156] Despite the universal acceptance of the principle of the common heritage of humankind in repeated resolutions of the General Assembly and at the Conference, the United States now argues that it is no

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[153]House Hearings, supra note 37, at 102, 105 (statements of U.S. Ambassador Malone and Powell A. Moore, asst. sec. of state), 294 (Kronmiller statement).

[154]See Appendix A infra, at 552, para. 4 (emphasis added); id. at 2 (Malone statement).

[155]Appendix A infra, at 553, para. 13.

[156]House Hearings, supra note 37, at 102 (Malone statement).

more than a "moral" or "political" principle. Its implementation was conditioned by the acceptance of a legal regime in a universally agreed treaty. In the absence of such a treaty, it is no more than an agreement to agree, and is "devoid of any legal content whatsoever."[157] Arrow concludes:

> Since in a very real sense the essence of the proposed regime lies in the detail, the failure of the Conference to agree on such detail is fatal to the conclusion that a new customary seabed regime had emerged at this point. In any case, no moratorium may be found due to the continual and emphatic protests of the developed and specifically-affected states.[158]

In other words, the United States wants to have its cake and eat it too. It wants all the rights and privileges of fishing and exclusive exploitation of economic resources in its EEZ as well as navigation through straits and territorial seas established as a matter of customary international law. Because deep seabed mining is unattractive at this time and is decades away at best, the U.S. government appears to have made its point at little economic cost.

One can respond to these arguments by pointing out that the common heritage principle is no more vague than the principle of the freedom of the seas, which has always been interpreted through the centuries by all states according to their immediate interests. The vagueness of the freedom of the high seas principle was never considered fatal to its legality.

There is little doubt that the basic tenets of the common heritage principle have come to be universally accepted[159] and have become jus cogens. The traditional law can never be interpreted to permit the exclusive exploitation of hundreds of miles of a seabed mining site for extended periods of time by any nation or its nationals.[160] Acceptance of the Convention by a

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[157] Arrow, The Customary Norm Process and the Deep Seabed, 9 Ocean Dev. & Int'l L. 15, 29 (1981).

[158] Id. at 34-35.

[159] See Van Dyke and Yuen, supra note 27, at 521-30, 538-43; see also Lee, The New Law of the Sea and the Pacific Basin, 12 Ocean Dev. & Int'l L. 255 (1983).

[160] For an excellent discussion of the freedom of the seas, see Van Dyke and Yuen, supra note 27, at 535-37.

vast majority of states, including the few industrialized Western powers who abstained but did not oppose it, can be said to have created a strong assumption in favor of an emergent custom.[161] Even the strongest power on earth cannot violate this principle except at a considerable cost.

The Convention: A Package Deal

As has been asserted time and again, the Convention is a package; no country can accept some parts of it while rejecting others. During the March 1983 session of the Preparatory Commission, the Group of 77 declared "its firm opposition to any action by states which have not signed the Convention to apply selectively, whether unilaterally or jointly, the provisions of the UN Convention on the Law of the Sea while continuing to reject the provisions relating to the international seabed area."[162] On April 23, 1983, the Soviet Union stated:

> The United States...ignores the fact that the Convention is integral and indivisible. It is a thoroughly balanced package of accords on all closely interlinked problems related to the regime of the marine expanses, the uses of the ocean's living and mineral resources.
>
> Any attempt arbitrarily to pick out some of its provisions, while discarding others, are incompatible with the law and order established by the Convention on the seas and directed against the legitimate interests of the other states.[163]

Although the United States still clings to the almost universally rejected three-mile territorial sea, it cannot force other states to roll back their extended territorial seas to less than the 12 nautical miles that has come to be more or less universally accepted. Although we believe that freedom of unimpeded navigation through straits and archipelagic waters, as

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[161] See id.

[162] See 8 Soundings 4 (May 1983); see also U.N. Doc. SEA/MB/2 (Dec. 6, 1982) at 5 (Alfonso Arias Schreiber of Peru on behalf of the Group of 77 and statements of George Castaneda), id. at 6 (statements of Ballati of Trinidad and Tobago); U.N. Doc. SEA/MB/4 (Dec. 7, 1982) at 3.

[163] See 8 Soundings, supra note 162, at 3.

provided in the Convention, has become part of customary international law and no country can or will ordinarily refuse such passage, even to nonparties like the United States,[164] a few small strait states, irritated by U.S. policy, may take a contrary position. Because under the pre-Convention traditional law only the right of innocent passage through territorial waters was permitted, submerged transit of submarines was not allowed, and overflight of military aircraft was not admissible, these small strait states, some of them U.S. allies, may insist that the United States cannot take the benefits of Conventional law without being party to the Convention. The point is not whether their stand is right or wrong. It has been pointed out that "What is dangerous for the United States is the existence of the argument and the potential uncertainty of its military rights in narrow seas during times of crisis."[165] The United States stand that it has a right to free navigation through straits under customary law may be vindicated eventually by the International Court of Justice after protracted litigation. But can the United States afford to risk its strategic interests on the whims of a few small states? Can the United States shoot its way through in the face of so much adverse public opinion, even within the United States itself?[166] These questions are not merely theoretical. It is reported that four key countries--Spain, Morocco, Oman, and Iran--have declared that they recognize "innocent passage" rather than the more dependable "transit passage" through Gibraltar and Hormuz. South Korea and China have also said that the "coastal state has the right to require prior authorization or notification for the passage of foreign warships through territorial sea in accordance with the laws and regulations of the respective coastal state."[167] Not only have 40 or so

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[164]But cf. LOS Hearings, supra note 34, at 180. Kronmiller argues that the navigation and overflight provisions do not simply serve the U.S. interests, rather they "reflect very significant concessions on our part." These concessions were the U.S. acceptance of the 12-mile territorial sea and the EEZ.

[165]See Ratiner, supra note 34, at 1019.

[166]See LOS Hearings, supra note 34, at 232 (Ratiner statement); House Hearings, supra note 37, at 172, 174.

[167]See 8 Soundings (Jan. 1983 supp.).

nations raised the question of notification or authorization for the passage of warships through territorial seas, but Brazil argued that the text should be revised "to make clear that it does not authorize military exercises in the EEZ without the authorization of the coastal state."[168] It is sometimes argued that the United States could protect the mobility of its military and commercial fleets and aircraft through a series of bilateral and multilateral agreements. It is probable, however, that the political, economic, and military costs of negotiating a number of satisfactory agreements would far outstrip the costs and concessions involved in the Law of the Sea Convention. Thus, in 1979 alone the United States agreed to pay the Philippines $500 million over the subsequent 5-year period for base rights there.[169] With the development of far-reaching nuclear missiles, the need for unobstructed transit passage through straits is sometimes discounted, and the wisdom of giving up so much on other issues has been questioned. As Richard Darman said:

> With the increased range and sophistication of U.S. missiles and missile launching submarines, it is arguable that transit through straits is not necessary to assure strategic deterrence.[170]

Darman also rejects the assumption that

> a state's assertion of legal power to close a strait, set a prohibitive fee, impose an unreasonable environmental standard, or otherwise limit transit will endow that state with sufficient power to do so. This assumption is simply not valid. [Such abuses] would not be tolerated, in practice, by major powers or the global community...The extreme hypotheticals--irrationally diverting tankers or 'closing' Gibraltar, Bab el Mandeb, Hormuz, or Malacca--make the argument considerably more dramatic but considerably less realistic.[171]

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[168] Senate Hearings, supra note 68, at 61 (statement of Lee Kimball).

[169] Id.; Whitaker, supra note 54, at 26.

[170] Darman, The Law of the Sea: Rethinking U.S. Interests, 56 Foreign Aff. 376 (1978).

[171] Id. at 382.

To accept "an ideologically antithetical deep seabed mining regime with a highly undesirable limit on production" and an Authority governed by a "supreme" Assembly on the basis of one-state-one-vote "majoritarianism" for the protection of freedoms of navigation and overflight would be, according to Darman, out of proportion. Trading these "objectionable elements" for "questionable interests in treaty protection of distant-water military mobility seems to tie to the past at the expense of the future, and trading them to protect interests that might just as well be protected without a comprehensive treaty seems no trade at all."[172] The importance of transit passage through straits and of other navigational freedoms for the protection of U.S. strategic interests will be crucial to evaluation by future U.S. administrations of whether to join the Convention.

A Wider Mini-Treaty?

Professor Anthony D'Amato has suggested the conclusion of a mini-treaty by the United States with other like-minded Western industrial powers. This treaty would contain deep seabed mining provisions to their own liking, "provisions exactly equivalent to those in the Law of the Sea Treaty that everyone likes--the 12-mile territorial limit, the 200-mile economic zone, the maritime environmental safeguards." These common provisions of both of the treaties would "constitute the new norms of global international law," unchallengeable by anyone,[173] and "it would follow that general customary law would be similarly thus constituted."[174] The deep seabed mining provisions in the mini-treaty would erect an alternative legal regime in conflict with the Law of the Sea Convention. Professor D'Amato asserts that the mini-treaty will have an equivalent legal force, because "there is nothing in international law requiring rule of the majority of states," nor is there any "principle of priority of time that would favor the Convention because it was concluded first."[175] He concedes that the principles that deep seabed minerals are the common heritage of humankind and that proceeds from their

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[172] Id. at 388.

[173] D'Amato, Law of the Sea: The Correct U.S. Response, N.Y. Times, Dec. 29, 1982 at A28, col. 3.

[174] D'Amato, An Alternative to the Law of the Sea Convention, 77 Am. J. Int'l L. 281 (1983).

[175] Id. at 283.

exploitation should be shared by all nations, including those that do not engage in mining activities, already are norms of customary law, "to judge by the consensus on the common heritage concept in the long negotiations leading to the Convention as well as in those on mining activities in outer space." This is further confirmed by the U.S. Deep Seabed Hard Mineral Resources Act of 1980, which sets up a tax of 3.75 percent of the imputed value of mineral resources mined from the deep seabed.[176] D'Amato believes that, in the absence of an alternative treaty, a nonsignatory to the Law of the Sea Convention should expect at minimum that the ICJ might advise that the Convention either confirms or generates a norm of customary law requiring some sharing of the proceeds from deep seabed mining. Once this condition of sharing at a level not "frivolous" (somewhere between the 3.75 percent established by the U.S. Congress or the higher figure usually paid to a private owner of mineral resources) is fulfilled, Professor D'Amato feels a credible alternative to the Law of the Sea Convention can be found. Moreover, he argues that a future tribunal might accord great weight to whichever treaty is first implemented by actual mining practice. He foresees a possibility that the tribunal may simply recognize two competing regimes for seabed mining.[177]

This is strange advice based on strange reasoning. On its face it is so incredible that it cannot be accepted as reasonable. Once the deep seabed and its mineral resources are accepted to be the common heritage of humankind, it must also be recognized that no one can exploit these resources except under the accepted legal regime. The common heritage principle cannot be said to be satisfied by a few crumbs thrown to the international community. D'Amato gives no satisfactory answer to the problem of conflict between a mini-treaty and the Law of the Sea Convention. Article 311 of the Convention seeks to recognize the common heritage principle as jus cogens. Derogation from this rule is not permitted. D'Amato argues rather unconvincingly that "there is no principle of majority rule in international law that would make the Convention more significant than" an alternate treaty.[178] If two or more states can change customary norms just by concluding a treaty between themselves, an anarchical situation will result. This theory is

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[176] Id. at 282-83.

[177] Id. at 283-85.

[178] Id. at 283.

totally unacceptable in an interdependent, increasingly shrinking world society.

The United States May Sign the Convention in the Future

According to some well-informed observers, the Law of the Sea Convention is the "only means of assured access to the strategic minerals of the deep seabed."[179] No country or company can hope to gain such assured access under a reciprocating states agreement or a mini-treaty. Although U.S. mining interests are critical of their onerous duties under the Convention, not a single representative of a U.S. seabed mining company is willing to state publicly that his company is prepared to take the risk of going ahead with seabed mining outside the Convention.

The present U.S. administration has downplayed the concern that isolation of the United States will result in the erosion of its vital interests in freedoms of navigation and overflight, which led it to promote UNCLOS III in the first place. The United States persuaded other countries to recognize its vital interests because it agreed to accept their resource interests. Having adopted a package deal, the rest of the world will tell the United States that it cannot rely on the parts of the treaty it likes while at the same time rejecting the parts it does not like.[180] The other Western industrialized powers are reluctant to join the United States, and some of them have already signed the Convention.

A historic global organization is expected to come into being shortly, which for the first time will regulate, manage, and produce globally shared resources. The Preparatory Commission for the International Sea-Bed Authority held its first session in Kingston, Jamaica, in March and April 1983. More than 350 delegates representing 99 countries who have signed the Convention and 17 observers from countries who have signed only the Final Act attended the session and elected Mr. Joseph S. Warioba of Tanzania chairman. A consensus statement of understanding on the structure of the Commission and some aspects of decision making were adopted. Work will soon begin on the rules, regulations, and procedures for exploration and exploitation of the deep seabed, the implementation of a resolution governing preparatory investments by pioneer miners, and the establishment of the Interna-

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[179] House Hearings, supra note 37, at 202 (statement of Elliot Richardson).

[180] See U.N. Doc. SEA/MB/15 (Dec. 10, 1982) at 3 (statement of Tommy Koh).

tional Tribunal.[181] By using its taxing power and generating other resources, the Authority may one day become self-sufficient even without U.S. influence, participation, and leadership. Under the circumstances, as former U.S. representative Ratiner stated:

> We will stand as the emperor without clothes--for the entire world will see that it can do amazing and stupendous things without American money, leadership or technology. If the United States is not part of the Treaty system, American companies will have to go to other countries to be able to conduct business in the seabed...
>
> In short, the guardians of pure conservative ideology may have won a battle when the United States stood alone at the Law of the Sea Conference, but the United States may lose a very important war.[182]

In the changed international environment--a world seriously divided by ideology and aspirations and constantly threatened with thermonuclear war--where there are other power centers ready to challenge the old hegemonies, even the strongest power on Earth cannot impose its desires on everyone. It cannot send its warships into every territorial sea or archipelago, nor can it protect all its fishing vessels and commercial ships from harassment everywhere.

The real importance of the Law of the Sea Convention is not to be found either in the sum of its parts or in its extraordinarily comprehensive whole, but rather in its demonstration that 160 sovereign states can work out rational accommodations of their vital and diverse interests. It shows that international law can be developed and modified without recourse to force, by peaceful means. It indicates that in the future international law need not and will not be forced on the majority by a few powerful states, but can be developed by accommodation of interests through consensus. The United States cannot expect to be taken seriously in the future if it just picks up its marbles and walks off, because it has not gotten everything it set out to obtain.[183] As a leader in international law, the United States should not, indeed

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[181]See 8 Soundings, supra note 162, at 1.

[182]Ratiner, supra note 34, at 1020.

[183]House Hearings, supra note 37, at 204.

totally unacceptable in an interdependent, increasingly shrinking world society.

The United States May Sign the Convention in the Future

According to some well-informed observers, the Law of the Sea Convention is the "only means of assured access to the strategic minerals of the deep seabed."[179] No country or company can hope to gain such assured access under a reciprocating states agreement or a mini-treaty. Although U.S. mining interests are critical of their onerous duties under the Convention, not a single representative of a U.S. seabed mining company is willing to state publicly that his company is prepared to take the risk of going ahead with seabed mining outside the Convention.

The present U.S. administration has downplayed the concern that isolation of the United States will result in the erosion of its vital interests in freedoms of navigation and overflight, which led it to promote UNCLOS III in the first place. The United States persuaded other countries to recognize its vital interests because it agreed to accept their resource interests. Having adopted a package deal, the rest of the world will tell the United States that it cannot rely on the parts of the treaty it likes while at the same time rejecting the parts it does not like.[180] The other Western industrialized powers are reluctant to join the United States, and some of them have already signed the Convention.

A historic global organization is expected to come into being shortly, which for the first time will regulate, manage, and produce globally shared resources. The Preparatory Commission for the International Sea-Bed Authority held its first session in Kingston, Jamaica. in March and April 1983. More than 350 delegates representing 99 countries who nave signed the Convention and 17 observers from countries who have signed only the Final Act attended the session and elected Mr. Joseph S. Warioba of Tanzania chairman. A consensus statement of understanding on the structure of the Commission and some aspects of decision making were adopted. Work will soon begin on the rules, regulations, and procedures for exploration and exploitation of the deep seabed, the implementation of a resolution governing preparatory investments by pioneer miners, and the establishment of the Interna-

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[179] House Hearings, supra note 37, at 202 (statement of Elliot Richardson).

[180] See U.N. Doc. SEA/MB/15 (Dec. 10, 1982) at 3 (statement of Tommy Koh).

tional Tribunal.[181] By using its taxing power and generating other resources, the Authority may one day become self-sufficient even without U.S. influence, participation, and leadership. Under the circumstances, as former U.S. representative Ratiner stated:

> We will stand as the emperor without clothes--for the entire world will see that it can do amazing and stupendous things without American money, leadership or technology. If the United States is not part of the Treaty system, American companies will have to go to other countries to be able to conduct business in the seabed...
>
> In short, the guardians of pure conservative ideology may have won a battle when the United States stood alone at the Law of the Sea Conference, but the United States may lose a very important war.[182]

In the changed international environment--a world seriously divided by ideology and aspirations and constantly threatened with thermonuclear war--where there are other power centers ready to challenge the old hegemonies, even the strongest power on Earth cannot impose its desires on everyone. It cannot send its warships into every territorial sea or archipelago, nor can it protect all its fishing vessels and commercial ships from harassment everywhere.

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[181]See 8 Soundings, supra note 162, at 1.

[182]Ratiner, supra note 34, at 1020.

[183]House Hearings, supra note 37, at 204.

it cannot, simply walk away from a tediously negotiated treaty "in the misguided hope that it will evaporate."[184] As Allan MacEachen, deputy prime minister and secretary of state of external affairs of Canada said:

> If states may arbitrarily select the rights and responsibilities under the Convention which they will recognize or deny. that may be the end not only of our dream of a universal comprehensive Convention on the Law of the Sea, but perhaps the end of any prospect for global cooperation on issues that touch the lives of all mankind.[185]

Therefore, it is hoped that before long the United States will accept the Convention it helped initiate and formulate. It is predicted by some well-meaning observers that, with its far-flung global interests and direct concern with the risks presented by isolationism and by worsening U.S. relations with the Third World and its own allies--who have already decided to sign the treaty--the United States will eventually sign the Convention.[186] Its wider business community--not just a handful of mining companies--will realize the wisdom of joining the widely accepted Convention, and enter the policy debate to advise the unquestioned acceptance of the new customary law of the sea developed through the Law of the Sea Convention.[187]

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184 Ratiner, supra note 34, at 1020.

185 U.N. Doc. SEA/MB/2 (Dec. 6, 1982) at 4 (statement of Allan Maceachen of Canada).

186 See Ratiner, supra note 34, at 1021; LOS Hearings, supra note 48, at 107 (statement of Elliot Richardson); House Hearings, supra note 37, at 9 (statement of Elliot Richardson); Nossiter, supra note 32, at 19.

187 Ratiner, supra note 34, at 1021.

THE LAW-GENERATING MECHANISMS OF THE LAW OF THE SEA CONFERENCES AND CONVENTION

by

Anthony D'Amato*

INTRODUCTION

Our task is to determine what rules of international law applicable generally to all states have been generated by the Law of the Sea Convention or by the international conferences that led to it. If there are any such rules, then either the Convention or the conferences or both have generated those rules. The Convention and/or the conferences would thus be lawmaking or law-finding mechanisms.

There will be many arguments and conflicting positions taken by many observers about these matters. The dispute goes not only to particular asserted rules but more basically to the law-generating or law-finding mechanism. Some observers assert that the Convention can bind only its parties and that it has no additional legal effect upon non-parties. Some assert that there are a few exceptions to that principle. But in all of these controversies there appears to be a lack of clarity about the underlying mechanism. My purpose here is to

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suggest a very simple paradigm for getting at this underlying mechanism.[1]

THE UNDERLYING MECHANISM

The paradigm I shall propose may perhaps best be introduced by an example of Henri Poincare. Poincare wrote in 1905 that we might deduce the mass of Jupiter in one of three independent ways: from the movement of Jupiter's satellites, from the perturbations of the major planets, or from the perturbations of the minor planets. Our three calculations will produce three numbers very close together but not identical. "This result might be interpreted," Poincare says "by supposing that the gravitation constant is not the same in the three cases. . . . Why do we reject this interpretation? Not because it is absurd, but because it is uselessly complicated."[2] By far the simpler hypothesis is that gravitation is constant, and the three numbers simply represent slight deviations from the true mass of Jupiter due to measurement error.

Let us now suppose that three nations, A, B, and C, have each asserted exclusive jurisdiction over coastal waters extending outward in distances respectively of 12 miles, 100 miles, and 200 miles. If we took the more complicated hypothesis, analogous to Poincare's variable gravitational constant, we might say that in different parts of the world the breadth of the territorial sea varies according to its location: in the area of nation C it is much larger than in the area of nation A. But the simpler hypothesis by far would be that there is a territorial sea of at least 12 miles in breadth. Twelve miles, at least, is a consensus position; only beyond that is there dispute.

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1 This paradigm has always been implicit in my writings on international law, but I see now that if I had been clearer about it my writings would have gained in clarity and perhaps in persuasiveness. I have been helped in recent years to see the paradigm by reading works on linguistic philosophy and the philosophy of science. The leading writers that have helped me include Wittgenstein, Putnam, Kripke, and Rorty, although I will not here refer to any particular works by these philosophers. Yet I note at the outset that studies in ontology and epistemology can be of critical usefulness to legal analysis, even though they concern questions that, at least superficially, have nothing to do with law.

2 H. Poincare, Science and Hypothesis 146 (1952).

Another example that focuses upon events that have occurred in the past ten years is that of so-called humanitarian intervention. France invaded the Central African Republic and overthrew Bokassa; Israel intervened in Uganda and rescued the hostages at Entebbe; Tanzania intervened in Uganda and overthrew Idi Amin; and we might possibly add the American invasion of Grenada that overthrew the Hudson Austin governmental group. The complex hypothesis would be that these cases are unique and prove nothing except that in particular bilateral relationships certain interventions have occurred.[3]

A much simpler hypothesis is that there is indeed an emerging norm of humanitarian intervention, which constitutes a legal (and not merely permissible) exception to other norms prohibiting transboundary military force. The cases I have cited, then, constitute measurements of this emerging norm. The measurements may be inexact, but they get at an underlying legal reality.

The underlying physical reality in Poincare's example is the mass of Jupiter. We note at the outset that Jupiter has a mass because of the orbital perturbations of other planets. Then we make another simplifying assumption: that the mass of Jupiter does not change depending on how we measure it. Rather, it is an underlying reality. Even Poincare did not make this latter argument, because he was writing in 1904, more than two decades before Heisenberg's uncertainty principle, which stated that certain quantum measurements necessarily change the object being measured. But the uncertainty principle fits very well within Poincare's overall philosophy of physics, which, like Einstein's, is that the experimental fact comes first and that many theories may explain it.

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3 Oppenheim, who attempted to present a rigid positivist account of international law, would have classified these interventions as permissible but not legal. They would be permissible, according to Oppenheim, because nations did them and got away with them; but they would not be legal, because they violate the rule of sovereignty of states and the concomitant right of domestic jurisdiction of each state. Yet we have to object to Oppenheim's view as fundamentally incoherent. How can something be permissible and yet not legal? Such a category, if it is intelligible at all, would depend on unique factors that could never be replicated from case to case, with the result that there could be no general rules of international law. (See 1 L. Oppenheim, International Law 28 (H. Lauterpacht 8th ed., 1955)).

Competing theories, therefore, cannot be assessed by virtue of their correspondence with experimental results; rather, of two theories which each account for an experimental fact, select the simpler.

Now law, unlike the physical universe, is a mental construct of human beings. It might very well be the case that law varies according to who perceives it, and therefore there is no underlying legal reality to uncover. Sometimes in the writings of Professor McDougal one gets the impression that international law is different for the United States and the Soviet Union; the latter does not have the same right to engage in nuclear tests on the high seas that the United States enjoys, because the United States is in the privileged position of acting on behalf of the free world.[4] This is a highly phenomenalistic, if not solipsistic, view of international law, one that can hardly be expected to carry argumentative weight with those nations who do not enjoy Professor McDougal's privileged status.

My position is that although law could be phenomenalistic in this sense, international law in fact never has been. From the days of Grotius to the present time, international law has been conceived of as a body of rules that affects all nations equally.[5] The underlying requirement of equality--the idea that each nation's legal entitlements are the same as any other nation's--operates as a constraint upon the content of the rules.[6]

However, the principle of equality does not itself yield rules of international law. It operates rather as a negative: a purported rule that is not equal in its applicability to nations is thus not a rule of international law. But that does not tell us what <u>are</u> the rules of international law.

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4 McDougal and Schlei, <u>The Hydrocarbon Bomb Tests in Perspective: Lawful Measures for Security,</u> 64 Yale L.J. 648, 686-87 (1955).

5 The UN Charter, art. 2, para. 1, reaffirms the sovereign equality of nations.

6 One nation cannot test nuclear weapons on the high seas without implicitly acknowledging the right of other nations to engage in similar testing (so long as conditions are indeed similar); thus a rule of "no tests" may be preferable to a rule of "tests open to everyone." Note that the rule of "no tests" is itself of general and equal applicability.

NATURE OF CUSTOMARY INTERNATIONAL LAW

Legal systems produce rules in one of two ways: either by legislation or by inferring the rules from practice. The latter is termed in domestic law the "common-law approach" and in international law it is the operation of "custom."[7] I want to suggest that the difference between legislation and custom is more profound than the mere difference between the instrumentalities involved (the legislature and the judiciary, to take the common-law instrumentalities). The real difference is grounded in our fundamental attitudes toward what law is.

A legislature can pass any law irrespective of the laws passed by previous legislatures. Thus a legislature need not concern itself with the legal context in which it passes new laws. Any inconsistency is simply resolved in favor of the new laws.

The common-law system exhibits qualities that legislation lacks. Most importantly, it is logically coherent. Any new rule has to "fit" with the old ones. A new case has to follow precedent. If a new case overrules precedent, it is because there is a more

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7 See, e.g., Statute of International Court of Justice, art. 38 (b), which refers to "international custom, as evidence of a general practice accepted as law." General custom applies to all states equally. Special custom is quite different; it refers to rights one state claims to have acquired over another state, such as territorial rights, and thus depends upon a showing of the latter's consent. The consent can be demonstrated by a showing of opinio juris. See D'Amato, The Concept of Special Custom in International Law, 63 Am. J. Int'l L. 211 (1969).

General custom does not require a showing of opinio juris as such; nor does it require any predetermined duration, generality, acceptability, or absence of protest. Writers who have focused on these "requirements" have lost sight of the fact that, even without them, a customary rule can be demonstrated. The bottom-line requirements for custom are (a) an interaction of two or more states (e.g., a resolution of a dispute between them, the signing of a treaty, the acceptance by one of the practice of the other), and (b) an articulation that the generalization we infer from that interaction is or should be a rule of international law. For details and justification, see A. D'Amato, The Concept of Custom in International Law 47-102 (1971).

logical connection between the new case and the previous law than the overruled case had. Thus the new case "corrects" the overruled case, which is now seen to be deviant. Judges see it as their duty to square the rule of decision in the present case with the underlying received rules of common law. In the common-law system, the attitude is that there is an existing body of coherent law, and it is the task of the judge to find it and apply it to each case.

There is one more observation I want to make about the common-law system before turning to international law. The idea of common law is very close to the idea of natural law. Rules must be induced from the successful interactions of real persons (or real nations) in society (in international society). We have therefore a blend of deduction and induction in the natural-law process. This is the same blend that exists in the operations of the common law.

We can only find out what is practical by seeing what people do in practice. We then induce the rules from their behavior.[8] We cannot take as our data everything that people do in practice, however, for then we would be hopelessly confusing the normal and the deviant, the reasonable and the unreasonable, the legal and the illegal.[9]

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8 This is what Lord Mansfield did when he discovered the rules of the "law merchant." Although he articulated them for the first time, these rules were inherent in the customary practices of the mercantile trade.

9 In our measurements of the perturbations of the planets, we do not include the measure of a child using a two-dollar telescope; that would be unreasonable. In our measurement of mercantile practices, we do not include the people who violate, and are generally known to have violated, the terms of a bill of lading. In international law, if we had only one instance in history of a "humanitarian intervention," we might say that that was simply an illegal use of transboundary military force. Only when instances begin to proliferate may it be argued (without necessarily concluding) that there is a rule allowing humanitarian intervention that constitutes a legal exception to the prohibition on the use of transboundary military force. This exception, if it exists, as well as any other exception or refinement of existing rules, must nevertheless make sense; it must be "reasonable." It must cohere logically with the other existing rules; it cannot be an ad hoc deviation.

Let us now consider international society. The most striking fact about the international legal system is that there is no legislative mode of lawmaking.[10] International law has its roots in an older system, one akin to the common law. To understand international law, and to discover its norms, we must put out of our minds the idea of law as legislation. Instead we must look for those regularities in the behavior of states that imply underlying norms of mutual accommodation.[11] The paradigm I have been leading up to can now be stated simply: From the behavioral interaction of states we infer what the underlying rules of international law really are.

THE LAW OF THE SEA NEGOTIATIONS

"Finding" Customary Law

Let me now suggest how this paradigm might be applied to the Law of the Sea Conference and to the Convention.

There is nothing to stop representatives of states, meeting in a multilateral conference, from adopting a "legislative" mode. For example, a representative might say that his government would be in favor of the conference adopting a 300-mile territorial sea. He may attempt various lobbying efforts on behalf of this preferred rule, offering to trade votes on other rules in order to achieve his

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10 Although the United Nations counts as its members most of the nations in the world, the resolutions of its General Assembly are not legally binding. Even to refer to them as quasi-legislative is misleading, unless one underlines the quasi and not the legislative.

11 When we look at behavior to discover the underlying norms that are implicit in that behavior, we are postulating the reality of law in the same sense that a scientist postulates the reality of the mass of Jupiter when looking at the perturbations of the other planets. It is our task as observers to discover, to infer, these legal norms.

Each observation of an international interaction gives us a measure of the underlying norm. As we add more observations, we get an increasingly clear sense of the underlying customary law, just as different measurements of the behavior of planets and satellites in the aggregate give a close approximation of the real calculated mass of Jupiter.

desired territorial sea. We should examine carefully the context of his remarks, the reaction of other participants, and any related materials bearing on his proposition. Our examination should be conducted with a view toward determining whether the proffered 300-mile rule is advanced as new legislation for the international community, or whether it is put forth as a simple restatement of the underlying customary rule.

In this particular hypothetical case, I am sure that an examination of the remarks of this delegate in their context would reveal that he desires new legislation that would extend the territorial sea beyond that which is generally accepted as customary in international law. If that is indeed our conclusion, then we can give no weight to the remark about the 300-mile territorial sea as such in attempting to infer what the real rule of international law is in that regard. The delegate's legislative preference would be like a child's two-dollar telescope in measuring the mass of Jupiter.[12] If, however, the records of a conference session indicate agreement as to the description of a generally accepted customary rule of law, then that description becomes very important as evidence of the customary rule. If, for example, the conferees agree that customary international law requires free navigation through international straits, then the record of that agreement in that conference constitutes evidence of such an international rule of customary law. The conferees might define an international strait in a certain way, and even if this definition does not exactly accord with what an observer might have said was the underlying customary-law definition, it becomes evidence of the underlying customary law by virtue of the conferees' acceptance of their own definition.[13]

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12 Although we can give no weight to the remark as such, we need not dismiss it as irrelevant. For at least it subsumes acknowledgment of a lesser territorial sea. A nation that wants a 300-mile territorial sea implicitly acknowledges the legality of a breadth of less than 300 miles, in contrast to the nation that desires a 3-mile limit, which implicitly disavows any greater width than 3 miles.

13 The same might be true of a common-law judge basing a judicial decision on custom. The decision itself becomes in future cases the "best evidence" of that custom.

The several lengthy multinational conferences leading to the Law of the Sea Convention thus constitute a wealth of potential evidence concerning customary law of general applicability. In each case, the scholar should examine the proffered positions of the delegates in the context in which they were advanced. We must determine whether the conferees were restating a rule ("finding" it) or whether they were lobbying for new legislation ("making" new rules). On those occasions where the conferees were "finding" the rule, we have evidence applicable to all states (not just the conferees) of the content of that rule.

The Impact of New Treaty Rules on Customary Law

What about the new legislative-type rules that have become incorporated into the Convention? These rules have an impact upon customary law but not because of their status during the conference. Rather, they have an impact upon customary law because of their status in a multilateral convention.

What is that impact? I have tried to spell out the impact of treaties upon customary law in a book published in 1971,[14] and in a recent article that updates the arguments and addresses the criticisms of Dr. Michael Akehurst.[15] To simplify my position, suppose that state A wants to extend its territorial sea from 3 miles to 12 miles and issues a proclamation to that effect. Suppose state B challenges that proclamation by sending fishing vessels 6 miles off the coast of A. Assume further that A intercepts these vessels and confiscates their catch. Diplomatic negotiation ensues between A and B, and at the end of the negotiation B decides not to challenge any further A's 12-mile limit.

This series of events can be called the "behavior of states" leading to the inference of a customary rule that tends to support the establishment of a 12-mile territorial limit. We normally look upon such cases as constitutive of customary law applicable to all states, not just to A and B. Indeed, under the paradigm I have suggested in this paper, we find in the diplomatic and subsequent interaction of A and B an implicit rule of accommodation in their external relations that

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14 A. D'Amato, The Concept of Custom in International Law 103-166 (1971).

15 D'Amato, The Concept of Human Rights in International Law, 82. Colum. L. Rev. 1110, 1127-47 (1982), responding to Akehurst, Custom as a Source of International Law, 47 Brit. Y.B. Int'l L. 1 (1974-75).

establishes a 12-mile territorial sea. We have "found" an underlying rule by examining the behavioral interaction of A and B.

Now let us suppose instead that A, desirous of a 12-mile limit, enters into a treaty with B that provides for a 12-mile territorial sea. Indeed, A can enter into a multilateral treaty that so provides, with B being one of the parties to the multilateral treaty. Is it plausible to suggest that customary law is not affected, in this second hypothetical case, because a treaty was used as the instrument of accommodation, whereas in the first case, which contained no treaty, customary law was generated? Such a position would denigrate the role of treaties as natural instruments of accommodation among nations. Yet such a position has been taken by the English positivist writers on international law, going back to Oppenheim, who have argued that a treaty cannot affect the underlying customary rule.16 By analogizing a treaty to a contract, these writers say that nations by contract cannot change the substance of the underlying law.

I contend that their position is at variance with the process by which international law has developed through the centuries. Most of the current rules of

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16 These positivist writers assert that treaties merely establish contractual obligations for the parties and have no effect on the underlying law. W. Hall, International Law 7-8 (A.P. Higgins 8th ed. 1924); 1 L. Oppenheim, International Law (H. Lauterpacht 8th ed. 1955) This view has been reiterated by several British and American scholars. C. Parry, The Sources and Evidences of International Law 29-32 (1965); Baxter, Multilateral Treaties as Evidence of Customary International Law, 41 Brit Y.B. Int'l Law 275, 285 (1965-66); Baxter, Treaties and Custom, 129 Recueil des Cours 31 (1970); Waldock, General Course on Public International Law, 106 Recueil des Cours 3, 84 (1962).

The contract view of treaties has been challenged by Lord McNair and Professor Sohn. They assert that domestic contracts are substantially different from treaties in several respects and that treaties can be important sources for finding evidence of customary law. McNair, The Functions and Differing Legal Character of Treaties, 11 Brit. Y.B. Int'l L. 100 (1930); Sohn, The Many Faces of International Law II, 57 Am J. Int'l L. 868 (1963).

See generally D'Amato, The Concept of Human Rights in International Law, 82 Colum. L. Rev. 1110, 1132 (1982).

customary law originated in treaties.[17] A treaty is a clear record of an interaction between two or more states that led to a resolution and accommodation of their positions. There is nothing about a treaty that makes it less a statement of customary accommodation than is behavior without a treaty.[18]

I would argue that the Law of the Sea Convention contains rules of accommodation among the parties that constitute evidence of customary law that is as good as any other evidence. The Convention, as a treaty that generates custom, thus has an impact upon nonsignatory nations. It does not affect nonsignatories as a "binding treaty," because a treaty can only bind the parties thereto. But it does affect them in the way suggested by Article 38 of the Vienna Convention of the Law of the Treaties: that the rules contained therein become "binding upon a third State as a customary rule of international law, recognized as such."[19]

If the pedigree of a rule in the Convention is a "legislative" one, it affects customary law as indicated above, but its status is somewhat different from that of another rule in the Convention whose pedigree was "law-finding." The latter type of rule was, after all, already a rule of customary law which was simply reinforced by virtue of its inclusion in the Convention. In contrast, the former was not a rule of customary law (because of its "legislative mode") until it became part of the Convention. Thus, the former rule, embodied in the Convention, may clash with a contrary rule of customary law that exists apart from the Convention. Here we have a clash of "measurements" of the underlying rule, just as two inconsistent cases clash with each other in common law. Whatever the resolution of this clash,[20] clearly this "new" rule is on somewhat shakier ground than the other reinforced rule.

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17 See D'Amato, supra note 16, at 1132.

18 Indeed, in the realm of contracts, Lord Mansfield looked to the content of contracts among merchants as an important source of the rules of the law merchant.

19 Vienna Convention on the Law of Treaties, art. 38, U.N. Doc. A/CONF. 39/27 at 289 (May 23, 1969).

20 I deal with some such conflicts in my book, The Concept of Custom in International Law, supra note 14, at 92-96.

The Requirement of "Generalizability" and the "Package Deal"

Not every provision of a treaty is capable of impacting upon customary international law. Some provisions apply only to the treaty parties, because they cannot be generalized to nonparties. Only those provisions that are generalizable beyond the contours of the treaty have the capacity to affect customary law. Provisions concerning the ratification and entry into force of a treaty are examples of rules that do not generate customary law.

Some supporters of the Law of the Sea Convention have attempted to characterize all of the provisions of that Convention as applicable only to the treaty and its parties.[21] This is the so-called "package deal" approach, whereby the legal benefits of the Convention are said to be applicable only to the parties who have also accepted its burdens. What is the status of the package-deal idea in international law?

Clearly the "package deal" itself is not generalizable; it is peculiar to the Convention. By its own terms, it applies only to the Convention and to the parties thereto. This is a trivial point--no one cares about the status of the "package deal" itself--but I make the point to call attention to the underlying mechanism.

Now we move to the question that everyone cares about: What is the legal effect of the "package deal"? Does it mean that only parties to the Convention can claim a 12-mile territorial sea because they have also accepted the burdens of the international regime for deep sea mining?

To answer this substantive question we must recall the "trivial" one--namely, that the "package deal" itself is peculiar to the parties to the Convention and is not a customary rule of international law. Because it is not a customary rule, how can it override the customary-law-generating process that treaties generally set in motion? The "package deal" theory attempts to carve out an exception to the law-generating aspect of multilateral conventions by saying that this particular Convention on the Law of the Sea shall not have general law-generating qualities. This stance of exclusivity can be only a wish, a desire, of the parties. It cannot override the general rule of the formation of custom. The rule is the same for every nation in the world and not just for the nations that are parties or are not parties to the Law of the Sea Convention.

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21 See pages 58-65 and 117-20 *supra*.

The "package deal" idea, in short, cannot legislate for the international community as a whole. It cannot deny law-generating status to other provisions of the Convention. When those other provisions impact upon general customary law, the impact is felt by all nations, parties as well as nonparties. The parties to the Convention cannot control the effect that the Convention will have upon general international law applicable to third states.

Thus, to sum up what I have said on the status of provisions in the Law of the Sea Convention, the following brief "rules" may be helpful:

1. In order for a provision in the Convention to constitute a "source" of, or "evidence" for, generally applicable customary international law, the provision must be generalizable as a norm of law.

2. Provisions in the Convention that are generally accepted apart from the Convention as expressing rules of customary international law have the highest status. The Convention reinforces these rules.

3. Provisions in the Convention whose pedigree in the Law of the Sea Conference showed the conferees to be in a "law-finding" mode have the next highest status as expressing rules of customary international law.

4. Provisions in the Convention whose pedigree in the Conference was "legislative" in mode also generate customary international law (provided Rule 1 above is satisfied), but these may be challenged by contrary rules emanating from a different source. The more parties that sign the Convention, the stronger will be the status of these rules found in the Convention.

5. None of the above rules is adversely affected by the "package deal" theory.

6. Agreements reached during the Conference that did not lead to treaty provisions nevertheless may furnish evidence of rules of international law if the context in which they were made was the "law-finding" mode.22

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22 Professor D'Amato expands on some of these themes and applies them to the Law of the Sea Convention more directly in his comments on pages 170-82 infra.

CUSTOMARY INTERNATIONAL LAW AND THE EXCLUSIVE ECONOMIC ZONE

by

Bernard H. Oxman[1]

It is no longer seriously disputed that international law permits the coastal state to establish an exclusive economic zone seaward of its territorial sea.[2]

But what does this mean? What is permitted? What is prohibited? What are the geographic limits of the zone? What are the substantive limits on the rights of states in the zone? To what extent is the arrangement stable?

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1 Having served as United States Representative to the Third United Nations Conference on the Law of the Sea, the author feels constrained to note that the views expressed herein are personal.

2 The International Court of Justice recently took the occasion to refer, in passing, to "the concept of the exclusive economic zone, which may be regarded as part of modern international law." Case Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 74, para. 100 (judgment). See also note 9 infra.

THE EMERGENCE OF THE ECONOMIC ZONE

At the risk of simplifying a great deal of history in a few brief paragraphs, it may be useful to review the political and conceptual history of the zone.

The Received Law

The "classic" international law of the sea, received at the start of the twentieth century, had two basic characteristics. First, it divided the sea between the free high seas open to use by all and a marginal sea adjacent to the coast subject to the sovereignty of the coastal states for all purposes (subject to a limited right of innocent passage for foreign ships). Second, it applied the high seas regime to virtually all of the sea. The maximum permissible breadth of coastal state sovereignty was probably 3 nautical miles from the coast, perhaps 6, arguably 9, and certainly not more than 12.

Outside the Western Hemisphere, virtually all coasts were controlled by European imperial powers. In general, they had no desire to change the system. Within the Western Hemisphere, a number of factors contributed to similar stability. These included the power of the British fleet, the emerging maritime interests of the states in the northern and southern temperate zones, a tradition of respect for the received law of Europe, the waning but still persistent influence of natural law philosophy, and an apparent view of the sea and its fisheries as a "free commodity" (inspiring early attempts to control markets through cabotage and landing restrictions rather than the resource itself).

Piracy and smuggling were the two major problems under this system. The roughly identical interests of states in suppressing piracy made the emergence of universal jurisdiction to control piracy on the high seas a relatively easy step. The jurisdiction being universal, it included the coastal state and therefore eliminated any need for coastal state incursions on the high seas regime as such in order to control piracy.

Smuggling was another matter. Although all coastal states shared, to some degree, an interest in controlling smuggling, the object of that control differed from state to state. For every unlawful import into one state, there were profitable exports from another. Accordingly, tentative efforts emerged to place a specifically coastal limitation on the high seas regime for purposes of controlling smuggling. During Prohibition, the United States attempted to extend such control as far as 50 miles from the coast, but was in effect forced back by Great Britain in a compromise arrangement.

Destabilizing Forces

By the mid-twentieth century, a number of forces combined to destabilize this system. Among these were:

Neutrality and defense. Isolationism in the United States and other parts of the Western Hemisphere promoted a desire to keep European military forces and European wars far away from the hemisphere. This became mingled with a passionate interest in protecting the Panama Canal. The huge zone around the Western Hemisphere proclaimed by President Roosevelt in the early years of World War II to protect the security of the hemisphere is perhaps the major manifestation of this trend. However, similar tendencies can be observed in the arrangements under the Treaties of Lausanne and Montreux regarding the Turkish Straits and the Black Sea, and indeed contemporary proposals for an Indian Ocean zone of peace and other proposals for special regional regimes.[3]

Decolonization. By mid-century, the nation-state system had exploded on the planet, replacing imperialism as the conceptual norm. Unlike the peoples of the Western Hemisphere, the peoples of Africa and Asia did not regard themselves as the biological or cultural descendants of Europe. Having liberated themselves from maritime imperialism, they had an ideological aversion to the rules of international law associated with the imperial regime, including the freedoms of the seas. Lacking industrial infrastructures, they looked to natural resources as the key to subsistence and foreign exchange. Lacking a merchant marine, they perceived little interest in protection of far-flung trade routes, not to mention naval mobility.

Fixed uses. Increasing demand for energy, the emergence of petroleum as a preferred source, and the discovery of petroleum in the seabed of the continental shelf had a profound impact.

Four factors were critical. First, hydrocarbons were discovered in the seabed in areas seaward of the traditional limits of the territorial sea. Second, the

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3 Historians might wish to consider whether the intended beneficiaries of such arrangements are the small and weak countries whose protection is the stated object or, rather, medium-sized regional powers, like the United States until sometime in the twentieth century, attempting to exclude the global powers from interfering with their political domination of the region.

exploitation of hydrocarbons required permanent or semi-permanent installations, thus raising the spectre of foreigners permanently installed off the coast. Third, mining on land was traditionally based on exclusive rights in a defined area for a substantial period of time, in part to encourage expensive exploration efforts, in part to avoid poaching, and perhaps because financing and tax structures were themselves based on an assumption of exclusive rights. Fourth, even if the high seas regime could conceptually accommodate claims of exclusive use over large areas for long periods of time (which is doubtful), it provided no precise guidance as to the spatial and temporal limitations on claims, offered no assurance of "secure title" such as accompanied mining on land, and left open the prospect of myriad competing claims with no global dispute settlement system in place equal to the needs of private investors.

The United States led the way--after a much more limited move by the United Kingdom and Venezuela in the Gulf of Paria--with the assertion in the 1946 Truman Proclamation of exclusive rights over the seabed beyond its territorial sea that constituted an extension of its land territory, namely, the continental shelf.

Today, the doctrine of the continental shelf is widely regarded as the direct historical antecedent of the economic zone, in part because of the substantive objects of coastal state jurisdiction (resources and scientific research) set forth in the 1958 Convention on the Continental Shelf. However, if one rereads the Truman Proclamation, it is rather clear that the effort was not so much a functional division between coastal state jurisdiction and high seas freedoms in the same area as a geographic one: the high seas regime applied to the waters, while the regime of the land extended under the waters to embrace the continental shelf. The modesty of the companion Truman Proclamation on fisheries is explained not only by pressure from U.S. distant-water fishing interests, but by the fact that the authors of the proclamations regarded the high seas regime as fully applicable to the waters but not to the seabed.[4] Moreover, aside from submarine cables and

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[4] The Truman Proclamation on fisheries expressly applies to "certain areas of the high seas" while the Truman Proclamation on the continental shelf refers only to "[t]he character as high seas of the waters above the continental shelf." An explanatory memorandum circulated by the U.S. Department of State to other governments along with the texts of the draft proclamations states, "The rationale of the open sea being free and forever excluded from

(Footnote continued)

pipelines, and anchoring by necessary implication, neither the 1958 Continental Shelf Convention nor the 1958 High Seas Convention explicitly addresses the question of nonresource uses of the seabed other than scientific research. Thus, the continental shelf "precedent" is a limited one.

Fisheries. Whether or not of particular concern to Grotius or supported by his conceptual arguments, there was no doubt at the start of this century that the freedoms of the high seas included freedom of fishing. However, increased competition for whales and fisheries made it clear that at least particular stocks in particular places were not free and inexhaustible commodities. This recognition led to two related developments. The first was competition for allocation of desired shares of stocks to support existing or projected fisheries. The second--an aspect of the next item in this listing--was a struggle for power to allocate, not only as a means for obtaining desired allocations, but as a source of political leverage over foreign states and economic rent from their fishermen.

Leverage. The search for sources of leverage in dealing with others is doubtless as old as society itself. The high seas regime, however, was in effect an agreement not to use the power to control the sea as a source of leverage over those interested in using the sea--at least in situations short of war. The successful campaign for free use of the Danish Straits in the nineteenth century was just that--an objection to the payment of economic rent even if the area was open to all those willing to pay rent.[5]

4(continued)
occupation on the part of any state is that it forms an international highway connecting distant lands and securing freedom of communications and commerce between states separated by the sea. There is no reason for extending this concept of the freedom of the high seas to the seabed and subsoil beneath its bed." 2 Foreign Relations of the United States, 1945 at 1502.

5 Even in the case of the Suez and Panama canals, the rhetoric surrounding the tolls reveals a confusion between return of capital, a reasonable rate of return on capital investment, division of operating costs among users, and pure economic rent above and beyond these amounts extracted solely by reason of control over the canals.

In the mid-twentieth century, various states began again to see control over navigation routes (perhaps by analogy to air routes over land) and marine resources as a valuable source of leverage and economic rent. There are those who believe, for example, that Indonesia deliberately embarked on a policy of encouraging tankers to use routes through the Indonesian archipelago in preference to the Straits of Malacca for such reasons. Franco's reasons for opposing agreement on free transit of the Strait of Gibraltar may have been similar; he was reportedly willing to accord such rights to "friends" in bilateral agreements of limited term. The Philippines have consistently maintained that U.S. navigation rights inside their claimed waters derive from mutual defense and base-rights agreements, which are of course subject to periodic renewal.

Whatever the intent, pollution-control jurisdiction over navigation was perceived to have leverage potential as well, as a former Canadian minister apparently made clear when he told constituents that closing Head Harbor Passage to large tankers for environmental reasons could encourage the flow of oil to New Brunswick refineries. Peru and Ecuador insisted not so much on a right to exclude foreigners from their claimed zones, or even to allocate tuna to themselves, as on a right to require the purchase of licenses at substantial fees. Little need be added regarding the growing perception in the mid-twentieth century that control over hydrocarbons is a colossal source of economic rent, not to mention political power.

Pollution control. The desire to prevent and reduce pollution of coastal areas had led, in the second half of the century, to increased pressure for coastal state jurisdiction over activities either in general or at least for the limited purpose of controlling pollution. This pressure was felt most substantially with respect to activities beyond the territorial sea that were not subject to coastal state jurisdiction under the 1958 regimes: navigation, overflight, marine scientific research, submarine pipelines, and nonresource installations.

Collapse of the Received Law

These forces and others combined to alter radically the law received at the start of the century. Conservative claims to fisheries jurisdiction beyond the territorial sea--combined with the continental shelf doctrine--broke the sharp division between the two classical regimes of the high seas and the marginal sea. More ambitious claims to very extensive territorial seas cut deeply into the predominantly high seas character of the sea. In both respects, the

regime of the sea as previously understood was giving way to ever-increasing projections of the regime of the land, be it sovereignty for almost all purposes or exclusive jurisdiction for more limited purposes.

By 1970, when the United Nations began formal preparation for a new comprehensive conference on the law of the sea, an increasing number of coastal states around the world refused to respect the limitations of the received law, and a substantial number of maritime and other states refused to acquiesce in extensive claims in derogation of the classic law (with the notable exception of the continental shelf). If lawlessness is properly described as a breakdown of old rules with no general acquiescence in anything to replace them, then it certainly was a period of growing lawlessness.

It may be that some new synthesis would have developed out of this struggle, a struggle that those of us who do not stake our careers on acquiescence and do not stake our lives on nonacquiescence politely call "the processes of customary law." In the event, that is not what happened.

The Third UN Conference on the Law of the Sea

The underlying issue was negotiated on a global basis in the Seabed Committee and in the early years of the Third UN Conference on the Law of the Sea in the form of provisions of a new general convention on the law of the sea. All major participants understood full well that (1) the very act of renegotiation weakened the legitimacy of the received regimes and their 1958 manifestations[6] and (2) that the document that emerged, whatever its future as a treaty, would have substantial impact on perceptions of legitimacy (arguably the essence of opinio juris) as well as state practice.[7]

Those who wished radical change in the classic regimes therefore had two objectives. The first was to delegitimate the classic law of the sea, particularly by breaking down the geographic scope of the high seas regime. The second was to achieve as much as possible in the new regimes, particularly in terms of coastal state jurisdiction.

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6 The regimes that the Conference was called to review are expressly identified, in lower case, by the words used in the titles to the 1958 Conventions.

7 The basic provisions regarding the economic zone were written in the present tense, to imply lex lata, rather than in the imperative (easily confused with the future) tense, which might imply lex ferenda.

Those who, on the contrary, wished to preserve much of the classic regimes--particularly in regard to navigation and military activities--also had two objectives. The first was to delegitimate unilateral action, particularly by coastal states, as the appropriate procedure for revising the law of the sea, and substituting therefor the idea that general agreement acceptable to the entire international community, and to those affected in particular, was the appropriate course. The second was to preserve as much as possible of the classic regimes in a new comprehensive regime. They chose to negotiate when they did because they saw time running against them.

The economic zone negotiated at the Conference was therefore an attempt simultaneously to accommodate two strategic objectives that--in terms of the classic law of the sea--were wholly irreconcilable: pushing the high seas regime as far out to sea as possible and pushing the territorial sea regime as close to the coast as possible. The reconciliation was sought not by dividing the area of contention--for political reasons defined as the area between 12 and 200 nautical miles from the coast[8]--but by creating a new regime that for some purposes has the characteristics of the regime of the land in somewhat attenuated form and for other purposes has the characteristics of the regime of the high seas in somewhat attenuated form. This entailed an exceedingly complex allocation of rights and duties to the coastal state on one hand and to all states on the other, with sufficient nervousness on both sides on some issues to produce an unprecedented agreement on compulsory arbitration or adjudication not subject to reservation.

Claims During the Conference

Not only before the ink was dry, but before all the "i's" were dotted and the "t's" crossed, coastal states around the world raced to "implement" their new "rights," particularly with regard to fisheries. Governments whose real objective was to delegitimate unilateral claims and preserve the classic high seas regime to the extent possible could no longer credibly contest unilateral claims conforming to substantively "acceptable" Conference texts solely on the grounds that only the entry into force of a global treaty could legitimate such radical change and could not resist the

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8 The approach of extending coastal state jurisdiction to 50 or 100 miles was, by the way, suggested at a meeting of the Asian-African Legal Consultative Committee in New Delhi in the 1970s.

pressure of their own coastal fishermen to claim now what they clearly were prepared to permit others to claim later.

Thus, the coastal elements of the economic zone--inspired by earlier contested claims--entered "customary law" in conceptually uncontested form by virtue of the emergence of general agreement on various negotiating texts at the Law of the Sea Conference. There is little doubt that this process was all but complete before the first signature was ever affixed to the ultimate Convention.

RESTRAINTS ON COASTAL STATES

This historical process leads many to conclude that the economic zone regime set forth in the Convention has moved, completely or largely, into customary international law.[9] This assertion is almost certainly true if by it one means that previous restraints on coastal state action have collapsed. The salient question is whether the new restraints on coastal state action set forth in the Convention are and will continue to be respected as a matter of state practice. To answer this question, we must speculate,

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9 Judge Jimenez de Arechaga asserts, "The provisions of the negotiating texts and of the draft convention [elaborated by the Third U.N. Conference on the Law of the Sea], and the consensus which emerged at the Conference, have had in this respect a constitutive or generating legal effect, serving as the focal point for and as the authoritative guide to a consistent and uniform practice of states. The proclamation by 86 coastal States of economic zones, fishery zones or fishery conservation zones, made in conformity with the texts of the Conference, constitutes a widespread practice of States which has hardened into a customary rule, an irreversible part of today's law of the sea." Tunisia/Libya Continental Shelf Case, supra note 2, at 115, para. 54 (sep. op. Jimenez de Arechaga, J.). On the other hand, Judge Oda agreed that "the Court need have few qualms in acknowledging the concept of the exclusive economic zone as having entered the realm of customary international law," but believes that "quite apart from the treaty-making process, the sui generis regime of the exclusive economic zone is going to require much more careful examination before the rules so far adumbrated may be viewed as susceptible of adoption into existing international law." Id. at 229, para. 123 (Oda, J., dissenting).

about state practice and about opinio juris. Will the coastal states restrain themselves? Will other states "enforce" the restraints on coastal states who do not?

Coastal State Self-Restraint

Why will a coastal state respect a limitation on its freedom of action to assert additional controls over foreign activities off its coast? Let us consider some of the possible answers.

Substantive interest. The state has no substantive interest in avoiding the limitation.

Strict reciprocity. The state believes that the specific limitation on the freedom of action of other states serves its interests (e.g., it does not want other coastal states interfering with its navigational interests off their coasts).

"Package" reciprocity. The state has little interest in promoting the specific limitation on the freedom of action of other states but desires other states to adhere to other limitations on their freedom of action that are linked--conceptually or politically--to its own respect for the specific limitation in question. The problem with package reciprocity is defining the package. At one extreme, the package is reduced to "strict reciprocity"; at the other extreme, it can embrace respect for all of international law, and thus the broader issue of credibility. One characteristic of treaties is that they help define discrete packages for purposes of reciprocal respect of rights and obligations.

Credibility. The state wishes to preserve its credibility to insist on adherence by other states to other "unrelated" restraints of international law. A state with a record of actions widely perceived as "violations" of law weakens its ability to insist on respect for law by others, particularly those offended by the precise "violations."

General reputation. The state believes that other states (or those with influence on other states) with which it seeks to make common cause will regard violation of the specific limitation as contrary to international law and, because they attach importance to the rule of law as part of their value structure, will be more reluctant to be too closely identified with the transgressor.

Internalization. The state, or significant internal forces in the state, believes that violation of the specific limitation is contrary to international

law and attaches importance to adherence to "the rule of law" as part of the state's internal structure of values.

Fear of failure. A state believes that an attempt to ignore the specific limitation will fail either because of direct resistance or retaliation by those affected, or because of legal condemnation by general opinion or a competent tribunal.

Specific costs. The state believes the specific costs of ignoring the restraint will be too high. Many of the preceding items are in fact costs of an action perceived to be a violation of a rule or system of rules either that the acting state wishes others to regard as law or that are in fact generally regarded as law. By specific costs we mean the costs of a struggle with other states over the specific limitation--be they military, economic, or political costs. Those costs are a function of the willingness of one or more states to sustain specific costs to promote respect by the acting state for the specific limitation.

It is readily apparent that opinio juris plays a very significant role in determining whether or not a state will yield to a temptation to ignore a specific limitation. In this regard, opinio juris is being used to refer not only to what is believed to be the law but what the specific state would like others to believe is the law. Only the first and the last two items listed bring into play extra-legal considerations, that is, reasons for self-restraint that go beyond the interests of the state with respect to rules of law and the "rule of law" as such. They raise the issue of reaction--or acquiescence--by other states that goes to the heart of state practice.

Flag State Enforcement of Restraints

The factors influencing the flag state decision on how to react to a coastal state's violation of a specific restraint are largely a mirror image of the factors influencing coastal state self-restraint. Why, and to what extent, will a flag state resist coastal state violation of a specific limitation? Let us consider some of the possible reasons for resistance:

Substantive interest. The flag state has a substantive interest in avoiding that particular limitation by that particular coastal state. What is rarely understood about the law of the sea is that this is not usually a very strong motive for resisting a particular action by a particular coastal state, either because the particular flag state activity affected is minor or can be conducted elsewhere, or because the coastal state makes a temporary bilateral exception for certain "friends."

Strict reciprocity. The flag state believes that the specific limitation on the freedom of action of third states, or all states in general, serves its interests. The object is deterrence of third states by example and by keeping open the option to react negatively to similar actions by them without the taint of discrimination or alteration of an accepted status quo.

"Package" reciprocity. The flag state has little interest in promoting the specific limitation on the freedom of action of third states but desires to deter other states from contravening other limitations on their freedom of action that are linked--conceptually or politically--to the specific limitation in question. In this case, both the specific coastal state that is the object of the reaction and the specific issue as well are merely exemplary. The reaction helps keep open the option to react similarly to different contraventions by other states.

Credibility. The flag state wishes to enhance the perception that violation of its rights in general will entail an adverse reaction. Promoting general respect for law is the object.

General reputation. The flag state believes that an active role of "law enforcement" will enhance its standing among those with which it wishes to make common cause.

"Internalization". External "enforcement" of the "rule of law" is perceived to have desirable internal exemplary effects.

Expectation of success. A flag state selects the reactive strategy best calculated to achieve either a rescission of the objectionable coastal state action or a legal condemnation of that action by general opinion or a competent tribunal. The flag state may be willing to engage in futile gestures but rarely costly ones. Ineffective resistance may be worse than nothing.

Specific costs. The decision whether and how to react will be influenced by the specific costs of reaction. The preceding items are largely benefits of an effective reaction. Against this must be weighed the costs of a struggle with the coastal state over the specific limitation in question--be they military, economic, or political costs. These costs are a function of the willingness of the coastal state to devote its resources to the struggle and the willingness of third states to share the cost of resistance.

It should now be apparent that opinio juris plays a very significant role in determining whether a flag state will react with vigor to a violation of a specific limitation. Again, opinio juris is being used to refer not only to what is believed to be the law, but what the flag state would like others to believe is the law.[10]

Governments that do not believe (much) in law presumably will devote few resources either to respecting or enforcing the law. One of the great mysteries of the current debate on the law of the sea is the assumption that such governments will be more willing to respect and enforce customary law than their predecessors.

Restraint and Legitimacy

Once it is recognized that both coastal state self-restraint and the willingness of flag states to react effectively to coastal state violations of asserted restraints are dependent upon a belief in and commitment to legitimacy, the weakness of the argument that "state practice" is a reasonable substitute for institutionalized or more formal sources of legitimacy is readily apparent. The weaker the sense of legitimacy, the less restrained state practice is likely to be or to be made. The more indeterminate the source of legitimacy, the weaker both self-restraint and the reaction to a supposed "violation" will be.

In terms of restraints on coastal states, it will be recalled that the first of the two effects sought by flag states from a global conference on the law of the sea was to delegitimate the process of change through unilateral claims in principle. That objective was weakened by unilateral assertions of fisheries and economic zones in anticipation of the Convention's entry into force. It was further weakened by

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10 Again, only the first and the last two items bring into play extra-legal considerations, that is, sources of restraint that go beyond the interests of the state with respect to rules of law and the "rule of law" as such. Moreover, the probability of success and the probability and nature of both a violation and a reaction to a violation--probability of success and the potential "specific cost" to the violating and reacting state--are related to willingness of others to act and react; that willingness is itself influenced largely--but by no means entirely--by the conviction that a specific legal rule, a body of related rules, or the "rule of law" exists or can and ought to be made to exist as a real restraint on behavior.

unilateral deep seabed mining legislation and agreements arguably at variance with the emerging Convention. It was gravely weakened by the United States' rejection of the Convention and virtually simultaneous assertion of an economic zone in terms that imply--presumably because of an aversion to the Convention in high places--that state practice, rather than the Convention, is the relevent source of authority.[11] The matter is done when U.S. government experts assert that the Convention is declaratory of international law because and to the extent that it reflects state practice. Unilateral action has been elevated above global negotiation as the basis of legitimacy.

We are back in the old world of customary law (that we never really left). The problem is that unless we promote the Convention as the primary source of legitimacy, we lose the platform of neutral legitimacy necessary to make any program of "enforcement of rights" either probable or credible or effective against either coastal states (or the exceedingly coastal propensities of the U.S. Congress and the U.S. bureaucracy outside the uniformed Navy and the Legal Adviser's Office of the Department of State).

In terms of restraints on coastal states, the second of the two effects sought by flag states from a global conference was to enshrine the desired restraints as binding treaty law in a form both more likely to be respected and more easily "enforced." This gain was to be the quid pro quo for accommodating coastal state ambitions in the same text. The maritime nations thought that the tendency to take treaty obligations more seriously than customary law obligations, the relatively greater determinancy of treaty rules as opposed to customary law rules, and the provision for compulsory arbitration or adjudication of disputes regarding interference with navigation, would contribute to increased self-restraint by coastal states, provide a relatively inexpensive option for reacting to violations of navigation restraints by coastal states (arbitration or adjudication), and provide a clear platform of binding principles to legitimate--and therefore render more likely and less costly--unilateral measures (including forcible measures) by flag states to deal with coastal state violations of those restraints. The hypothesis upon which this approach rested was widespread ratification of the Convention--a questionable prospect at the moment.

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[11] See Appendix A infra at 554-55, para. 18.

The ambitious coastal states, on the other hand, achieved much of what they wanted from the Conference, namely, to destroy the restraints of the old Grotian law of the sea regime without necessarily replacing them with anything else. They delegitimated the old restraints. They moved the negotiated texts strongly in the direction they desired. They did not commit themselves to accept the new restraints.

One interesting political question is whether they achieved even more than that. Having lured the United States into a process that delegitimated the old law, did they deliberately provoke the United States into delegitimating the Convention that was to replace the old law? Of the five most active "territorialist" states at the Conference--states favoring a 200-mile territorial sea at the least--only Brazil has signed the Convention.[12] Argentina, Ecuador, El Salvador, and Peru have not--as some in Washington are even prone to boast! The territorialist states, and in particular Peru, were instrumental in fashioning a Group of 77 position on deep seabed mining that ultimately led Washington to reject the Convention. It should also be recalled that these states were the <u>least</u> enthusiastic about moving "too quickly" into a new conference on the law of the sea, because they recognized that the territorialist position had insufficient adherents at the time to succeed.

<u>Continuing Destabilizing Forces</u>

It cannot be said that the economic zone set forth in the Convention text fully accommodates the pressures that led to the collapse of the old law. To some extent it does, but to some extent it does not. The following is a brief review of the destabilizing factors identified earlier, in light of the Convention text regarding the economic zone:

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12 Many other coastal states wanted more than 200 miles. Canada, for instance, while not a member of the territorialist group, has made it quite clear in fisheries discussions since the Convention was negotiated that it is dissatisfied with the 200-mile maximum limit for fisheries jurisdiction. It should be obvious to anyone who studies the law of the sea that if the tuna fleet lines up right outside the 200-mile limit either in the eastern or western Pacific, they could fish a great deal of tuna. The coastal states may try to extend their jurisdiction to try to stop this activity.

Neutrality and defense. The economic zone does not accommodate desires to exclude foreign military forces. Quite the contrary, the Convention text accomplishes the reverse by holding back the territorial sea at 12 miles.[13] Thus, both the breadth of the territorial sea and the nature of navigational rights in the economic zone remain subject to coastal state pressure.

Decolonization. The global renegotiation of the law of the sea does tend to sanitize it of its imperial connotations. Similarly, the Conference itself served to educate many developing country officials about the importance to them of protecting maritime lines of communication from third-state interference--irrespective of the flags flown by the ships plying the routes.

Fixed uses. The coastal states received almost--but not quite--all that they wanted, namely, control over all fixed uses. They gained control over fixed military installations only if drilling into the seabed is involved or if the installations "may interfere" with the exercise of coastal state rights.[14] Thus, the pressure for coastal state control was not fully relieved by the Convention. Moreover, in the future, coastal states may desire control over fixed uses beyond the 200 miles in areas--plentiful in the Pacific--where the continental margin does not extend beyond that limit. There is nothing "natural" or "principled" about 200 miles.

Fisheries. Coastal states received almost--but not quite--all they wanted.

The exceedingly flexible duties to conserve and ensure full utilization of fish stocks require at least a rhetorical fig leaf for coastal state management programs.[15] Still, some politicians--particularly in the U.S. Congress--seem to find these nominal restraints distressingly confining.

Although not without its interpretive challenges, Article 64 on highly migratory species is certainly less than some coastal states wanted. Should the

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[13] See discussion at pages 302-06 infra.

[14] See Articles 81 and 60(1)(c).

[15] See Articles 61 and 62 and discussion at 314-41 infra.

threat to tame the coastal states by overfishing tuna beyond 200 miles ever take shape, one can expect pressure to extend coastal state claims.[16]

In response to the position of the United States Department of Defense, the Convention does not expressly permit arrests beyond 200 miles for violation of salmon fishing regulations.[17] In response to the position of the United States Department of Commerce, the U.S. Fisheries Management and Conservation Act does.[18]

Leverage. The underlying approach of the Convention is to permit the coastal state to use control over resources to 200 miles or to the edge of the continental margin as a source of economic rent and leverage, but also to prevent the coastal state from using geographic control over the area itself--that is, over navigation and overflight--for leverage, be it in straits, archipelagic waters, or the economic zone. The deep seabed mining regime was rejected in part because it appeared to accommodate the demands of the developing countries for leverage in that area. To the extent the desire for leverage persists, it will stimulate either coastal state claims over resources seaward of 200 miles and beyond the continental margin--tuna and deep seabed resources--or claims to control activities in the economic zone that are not, under the Convention text, subject to coastal state control: noneconomic installations and navigation and overflight in particular.

Pollution control. The economic zone set forth in the Convention accommodates coastal state demands substantially but not entirely. With respect to navigation, coastal states have limited rights to enforce against violations of generally accepted international discharge standards. If those enforcement rights are absorbed by customary law, maritime nations may lose their ability to claim compulsory arbitration to adjudicate claims that specific enforcement activities unreasonably interfered

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16 As Canada makes clear at every opportunity, 200 miles is not enough for coastal states that "have fisheries that migrate beyond 200 miles."

17 See Article 66(3)(d) and discussion at 361-69 infra.

18 See 16 U.S.C. secs. 1857(2)(b) and 1858(a).

with freedom of navigation.[19] Moreover, the coastal state lever of compulsory arbitration over the flag state with respect to its environmental and navigation duties is lost without a Convention, further increasing the temptation to make unilateral claims of control. Warships--and thus the sensitive issue of nuclear pollution--are beyond the reach of coastal state pollution regulations under the Convention. That is not the case under the 1958 Territorial Sea Convention that is part of the customary law superstructure upon which opponents of the new Convention hope to rely. Overflight is untouched by the new Convention's environmental provision (despite an ingenuous argument the author once heard from U.S. aviation bureaucrats that Concorde could disturb fisheries in the 200-mile zone).[20] The coastal state acquired substantial new controls over pollution from scientific research, pipelines, and all economic installations, but it is limited with respect to noneconomic installations.

In sum, a great deal of the destabilizing pressure has been relieved, but not all. In my opinion, the economic zone is part of customary law today, if by that one means that the coastal state has no less than the rights set forth in the Convention. If, on the other hand, what one means is that the economic zone is part of customary law in the sense that the coastal state will not be entitled to claim one more thing than is given to it under the Convention, then I am not at all sure. I am not sure that the restraints on coastal state claims will become part of customary international law, because the exclusive economic zone was a compromise. It did not fully accommodate every coastal state desire for jurisdiction. We are back in that wonderful world of state practice to which Mr. Colson referred.[21]

CONTENT OF THE ZONE

The most significant question to consider in connection with the economic zone under customary law is whether the zone is an amorphous regime to which certain very general principles apply (such as those

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[19] Routing and navigation practices, construction and equipment, and even standard-setting for discharges are, however, beyond coastal state reach (outside ice-covered areas).

[20] See also page 289 infra.

[21] See discussion at pages 40-49 supra.

found in Articles 56 and 58 of the Convention and the antecedent Santo Domingo and OAU Declarations) or a precise regime incorporating the detailed compromises set forth in the Convention, including a precise inner limit (12 miles) and outer limit (200 miles). This is the most significant question because (1) if the idea of an economic zone is part of customary law, (2) if coastal state pressures for increased control in areas off the coast persist, and (3) if the specific restraints set forth in the Convention do not become part of universally binding treaty law subject to third-party arbitration or adjudication, then the door is open to gradual expansion of coastal state authority. If the economic zone is only a few general principles awaiting elaboration by state practice, such expansion cannot be opposed as a matter of clear principle, because the only generally accepted principles would be vague and conflicting (e.g., freedom of navigation vs. coastal state jurisdiction to control pollution).

Three forces are at work to keep the content of the economic zone regime vague under customary international law. First, the language of the International Court of Justice in the North Sea Continental Shelf cases can be understood to mean that general principles set forth in a treaty are more easily absorbed into customary law than technical details, arbitrary choices, rules of convenience, etc.[22] Second, the same states that insist on excruciating detail in international treaties are, invariably, coyly vague about details in their unilateral pronouncements regarding international legal obligations. The same options they wish to foreclose for others in a treaty they wish to keep open for themselves in unilateral statements. Third, national legislation regarding coastal zones almost invariably concentrates on coastal state rights, ignoring--or treating quite gingerly--coastal state duties and third state rights.

In response to these considerations, what then do we make of the exclusive economic zone?[23]

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22 North Sea Continental Shelf (W. Ger. v. Den. & Neth.), 1969 I.C.J. 3.

23 The remarks that follow are contained in similar form in Oxman, Customary International Law in the Absence of Widespread Ratification of the U.N. Convention on the Law of the Sea in A. Koers and B. Oxman (eds.), The 1982 Law of the Sea Convention, 17 L. Sea. Inst. Proc 668 (1983).

Article 55 of the Convention states that the essence of the economic zone is the functional allocation of rights and freedoms set forth in the Convention. 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 nonresource 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, although extensive, are not completely unfettered. They are qualified by duties to ensure conservation, to protect the ecological balance, and to promote optimum utilization, as well as special rules regarding anadromous species, catadromous species, highly migratory species, marine mammals, stocks that traverse the limits of a particular state's economic zone, as well as obligations to protect the interests of landlocked 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.

Many states in the negotiation 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 principles 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, 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. The general principle in

Article 56 that the coastal state has jurisdiction to control pollution in the economic zone is only a cross-reference to other detailed provisions; in the case of ships, it is in fact quite misleading.

The detailed pollution provisions make clear (outside ice-covered areas) that 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 such enforcement interferes with navigational rights.

Is any expert in constitutional law or individual rights 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 an 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 United States proclamation of an economic zone[24] 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 seabed. The supposed principle in Article 56 is in fact a cross-reference to the finely honed provision of Article 60. If one reads Article 60 carefully, one discovers that most, but not quite all, installations and structures in the economic zone and on the continental shelf are subject to coastal state jurisdiction; the jurisdiction embraces:

-- all artificial islands;
-- installations and structures used for resource or other economic purposes;
-- installations and structures subject to coastal state rights over scientific research; and

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24 See Appendix A *infra* at 551, para. f.

-- 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 noneconomic installations that do not interfere with coastal state rights? How useful is the argument if most coastal states disagree?

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; 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:

First: Customary international law is continuously changing in response not merely to rational dialogue (or a battle of words), 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.

Second: 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 internationl organizations or tribunals is for all practical purposes out of the question.

Third: 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 between the restraint provided by a treaty and that provided by customary law is substantial.

CONCLUSION

It may be that, as of today, there is insufficient basis in state practice and opinio juris for coastal state claims of control beyond those recognized in the Convention. Even if that were so, there will be no compulsory arbitration to keep interpretations (including those by the U.S. Congress and bureaucracy) within a reasonably narrow range. It may also be that a carefully implemented policy of "package reciprocity"--which appears to be the intent of President Reagan's Oceans Policy Statement[25] could succeed if the principal maritime powers remained true to the Convention package (deep seabed mining aside) both by restraining themselves (including in particular the U.S. Departments of Commerce and Interior, the environmental lobby, and the U.S. Congress) and by adopting effective resistance and retaliatory policies designed to restrain others. But history supplies more than ample reason to doubt whether these conditions can be met, all the brave words to the contrary notwithstanding.

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25 Appendix A infra.

The U.S. record on coastal state self-restraint on law of the sea issues is--to put it very mildly--ambiguous. The U.S. record on enforcement of rights off foreign coastal states is reasonably good in the rare instances when the U.S. has no significant bilateral interests in the coastal state that might be damaged by the confrontation (Cambodia, Libya), but it is--again to put it mildly--ambiguous where a military base, oil investment, contest for influence with the Russians, or similar "hard" interests in the coastal state might be damaged by confrontation. This ambiguous record was compiled at a time when U.S. policy was characterized by the most easily understood of "bright line" rules, namely geographic lines. How in the world does the Navy expect to convince politicians to absorb costs and run risks when the issue is the distinction between a coastal state right and a flag state obligation, or the meaning of "due regard," or control of pollution in what is concededly "the coastal state's" (note the possessive) economic zone, in order to "enforce" adherence to, or influence interpretation of, a Convention the United States rejected with such fanfare?

It is submitted that the American and Soviet lions, however formidable, are likely to become as timid when they cross the line into "foreign territory" as the metaphor implies. Rejection of the Law of the Sea Convention makes it certain the this psychological line is no less than 200 nautical miles from the coast. Therein rests the "balance" of customary "law."

DISCUSSION

Most National Statutes Declaring Exclusive Economic Zones Do Not Conform to the Convention Text

William Burke: A study has been recently published about the exclusive economic zone concerning details of national legislation.[1] Maybe national legislation is not the best evidence of what states believe the law to be on this, but it is probably as good as we are going to have for the time being. This study indicated that approximately half of the legislation that has been adopted goes beyond the Convention and only a very small part is actually in word-for-word compliance. Three years or four years ago, I looked at what was available then and discovered a fair number of states whose legislation governed coastal navigation in terms considerably beyond what was permitted in the draft treaty at that time.

Although we can safely conclude that the general concept of the exclusive economic zone has been accepted as part of international law, that does not get us very far in defining what it really means in practice. I think that what states think they can do in their 200-mile zones, as evidenced by their legislation, is currently still the best evidence of customary law. The Convention will be secondary for some time.

Were There Hidden Agendas Among the Negotiations? Did Some Nations Try to Make the Convention Text Unacceptable to the United States?

Hasjim Djalal: I will only make a short response to Bernie's paper regarding his point on geographic

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[1] Gerald Moore, Coastal State Requirements for Foreign Fishing (FAO, April 1983).

leverage.[2] Perhaps, as usual, Bernie knows more than I do about this whole problem, including the Lombok Strait or the Strait of Malacca issues. It has never been the intention of Indonesia to use the problems of navigation in the Strait of Malacca as leverage to divert the traffic to the Lombok Strait. This was what Professor Bernie Oxman would like the world to believe.

We did not see any benefit to us from the diversion of tanker traffic from the Strait of Malacca to the Strait of Lombok. These tankers of 280 or 300 thousand tons never stop. What benefit would there be for us? Even if they could stop at our port, we could not handle them. Why should they stop? They do not bring oil to us, they bring oil to Japan.

In fact we were very worried, as Professor Oxman knows, because our major tourist area is Bali. Bali is in the Lombok Strait route for tanker traffic. We were very worried because if there was an accident in the Lombok Strait, our tourist center would close. So this argument that the Indonesian position on the Strait of Malacca was used as leverage to increase the traffic in the Strait of Lombok was implanted in order to antagonize Indonesia and Japan. It did not work, because Indonesia, Malaysia, Singapore, and Japan worked very seriously to improve safety of navigation in the Strait of Malacca.

I have never heard of the theory suggested by Professor Oxman that countries like Peru and Ecuador, were actually at the forefront of instigating the Convention, and that they created contention over seabed mining so that it would be unacceptable to the United States.[3] I have never heard of this theory, and it is new to me. Perhaps Tommy Koh has heard?

Tommy Koh: You are right there.

Djalal: These countries have not signed the Convention not because of the seabed regime, but because of other specific problems that they have with it. What I know about this is that around 1967-68 it was the United States who came to us in Jakarta and proposed a conference. They proposed a conference that would deal with navigation, fisheries, and the continental shelf. The seabed issue was independently dealt with by Pardo at the United Nations. I myself would simply say that it is probably unfair to blame these Latin American countries for the United States not accepting the Convention. It is probably

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2 See pages 142-43 supra.

3 See page 152 supra.

going a little bit too far to blame other countries for the inability of the United States to live up to its own position.

The Claims of Coastal States to Extended Jurisdiction May Become Customary Law, But Their Responsibilities to Navigational Interests May Not

Koh: Bernie Oxman is as usual very profound and sophisticated in his reasoning, but I am not very sure whether I follow the main thrust of his argument. Bernie, may I try to summarize your main points as I understood them?

I understood you to have said that when we argue that the exclusive economic zone, by virtue of state practice, has become part of customary international law, we should be careful of the differences between the resource claims by coastal states and these states' obligations to the international community. We should be careful to differentiate the rights that coastal states derive under the Convention from the prohibitions against the claims of additional rights.

I understood your second point to be that further danger exists if the Convention does not become widely ratified and supported, or worse, if the Convention becomes unravelled because of lack of support. The danger present to the international community in general and to the great maritime powers, like the Soviet Union and the United States in particular, is that the claims and the rights of coastal states in the exclusive economic zone will become generally accepted as part of customary law, but the obligations to navigational interests will not enter custom. The denials to coastal states of additional jurisdictional claims that they have made and that were not conceded at the Convention will be eroded.

Would I be correct therefore in deducing the conclusion from your thesis that, even on a familiar subject like the exclusive economic zone, it is important from the point of view of the strategic interest of the great maritime powers for the Convention to succeed? The customary law itself may not prevent coastal states from acquiring additional rights, which would be injurious to the maritime powers' interests. Did I understand your thesis?

Oxman: I think the most merciful and accurate answers to all of the questions would be "yes."

Political Motivations and the Law

John Craven: Bernie Oxman has quite correctly pointed out that behind every nation's view with respect to the rule of law we can find a political motivation. The chief reason why the Reagan administration decided against signing the Law of the

Sea Convention is their view that they could not politically convince the U.S. Senate to ratify this treaty. The current position of the United States is the legal fiction that the Convention is not in fact a comprehensive treaty that resulted from a detailed negotiation process, but it is rather a mere restatement (95 percent correct) of developing customary law of the sea. Customary law that developed overnight. States' practices that developed overnight. Doctrines that arose suddenly out of air, doctrines that can now be construed as customary law. Yet almost all of them violate long-accepted principles of what forms customary law.

Satya Nandan: We have heard law and politics being mentioned as two different entities. I look at international law as a part of the political process. Obviously when we talk about technical rules and legalistic considerations you can make a distinction. I would urge this body to look into international law as a process of decision making and to place it in the broader context of the political arena in which we all function.

THE UN CONVENTION ON THE LAW OF THE SEA AND CUSTOMARY LAW

by

Anatoly Kolodkin and Anatoly Zakharov

All problems of using the oceans are global. They influence the development of international relations and concern the interests of all states. The Soviet Union has always expressed its will to cooperate with states of different social systems in order to settle any problem of exploring and exploiting the oceans on an equitable basis.

There are many examples that show us the real intentions of the U.S.S.R. and other states to work out a comprehensive Convention. The UN Conference has succeeded in regulating practically every kind of human activity on the oceans.

The Convention is a carefully developed balance of interests:

(a) of all states and groups of states;

(b) of socialist countries, developing countries, and the Western countries, including the United States (the text reflects most of the U.S. proposals);

(c) of coastal states and those that have special interests in navigation;

(d) of the individual interests of each state and the international maritime community as a

whole, especially in the fields of protecting the marine environment and scientific research in the oceans;

(e) of the coastal states and the international community in the areas of navigation and protecting the environment in the territorial sea, in navigation in the EEZ, and navigation in the straits;

(f) of different kinds of human activities conducted on the sea, such as navigation, shipping, and the operations of ships, on one side, and the exploration and exploitation of the resources of the continental shelf, the resources of the EEZ, and resources of seabed areas on the other; and

(g) of activities designed to promote peaceful purposes (Articles 88, 141, 301, etc.).

The Convention is a very important and significant historical step in the progressive development of the law of the sea. Not only has it confirmed and codified certain well-known and generally recognized principles and norms of the high seas, such as the freedom of navigation on the high seas, freedom of overflight, innocent passage through the territorial sea, and the regime of the continental shelf, but it has also established and developed new principles, such as the norms regulating deep sea mining, transit passage through the straits used for international navigation, the exclusive economic zone, and a number of provisions concerning marine scientific research.

Many theoretical problems arise from the Convention. How do these new conventional rules correlate with the norms of customary international law?

In accordance with Article 38 of the Statute of the International Court of Justice, a custom is viewed "as evidence of a general practice accepted as law." At the same time, an opinion prevails both among Soviet and foreign jurists that evidence of a general practice is not necessarily enough to prove an existing custom. A general practice may be considered only as a usage that serves as a necessary step in the lawmaking process.

These jurists feel that an additional requirement for the creation of customary law is <u>opinio juris</u>, which means the <u>obviously expressed</u> recognition by a <u>state of such a practice as a norm of law</u>. A sovereign state expresses its will to be a party to legal relations based on a custom and general practice by means of recognition or <u>opinio juris</u>.

Therefore, the necessary condition for the creation of a customary law norm is opinio juris; or rather the obviously expressed recognition by a state of a practice as a norm, by which that state will be obliged. The substance of opinio juris consists of the decision of the state to accept and follow the general practice and to be obliged by the law to act in such manner.

The UN Convention comprises a number of new, previously unknown international legal norms and institutions. These norms relate to the exclusive economic zone, the legal regime of deep seabed mining, and the delimitation of the continental shelf. Such concepts may be accepted as customary norms only if states come to an agreement in relation to their content.

Is the EEZ Part of Customary Law?

Using this opinio juris approach, can it be said that the exclusive economic zone has become a part of customary law? During the negotiations at the Conference, many nations established different kinds of zones: economic zones, "resource zones," "zones of national jurisdiction," and "interim measures" for the preservation of living resources. There is a difference not only in their terminology but also in their content. The rights and obligations provided for in these national zones differ greatly from the provisions of the Convention and from each other. Because of these differences, we cannot say that any specific concept of a coastal zone has emerged as customary law.

In the case of the United States, we can say that its establishment of an economic zone is an attempt to pick and choose only those provisions of the Convention most favorable to U.S. interests, thus trying to destroy the idea of accepting the Convention in toto as a whole, as a package deal that cannot be unpacked. This attempt will not help the creation of an effective, equitable, and balanced legal order of the oceans.

Let us say in closing that in spite of the differences between our countries, we are here in our personal capacities. We are here to exchange views in order to find the appropriate solution to help the international community and our governments. We feel that the best compromise solution--to avoid these difficulties about customary international law--would be for the United States to sign and then ratify the Convention.

DISCUSSION

Is the Common Heritage Principle a Norm of Customary International Law?

Young-sun Song (University of Hawaii, Ph.D. in Political Science, 1984): According to Tunkin,[1] the Soviets make a distinction between a customary rule and a customary norm of international law. For a customary rule to change into a customary norm of international law, there must be opinio juris. Is there opinio juris for the concept of the common heritage of mankind in your opinion?

Anatoly Kolodkin: In my country not everybody recognizes that the concept of common heritage is a norm of customary international law. It is difficult to say now that it is a norm of customary law, but some people feel that the situation is such that we can say that it is in the process of development from a concept to a principle of international law. If you ask my opinion, we adopted the concept of the common heritage of mankind in the Declaration of the General Assembly in 1970.[2] Of course, there is the problem of the recommendatory nature of the declarations and resolutions of the General Assembly. But at this stage you cannot absolutely reject and refuse the common heritage concept on this basis. That is why I believe that we can state that this concept became a norm of law and a principle as well.

The very important element of the common heritage is that nobody has a right of access to the seabed without the consent of the international authority.

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1 G.I. Tunkin, Theory of International Law 113-33 (especially 117) (W.E. Butler trans. 1974).

2 See Appendix B infra.

Irony of a Meeting on Customary Law

William Burke: I would like to note the irony of this meeting. Anybody who had predicted ten years ago that we would be meeting a year after signing the Convention on the Law of the Sea to discuss the customary international law of the sea, primarily in the context of the United States as a nonsignatory, would have been a candidate for examination by a psychiatrist. Here we are, meeting in the United States, after years and years of complex, arduous, difficult, and innovative negotiations. The United States was a leader in those negotiations and a prime instigator of the Law of the Sea Conference in the first place.

What makes this so ironical is that the purpose of the United States in having a Law of the Sea Conference was to end customary international law. There was not to be any more development of the law of the sea by custom, strange as that sounds. The idea was to put an end to continual extensions of national jurisdiction. It seems to me ironic that after all those years of trying and, in major respects, succeeding in reaching the desired objectives, we are now discussing customary law, primarily because the United States has decided not to sign.

How Does Customary International Law Develop?

Anthony D'Amato: I would like to respond to the ideas presented by the other speakers and apply the theories of customary international law more directly to the Law of the Sea Convention.

We infer customary international law from the behavioral interaction of states. States behave toward each other in certain ways. We infer from that behavior certain regularities that amount to legal explanatory rules of custom.

There is an assumption under this view that states have an equal impact in the creation of international law. After all, we are talking about states and we are talking about law; it would seem highly problematic to assume a system where there is unequal applicability of that law. I disagree with Mr. Colson very sharply on this point.[3] I do not think the United States has a better claim to be a law generator than any smaller state in the system, any more than a rich person has a claim to have more impact on law than a poor person in a domestic legal system.

The behavioral manifestation of customary law is found through an examination of the positions that

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[3] See Mr. Colson's discussion at 41-42 supra and also see 267-68 infra.

states take on millions of interactions with other states over hundreds of years. Regularities emerge that coalesce into rules of custom. Is it necessary for a certain period of time to elapse for a custom to be generated? I think the custom that established the legality of spy satellites occurred with extreme rapidity even though only two nations had been using them, and they had been using them for only a few years. In matters of rapid technological development, a custom can arise quickly.

How Much "State Practice" Is Required?

It is important to put "state practice" in quotes. I think a treaty is as much practice as anything else. If two nations enter into a treaty, that action is just as good an example of their actual practice as if they did not enter into a treaty but acted in the same substantive manner. For example, suppose the nine nations that have ratified the Law of the Sea Convention did not ratify the Convention, but nevertheless respected among each other a certain territorial sea and a certain EEZ. This interaction is indicated by unilateral declarations, respect by the other side, and enforcement by the coastal state. We would say after observing that practice: "Well sure, that is custom. These nine states are creating custom." Now how could it possibly be that if they ratify a treaty to the same effect, we would not count the treaty as constitutive of custom? The treaty is after all a legal commitment to do those very things that would have been done in practice absent the treaty. I was surprised when I did my research into this to find out that virtually all--not every one but virtually all--the rules of international law as we know it derive from treaties. If you go back far enough, you will find that the first indications of all the customary rules that we now have were previously in treaties in one form or another. Professor Schwartzenberger even found some examples that I would not have thought could possibly have had treaty origin.[4] Even the rules for protecting ambassadors originated in treaties. To claim that treaties do not generate custom is to ignore the entire historical record.

What Is the Role of Opinio Juris?

Whenever we are talking about law, we are talking about something that is visible--behavior--and something that is invisible--a mental attitude. Opinio

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[4] G. Schwartzenberger, The Frontiers of International Law (1962).

juris refers to that mental attitude. How do we know what a mental attitude of the state is? We look at what the state says. Does it acknowledge or articulate a rule as a norm of law? That is all we can get when we are talking about artificial entities such as states. That plus the behavioral evidence constitute the customary norm.

Can One Nation Prevent a Norm That All Other Nations Agree Upon From Becoming a Binding Principle?

This question, suggested by Professor Van Dyke, is in my opinion not worded properly, because the agreement of other nations is not essential to the formation of customary international law. We do not take a survey of every nation in the world and say, "Now do you agree to this most recent customary international rule? Do you agree to the spy satellites?" No one takes this kind of survey, nor do they do so in domestic law if Jones sues Smith in court. If Jones wins, his victory may have a profound impact upon you. The case that he brought in court against Smith may involve a legal principle that directly affects your life. Does anybody ask you? No. Did you vote for it? No.

The common law develops out of lawsuits between other individuals that impact upon the rest of us. Similarly, international law develops when nations interact. The way they resolve their interactions has a bearing on all the other nations. If the other nations do not do anything, even if they have not heard about it, rules nevertheless develop.

New nations sometimes object that they do not need to follow international law because they had no say in developing it. That is not a very good claim. When a baby is born, that baby does not have the right to reject some or all of the law of the domestic legal system into which it was born. A state that exists in a system of states has a great many duties and a great many rights whether it likes them or not. The right to the sanctity of its borders is probably the most important right that a new state inherits. If it were not for international law, then a new nation would be far worse off, even though the new nation did not participate in the formation of these rules.

I do not think one nation can stop a rule of law from developing. One nation could try to set up a contrary rule by agreements with similar-minded dissenting nations or by developing a practice with other dissenting nations. If a nation did that, then the international arena would be just like a jurisdiction that had some cases that went one way and some cases that went another way. In international law, we would have an example of conflicting customs that would have to be resolved.

But I do not think one nation can do it on its own, because a nation acting on its own has not acted in an internationally relevant sense. It has not interacted with any other nation. Its own wishes therefore have not been actualized in any way that could lead to the formation of custom.

The Requirement of Generalizability

Norms of customary law derived from the behavior of states have to be generalizable. In other words, they have to be principles that we can say count as rules of law. The seabed provisions of the Law of the Sea Convention are not generalizable in this sense, because a specific regime, a specific institution, has been set up to collect money and to engage in mining enterprises.

In any traditional view of customary law, the creation of such an organization is not a law-generating mechanism. Because states are free to join or not join this organization, it does not create law for all states in any equal sense. From this perspective, one can support the Reagan administration's position of rejecting Part XI while claiming that other parts of the Convention are applicable.

Mr. Colson said that custom must include the state whose interests are most directly affected.[5] I do not agree. The spy satellites might directly affect France or England or Australia, but so what? I do not think a claim by a nation that these matters are vital to its interest would hinder the development of a contrary custom, if the nation took no action to block that development.[6] No nation can legally be in a better position than another nation.

Mr. Colson says there must be a general practice that must contain elements of acquiescence and estoppel.[7] That is true if we are going to be descriptive of customary laws that have already arisen, but it is not true if we are talking about new norms of customary law. We may not have enough time or enough evidence of acquiescence and estoppel. Nevertheless, new laws can be created.

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5 See pages 40-42 supra and pages 177-78 infra.

6 Moreover, any action to "block" development of custom would have to involve at least one other state in order to provide the requisite internationality to the formation of a contrary rule of custom.

7 See page 41 supra.

He says custom is slow to develop and difficult to apply.[8] I disagree with that. I think it can develop slowly or quickly or be easy or difficult to apply, depending on what rules we are talking about.

"Pick and Choose" on a Global Scale

Mr. Colson then said that custom ultimately depends upon the consent of states, that a state may remove itself from the customary practice.[9] When I heard him say that, I thought, "That sounds like the position of the Soviet Union in 1960." For a long time, we American scholars thought that the United States' position on custom was more liberal than that of the Soviet Union. We thought that the U.S. view was that custom did not depend on the consent of the parties, but rather was a law-creating mechanism that established law that may sometimes be at variance with what the United States wanted.

Many American scholars were upset with the Soviet position, at least as it was expressed in the early 1960s, that unless the state consents to each and every rule of the system, it is not bound thereby. That is "pick and choose" on a global scale. It would be like saying that unless the bank robber consents to the laws of burglary, he is not bound thereby, or unless the murderer consents to the laws of the murder, he can kill anybody he wishes. That has never been a rule in any legal system. I am surprised to hear the United States--at least through Mr. Colson--taking that kind of a position now. It seems to me that it is a very simplistic position, and it is not a position that comports with his ultimate conclusion that the United States remains committed to the rule of law.

I do not think one can have a rule of law that is dependent on the consent of the subjects to it. That is not a rule of law at all. That is like saying we will agree to it if we like it, and otherwise we will not bother with it. If it hurts us in any way, no matter how slightly, we are not going to go along with it. That seems to me to be power--if you want to describe what it is--but it is not law.

I do not think the United States needs to take that position. The requirement of generalizability would cover much of what Mr. Colson worries about, without having to discard so haphazardly so many years of development of a more sophisticated jurisprudence.

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8 See page 41 *supra*; see also response of Ambassador Djalal at 181 *infra*.

9 See page 41 *supra*.

A Package Deal?

Ambassador Djalal is worried about all the norms of international law constantly changing, with so many people having different views.[10] We do have many different views today, but I would hope that greater attention to the law-creating mechanisms might help us resolve some of these disputes. He also stated that nonparties to the Convention cannot claim any of its benefits without accepting its burdens.[11] I completely agree with this. There is no doubt whatsoever that a nonparty to the Convention cannot claim any of its benefits without accepting its burdens. If that is what we mean by a package deal, then I do not think anybody would disagree. How can I say to somebody else that I want to benefit from your treaty which I am not going to sign? The parties to the Convention are entitled among themselves to issue benefits and burdens with respect to the community that they have established, just like any treaty organization. If that is what package agreement means, I think it is noncontroversial.

It is more precise to say, not that the nonparties can claim any benefits of the Convention, but rather that the Convention is one of those instrumentalities of state practice that is adding to the richness and development of customary law binding upon nonparties.

Let us take an easy example. Suppose the Law of the Sea Convention says, from now on the high seas are going to be free. In other words, it restates Grotius' position. Would parties to the Convention possibly claim that nonparties are not entitled to the freedom of the high seas? Of course not.

To the extent the Law of the Sea Convention includes matters that have already been developed under customary international law and includes them simply for purposes of inclusiveness, the parties cannot say that other nations have no rights to those rules. Other nations had rights to those rules all along. The Law of the Sea Convention at best made them just a little more specific. It may have refined them, but it did not invent them. What we need to do is to identify those provisions that were truly bargained for and those that pertained irrespective of the Convention.

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10 See pages 50-51 *supra*.

11 See pages 54-56 *supra*.

Generalizable Treaty Provisions Tend to Become Customary International Law

John Craven: You came up with what I would call D'Amato's Principle of Developing Customary Law, which is that when a nation-state negotiates a treaty, it is only a matter of time before it becomes universal customary law. If this rule is valid, then we should all relax because it is only a matter of time before the Law of the Sea Convention becomes customary international law.

D'Amato: Not every provision. Only those provisions that are generalizable will become customs, because those provisions are the ones that are capable of creating rules. And I think that that is absolutely true. I think that is what is going to happen.

Craven: I am glad to hear that because I was absolutely terrified with the thought that a regression formula should some day become an element of customary international law (see Article 151(4)(b)(i)).

Ved Nanda: I do not understand the distinction between generalizable and nongeneralizable principles in the context of the Law of the Sea Convention.

D'Amato: Take the Norwegian Fisheries case that has already been mentioned.[12] If the principle were that Norway is entitled to 4 miles, that would be a totally nongeneralizable principle. It deals with a specific location and a specific country and it is almost like a claim to real estate. I wrote a paper fifteen years ago about "special custom", arguing that consent and specific opinio juris is necessary to sustain such a claim against an adverse party.[13]

Suppose instead we said there is a 4-mile rule of territorial seas. That would be generalizable. It would apply to every nation that is situated with a territorial sea. Norway would win that case on a 4-mile basis.

The seabed mining provisions that set up a particular regime to collect money and to regulate mining create an institution but do not establish a law. Through the centuries we do not know of laws that say things like that.

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12 Fisheries (U.K. v. Nor.), 1951 I.C.J. 116.

13 D'Amato, The Concept of Special Custom in International Law, 63 Am. J. Int'l L. 211 (1969).

Nanda: As you were saying, situations change, and maybe in the future the laws will say things like that.

D'Amato: Yes, the wonderful thing about studying international law is that there is no one on high telling you what it is. Rather, you infer it from the behavior of states. If states change their behavior, the law changes. One example is the revolution in the law of human rights. Here states have begun to acknowledge that individuals have claims under international law, a position which in the nineteenth century would have been viewed as preposterous.

Creation of Customary Norms Requires Acceptance by the Affected Nations

David Colson: What I have heard at this workshop sometimes does not bear much resemblance to what I have seen in my international law practice. My experience has been primarily in bilateral law of the sea issues between the United States and other states. I have been in numerous negotiations for the United States. I have never been in one yet where one side has acccepted a principle or norm that the other side alleged was a new binding principle of law, if the principle was not in the best interests of the first state. That just is not the way these things are dealt with. International law is really only good if the states that are dealing with a particular problem have a common understanding and perception of what the rules are and if the states are prepared to live with those rules.

Creating international principles out of the air and calling them law binding upon governments when those governments are not prepared to accept them or act in accordance with them is stretching international law beyond what it can sustain. This can only hurt the international lawmaking process.

I find it difficult to accept the general proposition that State A and State B can sit down and put together a convention, or engage in an action, that has some legal effect upon State C, without State C having any involvement with, or acceptance of, that particular action of States A and B. To argue that it is so seems to me to strike at the very heart of the sovereign equality of states. I recognize that many people are disappointed with the position that the United States has taken with respect to the Law of the Sea Convention. We should not, however, let that disappointment warp our sense of what the international lawmaking mechanism really is.

Equality in International Law

I should also say something about the general proposition of Professor D'Amato that in the formation

of customary law one does not need to take account of the who-is-doing-what criteria. Professor D'Amato asserts that all states are equal in this process. As I noted, international law often establishes an asymmetrical treatment of states. For instance, a general practice in international environmental agreements, including the Law of the Sea Convention, has emerged imposing greater responsibilities to protect the marine environment upon states with greater technical capabilities.

The United States has not rejected the common heritage of mankind. We have clearly rejected the Moratorium Declaration.[14] What our position will be with respect to the 1970 Common Heritage Declaration,[15] in light of the unacceptable outcome of the Law of the Sea Conference, has not been clearly established as yet.

Unilateral Assertions of International Custom

Bernard Oxman: Professor D'Amato, if I want the other people in this room to believe that something is a binding rule of customary law tomorrow, I am not going to say that it is not a rule today but that it ought to be a rule tomorrow. I am going to say it is a rule today, whether I believe it or not. Indeed, I was surprised that Professor Anand was willing to take at face value Elliot Richardson's statement that when he said something he really did not mean it, because after all, how do we know he really meant his statement that he really did not mean it?[16]

The U.S. "Split Personality" on Deep Seabed Mining

That raises another problem in dealing with the common heritage problem. While working on the delegation, we had a problem with the legal argument which had nothing to do with the concerns that bother Professor D'Amato. In order to induce the Third World to make concessions to us, we had to maintain that we really believed there was a freedom to mine the deep seabed upon which we were prepared to act. Conversely, we were negotiating a treaty that at best was going to be controversial. We realized that down the road we were going to have to turn around to the U.S. Congress and say that because the customary law of the subject

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14 G.A. Res. 2574D (XXIV), 24 U.N. GAOR, Supp. (No. 30) at 11, U.N. Doc. A/7630 (1969).

15 See Appendix B infra.

16 See pages 99-100 supra.

is so indeterminate we are probably better off with the Convention, because it brings some certainty.

It is because of this split personality that the United States government did not, during the negotiations, to my knowledge publish a long explanation of its customary law position on the subject on its own behalf. It contented itself with Theodore Kronmiller's thesis on the subject,[17] published with Department of Commerce funds but not directly representing the government's view.

Customary Law of the Sea and Motives in Negotiating the Law of the Sea Convention

It is obvious that some treaties in the past have become generalized rules of customary law binding on all nations. Everyone in this room would agree that certain articles in the new Law of the Sea Convention state the law applicable between their country and the United States. Certainly Ambassador Djalal and Ambassador Kolodkin would argue that a United States ship would have to respect the 12-mile territorial seas of their countries today. I doubt very much that either the Soviet Union or Indonesia would instruct the ships of their country to ignore the 3-mile territorial sea traditionally claimed by the United States or the 200-mile economic zone declared by President Reagan, March 10, 1983.[18]

The key question is whether the customary law that is likely to emerge is going to be similar to what the United States wanted to achieve from a convention. What the United States wanted from a convention was restraints on the behavior of others. A customary law regime will be too vague to be as effective a restraint on behavior.

As Ambassador Koh's exchange with Mr. Colson indicated,[19] one of the most interesting things about a state negotiating a treaty is that it becomes very eloquent, in great detail, about what it does not want others to do. When the same state issues a unilateral declaration on the same subject, it becomes coyly vague, because it recognizes that it cannot bind others with its own unilateral declarations. What it may be accepting, if it is specific, is a restraint on its own behavior without getting anything in exchange. Thus we have an elegantly vague set of statements from

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[17] Theodore B. Kronmiller, The Lawfulness of Deep Seabed Mining (U.S. Dept. of Commerce - NOAA, 1979).

[18] See Appendix A infra.

[19] See pages 65-68 supra.

President Reagan. I suspect they owe much of their elegance to our friend, Mr. Colson.

These vague statements will not prove to be adequate in building the kind of stable regime that the United States and other maritime nations require. The old Grotian system had collapsed, and the negotiating process was started to replace it with something else that had two qualities, both of which are very important. The first quality was that the substantive rules be acceptable to the maritime nations. The second quality was that the new regime must really function as law, that is, that most states most of the time under most circumstances would act in accordance with the new rules.

Mr. Colson said that international law is only good if the states involved have a common perception of what the rules are, and if they are prepared to accept these rules. I agree. That is what we mean by law. I do not disagree with Professor D'Amato's paper on what we mean by legal argument. But what the United States, along with many other states, wanted out of this Convention was not just a legal argument. On most issues we wanted law.

There are a few issues on which legal argument is good enough. One might maintain that as long as there is a decent case that a secret "black box" can be deployed on the continental shelf, legal argument is good enough, since the argument is needed only in case the box is found and its practical utility is thereby compromised to some degree in any event. But, by and large, what people wanted was law, a set of rules that everyone would respect. Such a regime is much less likely to emerge through the customary law process than through a universally ratified treaty.

Are New Countries Bound by Old Customary Law?

Paul Yuan: Professor D'Amato stated that a country that did not participate in the creation of customary international law is still bound by it.[20] China would categorically reject such an argument. This argument is inconsistent with a socialist revolution.

In the Hu-Guang railroad bonds case, which goes back a hundred years, the U.S. court decided in favor of the plaintiff and issued a subpoena to the Chinese Foreign Ministry for the reason that the transactions were in the nature of ordinary commercial transactions to which sovereign immunity was not applicable.[21]

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20 See page 172 supra.

21 Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982). See People's Daily,
(Footnote continued)

China's view is that China is a sovereign state and as such, should enjoy sovereign immunity, and secondly because there was a change of governments, the new government has to recognize a previous course of action as legitimate before it will accept responsibility. China says that the investments in the railroad bonds were in the nature of economic aggression. It was the result of unequal treaties made during the period when China was weak. Another very well known instance is the Hong Kong problem. We have the Nanking treaty, the Peking treaty, a lot of treaties that we do not recognize simply because these treaties were aggressive in nature.

Necessity of Time Factor and General Acceptance in the Creation of International Customary Law

Hasjim Djalal: In my mind, the time factor is not a necessary element for rules to become customary law. In my view, for rules to become binding international law under Article 38 of the ICJ statute depends on the general acceptance of the rules. This is the major consideration to me rather than any time factor.

With regard to the Law of the Sea Convention, we have to test its general acceptance in order to determine whether it has entered customary international law. General acceptance of the Law of the Sea Convention must be viewed with regard to its contents and with regard to the process of its creation: a protracted conference where all parties, all states, even nonmembers of the United Nations, participated in the spirit of a comprehensive treaty. Given this context, the totality of the rules provided in the Convention will enter into international law. Therefore, I cannot agree with the view that because several states oppose the Convention, the international community should submit to them. If you look at the participation at the Conference and the duration of negotiation, they project an image of general acceptability of the Convention.

What Elements are Required to Form a Rule of Customary Law?

Tommy Koh: I do not see a consensus among these learned professors on the doctrinal or jurisprudential

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21(continued)
Feb. 13, 1983, at 7; Feb. 25, 1983, at 7; Mar. 12, 1983, at 7; Sept. 13, 1983, at 7; and Nov. 22, 1983, at 7. The 1982 decision was set aside in 1984, see 23 Int'l Legal Materials 402 (1984).

framework that governs the interaction between custom and convention in the substantive areas we are examining.

Tony D'Amato offered us a very attractive and a very simple thesis, that a rule in the Convention--if it is generalizable and is not confronted by a competing rule--is ipso facto a rule of customary law. I find this approach to be extremely attractive, but I cannot help asking myself whether it is not too neat. Does it not also depend upon whether a rule in the Convention is widely supported by states in the international community? Does it not depend upon whether the behavior of states conforms to this rule? Does it depend at all upon the lapse of time between the promulgation of the rule in the Convention and the moment when we can confidently pronounce that the rule in the Convention has now become part of customary law? I do not know the answers to these questions.

D'Amato: The simple answer is that all of those elements would help strengthen the rule. If you have them, you still have more to support your position than a competing claim that lacked those elements. Every element you can point to helps to reinforce the rules, especially if you can show behavioral conformance to the rule. If behavior is not in conformance with the rule, however, that nonconforming behavior is generating a competing custom. In short, the traditional elements Tommy Koh refers to--general acquiescence, conformity, duration, repetition--are reinforcing elements, but none of them is a necessary element.

The Mini-Treaty Proposal

Nanda: Let me suggest that Tony's idea of a mini-treaty[22] is not a very useful contribution to the debate on the law of the sea. This idea is not very practical or helpful to the United States.

There are two reasons for this. First, these negotiations for a mini-treaty are likely to undermine what the United States claims to be customary international law. Second, the United States will not really be able to rely upon these negotiated rights in the long run because allegiances change.

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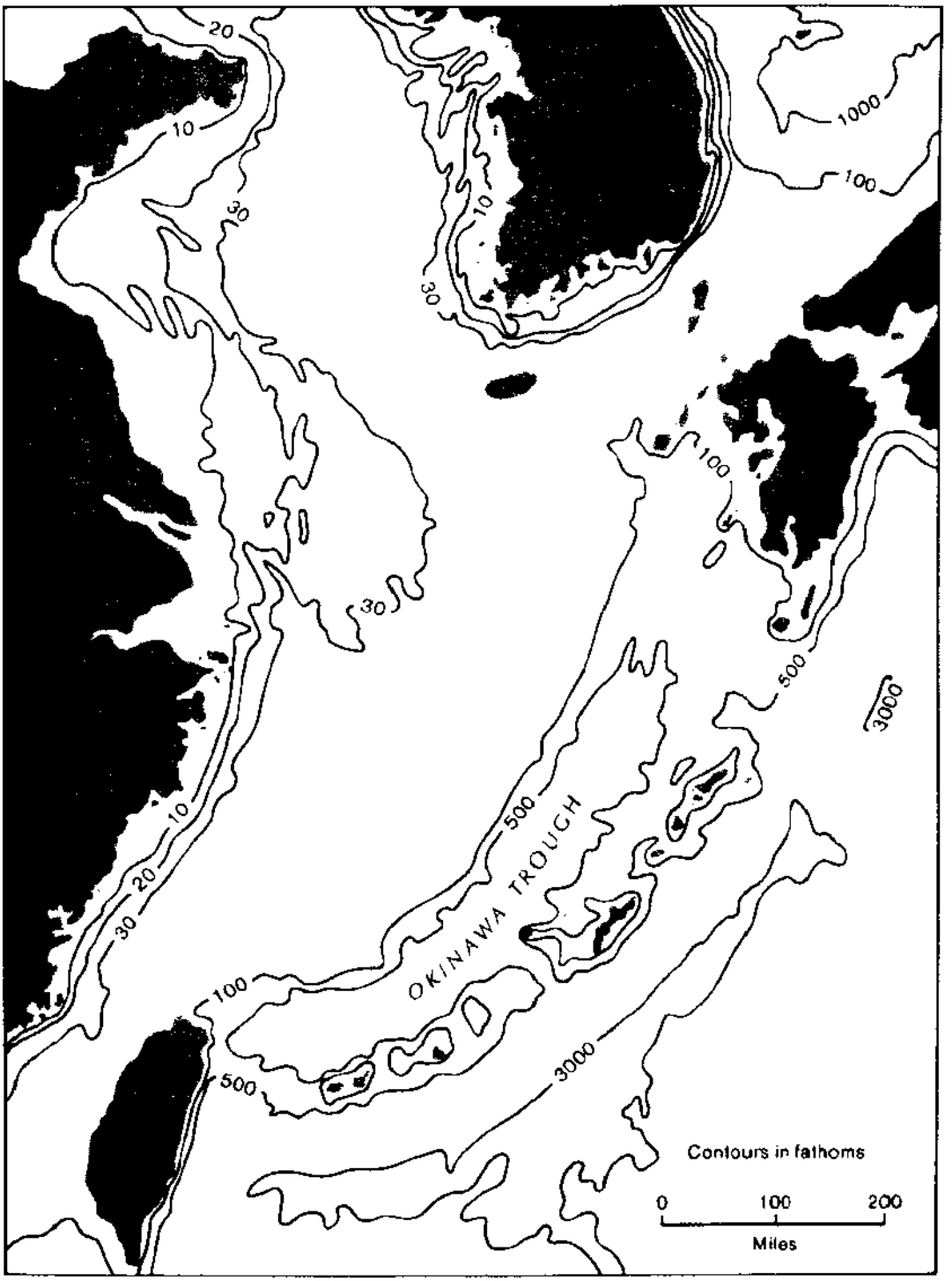
22 D'Amato, An Alternative to the Law of the Sea Convention, 77 Am. J. Int'l L. 281 (1983); see discussion at pages 49 and 120-22 supra and 231, 250-51, 256-57 and 490-91 infra.



Map 2. The continental shelf off the coast of China, illustrating the "natural prolongation" approach.

THE NEW CONVENTION ON THE LAW OF THE SEA FROM THE CHINESE PERSPECTIVE

by

Paul C. Yuan

This paper addresses some of the issues involved in the new Law of the Sea Convention from the Chinese perspective, with particular reference to Article 83, which concerns the delimitation of the continental shelf.

CHINA, THE CONVENTION, AND CUSTOMARY LAW

General Evaluation

China regards the adoption of the new Law of the Sea Convention as a great political victory for the Third World countries. It is a definite improvement over the 1958 Geneva Conventions, which were negotiated at a conference attended by about 80 countries, only half of which were from Asia, Africa, and Latin America.[1] In China's view, the four Conventions adopted in 1958 were the

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1 Peimei News (New York), Jan. 1, 1983, at 3. At UNCLOS III, the Group of 77, which represented the developing countries, had a membership of 120 states. See Lee, The New Law of the Sea and the Pacific Basin, 12 Ocean Dev. & Int'l L. 247, 256 (1983).

result of manipulations by a few major powers and were entirely advantageous to the superpowers' hegemonism in the world's oceans.[2]

Among the notable achievements for the Third World at UNCLOS III were the recognition of 12-mile territorial waters, the establishment of the 200-mile exclusive economic zone (EEZ), and the articulation of the principle of the common heritage of mankind. On the whole, the new Convention has made progress in protecting the common resources of the deep seabed and the legitimate maritime rights of nation-states, thus breaking the grip of the old maritime tradition that favored a few sea powers. In spite of these achievements, however, China is not satisfied with some of the important clauses contained in the new Convention. At the final session of UNCLOS III, the head of the Chinese delegation stated:

> [T]here are still quite a number of articles in the Convention which are imperfect or even have serious drawbacks. We are not entirely satisfied with the Convention.[3]

He noted that the issue of the passage of foreign warships through territorial waters is not clearly defined, and that the definition of the continental shelf and the principles of delimitation of the continental shelf between states with opposite or adjacent coasts are also flawed.[4] In China's view, too many concessions were made to a few developed nations, granting them special privileges and priority rights with respect to preparatory investment in seabed mining activities. China also opposes the "mini-treaty" and unilateral national legislation concerning the develop-

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2 People's Daily, Dec. 12, 1982, at 6. The People's Daily is the official organ of the Chinese Communist Party, and usually reflects the views of the Party and the Chinese government. The "four freedoms" of the high seas are, in the Chinese view, nothing but "freedoms of superpower aggression, threat and plunder against other countries, particularly the developing countries ..." Hsinhua Weekly, April 9, 1973, at 17-18.

3 People's Daily, Dec. 11, 1982, at 2 (author's translation).

4 China is in favor of the theory of the natural prolongation of land territory. See Yuan, China's Jurisdiction Over Its Offshore Petroleum Resources, 12 Ocean Dev. & Int'l L. 191, 195-98 (1983).

ment of international seabed resources, and would regard such a treaty and these statutes as illegal and void.[5]

Overriding Political Considerations

In spite of its dissatisfaction with some of the key issues in the new Convention, China decided to sign it. Evidently motivated by predominant political considerations, this decision will have an important impact on the Third World countries. The political implications of the Convention far surpass its legal implications. Instead of isolating itself from the world community of nations, as the United States has, China has taken advantage of the opportunity to show its sympathy and support for the developing countries and to identify its interests with those of the Third World. By signing the Convention, China also demonstrates to the world that it is willing to abide by international law.

Political Compromise and Resulting Ambiguity

Because the Law of the Sea Convention was the result of political compromises among various groups with competing interests, it contains many clauses that are vague, ambiguous, and subject to multiple interpretations. For instance, Article 19, concerning innocent passage, simply specifies situations that are considered "prejudicial to the peace, good order or security of the coastal state." It does not define the term "innocent passage," nor does it say that a foreign ship not engaging in the activities enumerated under paragraph 2 is entitled to the right of innocent passage. Thus, the right of innocent passage is still subject to the discretion of the coastal state.

In the case of warships, Article 30 suffers from the same deficiency. It simply provides that a warship not complying with the laws and regulations concerning passage through the territorial sea of the coastal state may be denied such passage immediately. It does not specify whether the coastal state may require previous notification or authorization for the passage of warships through its territorial waters.

Article 38 in Part III of the Convention, concerning straits used for international navigation, provides that "In straits referred to in Article 37, all ships and aircraft enjoy the right of transit passage, ..."; however, Article 37 does not define what constitutes "a strait used for international navigation," nor is there an enumeration of which straits fall into this category.

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5. People's Daily, Dec. 11, 1982, at 2.

Article 83, on the delimitation of the continental shelf between states with opposite or adjacent coasts, appears to be an accommodation of differing interests and views. In actuality, however, the Convention is shifting responsibility for conflict resolution onto the states parties, which will find it even more difficult to reach an agreement because of the vagueness of Article 83 (discussed below).

Although Part XV of the Convention provides for compulsory adjudication of disputes arising from the interpretation and application of the Convention, it is doubtful whether any country with due respect for its own sovereignty would ever subject itself to the adjudication of an international court. China has repeatedly proclaimed that the new Convention is imperfect in many ways and that some of the articles have "serious shortcomings."[6] This author believes that matters of territorial sovereignty can hardly be resolved through compulsory third-party settlement, particularly in the case of boundary disputes. The tribunal, sitting as a third-party adjudicator and relying on the fluid criteria embodied in Articles 74 (1) and 83 (1) of the new Convention, would actually be playing a "quasi-legislative" role.[7]

Continued Struggle

The signing of the new Convention by the overwhelming majority of nation-states by no means signifies the end of the struggle between developed and developing countries or between rich and poor countries over the domination of the world's oceans. China has expressed its commitment to continuing its struggle against superpower maritime hegemony in order to establish a new order in the law of the sea.[8] This struggle will mainly be directed against the superpowers and the unyielding position of the United States toward the Convention. China understands well that without the participation of the United States as a maritime superpower the Convention cannot be fully implemented and the world will not be at peace.

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6 Id.

7 Brown, Delimitation of Offshore Areas--Hard Labor and Bitter Fruits at UNCLOS III, 5 Marine Pol'y 180 (1981).

8 People's Daily, May 4, 1982, at 7.

Customary International Law

International treaties are generally regarded as a major source of international law.[9] Many of them, however, are not lawmaking treaties and consequently do not create general rules of international law. A lawmaking treaty is defined as

> an instrument through which a substantial number of states declare their understanding of what a particular rule of law is; by which new general rules for the future conduct of the ratifying or adhering states are laid down; by which some existing customary or convention rule of law is abolished, modified, or codified; or by which some new international agency is created. It is this kind of treaty through which conventional international law is created.[10]

Thus the rules set forth in such a treaty may be binding on a noncontracting state as customary rules of international law.[11] In some cases, even unratified treaties may be regarded as "a point of departure for a legal practice" or as "evidence of generally accepted rules, at least in the short run."[12]

Measured against this yardstick, the new Convention on the Law of the Sea can be regarded as a lawmaking treaty, because the Convention was the result of nine years of deliberations with the participation

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9 G. von Glahn, Law Among Nations 17 (4th ed. 1981).

10 Id. at 17-18. Among the lawmaking treaties mentioned were the agreements concluded at the Congress of Vienna (diplomatic ranks), the Declaration of Paris of 1856, the Geneva Red Cross Convention for the Suppression of the African Slave Traffic of 1890, a number of Hague Conventions in 1899 and 1907, the Covenant of the League of Nations, the Charter of the United Nations, the 1958 Geneva Conventions on the law of the sea, and the 1961 Vienna Conventions on Diplomatic Privileges and Immunities.

11 North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 242 (Sorenson, J., dissenting).

12 North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth), 1969 I.C.J. 3, 225 (Lachs, J., dissenting); 1 Brownlie, Principles of Public International Law 13 (3d ed. 1979).

of states with different political, economic, and legal systems. It can safely be said that an international conference with the participation of more than 150 nations of the world community, unprecedented both in its number and breadth of representation, can justifiably claim the status of an international legislative body in the world's oceans matters, constituting "a solid basis for the formation of a general rule of law."[13] It would be preposterous to assume, however, that all the rules laid down in the Convention are or have become rules of customary international law. The differentiation between the concepts of "codification" and "progressive development" of international law is of paramount importance.

> According to Article 15 of the Statute of International Law Commission, the term "codification" is used in that Statute to mean "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine." The term "progressive development", on the other hand, is used to mean "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States."[14]

It is clear from this statement that treaty provisions that are declaratory of pre-existing rules of customary international law are applicable to all states, whether they are parties to the Convention or not. On the other hand, treaty provisions that modify the existing legal institutions or that regulate matters previously not regulated by international law are not binding upon nor can they be invoked by noncontracting states.[15]

The new Convention contains many new concepts and important changes in the structure of traditional law of the sea, among which are the concepts of transit passage of straits used for international navigation, archipelagic waters, and the exclusive economic zone,

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[13] North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 228 (Lachs, J., dissenting).

[14] Id. at 242 (Sorenson, J., dissenting).

[15] Id.

as well as substantial change in the legal definition of the continental shelf, the idea of a general environmental protection system, and a clarification of marine scientific research within and beyond the national jurisdiction.[16]

The new concepts and fundamental changes in the existing rules of law as embodied in the new Convention will not be binding on the noncontractual parties until there is extensive and uniform state practice to substantiate their becoming rules of customary international law. Although the time element is not so important in the formation of a new rule of customary international law,

> an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[17]

In this sense, the new Convention contains rules that have already become customary international law because of widespread state practice, such as the 12-mile territorial waters, the 200-mile economic zone, and the principle of the common heritage of mankind.[18]

As for the many other concepts and changes introduced into the new Convention, including the dispute settlement system, they still require extensive and uniform state practice before they can become rules of customary international law.

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16 For further elaboration, see Pardo, The Convention on the Law of the Sea: A Preliminary Appraisal, 20 San Diego L. Rev. 490 (1983).

17 North Sea Continental Shelf, 1969 I.C.J. 3, 43.

18 80 States have already extended their territorial waters to 12 n.m. and about 86 have established 200-mile zones. Interview with John B. Breaux by Milt Freudenheim, N.Y. Times, Mar. 15, Sec. 4, at E5. The Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction unanimously adopted by the General Assembly of the United Nations in 1970 was proof of the universal recognition of the principle. See Appendix B infra.

A CRITIQUE OF ARTICLE 83 (CONCERNING THE BOUNDARY DELIMITATION PRINCIPLE) FROM CHINA'S PERSPECTIVE

Articles 74 and 83 on the delimitation principles of the exclusive economic zone and continental shelf are declaratory of pre-existing customary law. The articles simply refer to Article 38 of the Statute of the International Court of Justice, which is nothing more than a complete statement of the sources of international law as recognized by the international community of nations. As such, these principles are binding on all states whether they are parties to the Convention or not. As a matter of fact, the rules embodied in Article 38 of the ICJ Statute are applicable in virtually all cases where an international dispute is involved.

The central problem here, however, is not whether Article 83 represents customary international law but rather how to interpret the terms--such as "international," "civilized nations," "treaties," and "custom," as well as the judicial decisions of international courts and the opinions of well-known publicists--that are used in Article 38 of the ICJ Statute. These are the crucial points that are at issue between states of widely different social and political systems, as will be seen in the following discussion.

The boundary delimitation principle had always been a hard core issue throughout the sessions of the UN Conferences on the Law of the Sea. The difficulty lies in the conflict between two opposing interest groups, one insisting on equitable principles and the other on the equidistance rule as the guiding principle in shelf boundary delimitations. It was not until the Resumed 10th Session (August 1981) of UNCLOS III that a compromise was reached on the delimitation principle of the continental shelf between states with opposite or adjacent coasts. This solution is not a real compromise, however, because the interests of the opposing parties are not truly accommodated. States parties will probably find it more difficult to reach a solution in the absence of any rules to rely upon.

Article 83(1) of the new Convention provides:

> The delimitation of the continental shelf between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

It is clear from this provision that the shelf delimitation is to be carried out by (1) agreement between the parties and (2) the application of international law as defined in Article 38 of the ICJ Statute with a view to achieving an equitable solution. As it stands, this provision creates more problems than it solves. It is not only too flexible and indeterminate but it generates a host of new problems for certain countries with different political systems and ideology, such as China. This can be illustrated by examining Article 38 of the ICJ Statute, which states that the ICJ shall decide disputes submitted to it in accordance with international law, defined as follows:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[19]

The Chinese Definition of International Law

The first problem arises from the definition of international law as understood and recognized by the states involved in the dispute. China does not recognize traditional international law as binding upon it but regards it as bourgeois international law that serves the interests of the capitalist countries.[20]

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[19] Statute of the International Court of Justice, Art. 38.

[20] Chinese legal scholars have written numerous articles since the 1950s on the class character of international law. International law, as they see it, reflects "not only the will of the ruling class of a state, but also the will of the ruling classes of the respective states participating in the agreement". 1 J.A. Cohen & H. Chiu, People's China and International Law 33 (1974); J.W. Zhu, A Preliminary Investigation into the Basic Theoretical

(Footnote continued)

With the participation of states with different social systems in world affairs and the necessary adjustments in their mutual relations, traditional or bourgeois international law has undergone a gradual change and given way to the emergence of modern or generally recognized international law. Modern international law has a dual class character, expressing the will of the ruling classes of states with different social systems. The norms of modern international law are common to both capitalist and socialist states and possess the "dual class character of capitalism and socialism."[21]

How China Views International Treaties and Conventions

Chinese legal scholars distinguish between international treaties in which the Third World countries played a major role and those participated in and controlled by only a handful of major maritime powers. This sharp distinction finds its full expres-

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20 (continued)
Problems in International Law, paper presented at the inaugural meeting of China's International Law Society at 11 (February 2, 1980) (unpublished paper) (hereinafter cited as CILSM); C.F. Li and J. Wu, On the Concept of International Law 2, CILSM (Feb. 2, 1980) (unpublished paper). In China's view, international law is a product of the West. The origin of modern international law goes back to the middle of the seventeenth century; it was created to meet the needs of the new nation-states that emerged in Europe following the breakdown of the political and spiritual community of the Roman Empire (see 1 Cohen & Chiu, at 3) and it reflects only the will and needs of the ruling class of the big capitalist powers, serving the socioeconomic system of capitalism. China does not recognize that there now exists "socialist international law," but it is actively participating in modifying and developing modern international law to serve the interests of the Third World countries, including China itself. Chinese legal scholars are advocating taking over legislative power in international lawmaking from the two superpowers. Address by T.R. Shao at the inaugural meeting of China's International Law Society, February 2, 1980.

21 Zhu, supra note 20, at 16-17; 1 Cohen and Chiu, supra note 20, at 50.

sion in the Chinese attitude toward the 1958 and 1982 UN Law of the Sea Conventions. China has repeatedly attacked the 1958 Geneva Conventions as serving the interests of a few maritime powers in carrying out their hegemony in the world's oceans, whereas it warmly hailed the passage of the new Convention as victory for the Third World countries in their struggle against superpower maritime hegemony.[22]

During the period from the Opium War in 1840 to the establishment of the People's Republic of China in 1949, a number of unequal treaties were imposed upon the Chinese people by the imperialist powers. China has categorically refused to recognize the validity of these treaties, and consequently will not recognize them as sources of valid international law.[23]

International Custom

Chinese scholars have analyzed the formation of international custom from the class point of view and have observed that

> the bourgeoisie has never considered and will never consider as custom the resistance of weak and small countries and colonies, the socialist countries' anti-aggression and anti-imperialist wars and opposition to imperialist intervention in internal affairs of other countries, and other just actions, and has never given support to these activities.[24]

They noted as an opposite example the Declaration of Paris of 1856, which was enacted mainly by the major powers--Britain, France, Austria, Prussia, and Czarist Russia. Principles concerning the handling of maritime blockades and contraband of war, as embodied in the Declaration, were later invoked as custom in maritime warfare. Chinese scholars feel strongly that whether international custom can be accepted as a source of international law will depend on the class nature of the custom.

The Definition of "Civilized Nations"

The wording "... recognized by civilized nations" in Article 38(1)(c) of the ICJ Statute raises the question of the definition of the term "civilized

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22 People's Daily, Dec. 12, 1982, at 6.

23 Li, supra note 20 at 5.

24 1 Cohen and Chiu, supra note 20, at 71-72.

nations." Chinese legal scholars have vehemently attacked the term "civilized states" as used by some Western publicists to mean Christian states only.[25] NonChristian states, including the oriental states, were historically labeled "uncivilized states."[26] Colonial and semi-colonial countries were also excluded from the category of "civilized states." The purpose of the exclusion, as one writer put it, was to subject these countries to the domination and oppression of imperialism.[27] The bourgeois international law scholars, by confining the application of international law to the so-called "civilized nations," excluded many of the world's oldest civilized countries from the international law community and discriminated against them to create a legal basis for expansion and aggressive policies.

These criticisms of the use of the term, "civilized states" may not be valid in the context of present-day international relationships, because the distinction between Christian and nonChristian states as a criterion for judging whether a state is "civilized" has long become obsolete. However, the attacks by Chinese scholars against the use of the term as recently as 1980 underline the deep-rooted aversion to the Western concept of international law.

How China Views Judicial Decisions of the International Courts

Theory and state practice with regard to judicial decisions of the international courts do not go hand in hand in China. These decisions are generally regarded as being the result of manipulations by major capita-

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25 R.Q. Chiu, Dialectical Materialism and Historical Materialism Are Ideological Weapons in the Study of International Law--A Preliminary Study of a Few Problems in International Law, 1 CILSM (Feb. 2, 1980) (unpublished paper).

26 Ying Tao, Recognize the True Face of Bourgeois International Law from a Few Basic Concepts, Cohen and Chiu, supra note 21, at 29. The author specifically mentioned Oppenheim, a British international law scholar, who expressed doubts about the position of states such as China, Persia, Burma, Abyssinia, and other oriental states before the First World War, and questioned whether they could be ranked as "civilized states."

27 Li, supra note 20, at 4 and 7.

list powers.[28] It is interesting to note, however, that China has taken a "pick and choose" attitude toward some of the judicial decisions of the International Court of Justice. For instance, China has expressed great interest in the ICJ's judgment on the 1969 North Sea Continental Shelf cases, particularly the principle of natural prolongation of land territory, because it reinforces China's argument for applying the natural prolongation theory in boundary delimitations disputes with its neighbors. (At the same time, China tends to ignore the Court's dictum concerning the applicability of the median line rule in the case of opposite states.)[29] China has been unenthusiastic toward the arbitral decision in the Anglo-French Continental Shelf Arbitration case[30] because the decision deemphasizes the principle of natural prolongation in shelf delimitations. Commenting on the arbitral decision, one Chinese scholar said that

> both the natural prolongation principle and the equitable principles are important principles in shelf boundary delimitations, and under certain circumstances and to a certain extent it is permissible and sometimes necessary to emphasize the application of equitable principles. However, viewed from the theoretical point of view, it would be more appropriate to place the natural prolongation principle in the predominant position.[31]

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28 Zhu, supra note 20, at 2.

29 Shao Jin, Decision of the International Court of Justice on the North Sea Continental Shelf Cases and the Principle of Continental Shelf Delimitation, 2 Beijindaxue Xuebao 36 (Peking University Journal), (1980); see Yuan, supra note 4, at 199.

30 Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf (1977-78), reprinted in 18 Int'l Legal Materials 397 (1979) [hereinafter cited as Anglo-French Arbitration].

31 Shao Jin, The Arbitral Decision in the Anglo-French Continental Shelf Delimitation Case and the Equitable Principle, Chinese Yearbook of Int'l Law 254 (1982) (the English translation is the author's).

Thus, the Chinese attitude toward international judicial decisions is one of "pick and choose" rather than total rejection--it selects what serves its own interests.

As for the validity of the teachings of eminent publicists as one of the subsidiary sources of international law, the Chinese view is that these "publicists" were educated by the bourgeoisie and therefore serve their interests.[32]

Chinese Criteria for International Law

These tirades against traditional international law, although made about 20 years ago, are by no means obsolete if one examines the papers presented at the inaugural meeting of China's International Law Society in 1980--they still represent the main trends in Chinese international law circles. Although some attacks may be couched in a milder tone because of China's present participation in the United Nations and many other international organizations, their basic methodology for analyzing international events and politics remains essentially Marxist, that is, the application of class analysis.[33] From this standpoint, the Charter of the United Nations represents the wills and protects the interests of the ruling classes of both socialist and capitalist systems, possessing the dual class character of both capitalism and socialism.[34]

What are the Chinese criteria for accepting or rejecting the principles of international law? The following paragraph from the authoritative Chinese Communist Party organ, the People's Daily, is characteristic of the Chinese attitude toward international law:

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32 1 Cohen and Chiu, supra note 20, at 72.

33 A recent article published in the Guangmin Daily (Peking) and republished by the People's Daily in abridged form insisted on the ideological and theoretical application of Marxist theory. It stated that corrupt bourgeois ideas have infiltrated China over the years through imports of Western art and scholarly works. The article stressed that Chinese people must use the Marxist weapon of criticism to distinguish between what is good and what is bad for them. People's Daily, Oct. 9, 1983, at 3.

34 Zhu, supra note 20, at 14.

> International law is one of the instruments for settling international problems. If this instrument is useful to our country, to the socialist cause, or to the cause of peace of the people of the world, we will use it. However, if this instrument is disadvantageous to our country, to the socialist cause, or to the cause of peace of the people of the world, we will not use it and should create a new instrument to replace it.[35]

This statement, made in 1957, is still a valid norm by which Chinese behavior in international law and politics can be judged and understood.

China does not stress the distinction between law and politics as Western nations do. In the United States, there are so many law schools and law is separated from politics. In China, however, when we establish a law school, it is a political-legal institution, and students must study Marxism. The name of the school is usually School of Law and Politics--China regards the two as inseparable.

New Trends in the Law of Boundary Delimitation

A review of the genesis and development of the international law of boundary delimitation since the Truman Proclamation of 1945 shows that the legal concept of the continental shelf has undergone fundamental changes, although the law of boundary delimitation, though a topic of hot debate throughout UNCLOS III, remains unspecific. The fundamental change in the legal definition of the continental shelf consists principally in deemphasizing the role of physical and geological factors in defining the legal shelf and stressing the role of equity, by incorporating norms entirely alien to the geological and geomorphological features of the continental shelf in order to accommodate the interests of states with diverse geographic and resource circumstances. The exploitability criterion embodied in Article 1 of the 1958 Geneva Convention on the Continental Shelf and the incorporation of 200-mile distance criterion into the shelf definition in Article 76 of the new Convention are evidence of such accommodation.

The basic change in the continental shelf concept is paralleled by the toning down of the importance of

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35 L.L. Chu, Refute Chen Tichiang's Absurd Theory Concerning International Law, People's Daily, Sept. 18, 1957 at 3, see 1 Cohen and Chiu, supra note 20, at 32.

the principle of natural prolongation of land territory in shelf delimitations. Although it was recognized in the North Sea Continental Shelf cases that delimitation should be effected "in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other,"[36] the principle of natural prolongation has no practical effect in delimitation cases where the continental shelf proves to be one continuous geological shelf between the coastal states concerned. In the Anglo-French Arbitration as well as the recent Tunisian/Libyan Continental Shelf case, the tribunals tended to downgrade the role of the natural prolongation theory.

In the Anglo-French Arbitration, the Court of Arbitration refined the natural prolongation theory by adding that

> the continental shelf is a juridical concept [which] means that its scope and the conditions for its application are not determined exclusively by the physical facts of geography but also by legal rules.[37]

The court declined to give the principle of natural prolongation of territory its absolute force and stated that its applicability is "subject to qualification in particular situations."[38] Delimitation should be carried out not only on the basis of the particular geographical and other circumstances but also based on relevant considerations of law and equity.[39] The court further raised doubts about the categorical character of the statement made in the North Sea cases that "the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State"[40] and asserted that "so far as delimitation is concerned, this conclusion states

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36 North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 53, para. 101(c)(1).

37 Anglo-French Arbitration, supra note 30, 18 I.L.M. at 443, para. 191.

38 Id.

39 Id., para. 194.

40 North Sea Continental Shelf, 1969 I.L.M. 3, 47.

the problem rather than solves it."[41] It is clear from the court's decision that there is a gradual shift in emphasis from a concept of the continental shelf based primarily on geological and geomorphological facts to one more flexible and reflective of equity and the actual situation in a given case.

In the Tunisian/Libyan Continental Shelf case, both parties based their contentions on the principle of natural prolongation of land territory which was proclaimed by the ICJ in 1969 as the "fundamental concept of the continental shelf,"[42] and which they relied on as a major criterion for delimitation.[43] The court rejected the idea of defining areas of the continental shelf appertaining to Tunisia and to Libya solely on the basis of geological considerations and noted that geology is considered only as required for the application of international law.[44] Thus, in the Court's opinion, the principle of natural prolongation has no role in the delimitation of the continental shelf between the parties if the continental shelf is the common natural prolongation of the territory of both states into and under the sea.

The courts in these two cases emphasized that delimitation is to be effected by agreement in accordance with equitable principles, taking into account all relevant circumstances. The equidistance rule is by no means excluded, as it will frequently lead to an equitable delimitation. Thus, after almost forty years of debate on the delimitation rule, the ultimate criterion is still the equitable guideline

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41 Anglo-French Arbitration, supra note 30, 18 I.L.M. at 423, para. 79.

42 North Sea Continental Shelf, 1969 I.L.M. 3, 30.

43 The Court, in commenting on this point, stated that the concept of natural prolongation could only identify "the physical object or location of the rights of the coastal state," not "the extent of the rights of one state in relation to those of a neighboring state." Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 46. The Court carefully distinguished between the inherent right to the appurtenance of an area to a state and its right to the extent and limits of such an area (p. 46). The identification of the natural prolongation does not mean the satisfaction of equitable principles (p. 46).

44 Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 54. It is also interesting to note

(Footnote continued)

first advanced in the Truman Proclamation:

> [I]n cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary line shall be determined ... in accordance with equitable principles.[45]

There is no tenable reason to reject this equitable guideline as the basic norm in settling boundary disputes. The problem here is how to define equitable principles, not how to refute them.

The delimitation rule embodied in Article 83 of the Convention mentions neither the equidistance rule nor equitable principles and simply relegates the existing contradictions to states parties, who are called upon to apply international law, as interpreted through Article 38 of the ICJ Statute, in their negotiations. As previously noted, the application of Article 38 makes the situation even more difficult because it is subject to various interpretations and therefore creates bitter controversies. Article 83 of the Convention is generally regarded as a compromise between divergent views and interests among groups of states with varying geographic situations, but in fact the disparity in views and interests remains just as uncompromising as ever. Although China is an advocate of the theory of natural prolongation over the equisdistance rule as a guiding principle in shelf delimitations, it does not completely rule out the application of the equidistance method where it will lead to a reasonable solution of boundary disputes.[46]

44(continued)
that the Court admitted only the present-day geological and geomorphological facts to be taken into account in continental shelf boundary delimitations. The Court stated that "what must be taken into account in the delimitation of shelf areas are the physical circumstances as they are today.... It is the outcome, not the evolution in the long-distant past, which is of importance" (p. 54). Because Tunisia and Libya both derive their continental shelf title from a common natural prolongation of their land territories, the delimitation of their respective shelf areas must be "governed by criteria of international law other than those taken from physical features" (p. 58).

45 Proclamation No. 2667, 10 Fed. Reg. 12303 (1945).

46 Speech delivered at the University of Southern
(Footnote continued)

Article 83 of the Convention is so fraught with shortcomings and so vulnerable to fluidity of interpretation that the rule is far from being a practical norm that can be followed by the disputing parties. In this author's view,[47] the delimitation formula that survived throughout the various sessions of UNCLOS III until 1980 was a better formula for resolving delimitation problems because it put the principle of equity in command while allowing for the application of equidistance rule where appropriate.

> The delimitation of the continental shelf between adjacent or opposite states shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all relevant circumstances.[48]

This earlier version contains four important elements. First, the delimitation of the continental shelf is to be effected through mutual agreement. The states parties concerned are required to enter into meaningful negotiations with each other with a view to reaching an

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46 (continued)
California on October 22, 1982, by Professor Wang Tie Ya of Peking University. Prof. Wang stated that China adheres to the following principles in shelf delimitations with neighboring countries:

1. application of the concept of the natural prolongation;

2. delimitation through consultation; and

3. consultations shall be conducted on equitable principle taking account of all the relevant circumstances.

In the author's view, one of the reasons why China has not yet declared a 200-mile economic zone is that China feels the entire continental shelf belongs to China; this view may gradually be changing.

47 It is not clear whether the Chinese government fully endorses this view.

48 Doc. A/CONF. 62/WP. 10/Rev. 1 (April 28, 1979).

equitable solution. Second, the agreement shall be in accordance with equitable principles, thus ensuring the equitableness of the final delimitation. Third, it does not exclude the application of the median or equidistance rule where it is appropriate and where it will lead to an equitable solution. Fourth, it takes into account all relevant circumstances prevailing in the area, including geographical and geological features, unity of deposits, and the proportionality factor. Taken as a whole, the delimitation principle as stated here is congruent with the spirit of the Truman Proclamation and state practice as well as with the Judgment of the ICJ in the 1969 North Sea Continental Shelf cases, the 1977 Channel Award of the United Kingdom/France Arbitration case, and 1982 ICJ decision in the Tunisian/Libyan Continental Shelf case.

Overall, the main consideration in formulating rules on boundary delimitation at UNCLOS III seemed to be how flexible the rules could be to be acceptable to all the states parties to the Convention. This flexibility will lead to endless wrangles between the delimiting countries. The physical and geological features of the continental shelf no longer weigh heavily in defining the legal shelf. There is an increasing tendency toward dividing up marine resources among the coastal states irrespective of the size of their continental shelves. The 200-mile exclusive economic zone, the allocation of the 200-mile submarine area to coastal states with a less-than-200-mile continental shelf, and the advocacy of free exploitation of deep seabed minerals are indicative of this tendency. In summary, the trend is toward greater enclosure of the oceans and increasing allocation of ocean resources among the coastal nations.

Conclusion

The adoption by the overwhelming majority of the international community of the UN Convention on the Law of the Sea was symbolic of its success as a political rather than a legal document for an international oceans regime. However, because of the inherent weakness of the Convention, characterized by its deliberate vagueness, ambiguity, and irreconcilable contradictions masked by consensus, the Convention is vulnerable to political manipulations, abuse, and misinterpretation, which could eventually jeopardize its existence as the "constitution of the world's oceans." Because of the comprehensiveness and global nature of the Convention, no state is completely satisfied with all its provisions. The crucial question is whether the disagreements are substantial.

The passage of the Convention is not the end of the struggle but rather the beginning of a long and arduous process of adjusting and readjusting the

multiple interests of different political groups through various forms of conciliation and arbitration. It remains to be seen whether this worldwide "package deal" of unprecedented dimensions can really work to the advantage of humankind.

DISCUSSION

Chinese Practices Regarding International Business

John Vafai (Richardson School of Law, University of Hawaii): Mr. Yuan, you have stated that Chinese perspectives of international law are less legally and technically oriented and are geared towards political motivations. I wonder what your comments are on some of the recent Chinese practices involving offshore oil. The Chinese model contract deals with very complex issues in a serious manner. Such seriousness is derived from China's international commitments. For example, bilateral commercial treaties between China, on the one hand, and the United States, Japan, and the European Economic Communities, on the other, all indicate that the PRC has, to a considerable extent, adopted principles, customs, and procedures recognized by the world community. As far as the specific issue of offshore oil investment is concerned, there has been, so far, no indication of any dispute between China and the Western oil companies because of the PRC's nonrecognition of prevailing customs and rules in the international petroleum industry. Do you think that China deals with these international law questions relating to the investment in any way different from any other country seeking investment from abroad?

Paul Yuan: I have written an article on China's offshore regulations.[1] China adopted these offshore regulations to attract foreign investment and technology. These rules are very concrete and follow the general practices of most international oil compa-

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[1] Yuan, China's Offshore Petroleum Resources Law--A Critical and Interpretive Analysis, 16 Int'l Lawyer 647 (1982).

nies. China regards these regulations as compatible with its present policy. The model contract is very concrete. It has nothing to do with China's present recognition of customary international law.

Young-sun Song (University of Hawaii, Ph.D. in Political Science, 1984): In light of the major differences in political viewpoints among nations today, can there be any customary international law at all?

China's Criteria of International Law

Yuan: China does not reject customary international law. China recognizes international law, as long as the Third World countries, including China, participate in its formation. China's approach toward international law is very simple. International law is one of the instruments for settling international problems. If this instrument is useful to our country, to the socialist cause, or to the cause of peace of the peoples of the world, we will use it. However, if this instrument is disadvantageous to our country, to the socialist cause, or to the cause of peace of the peoples of the world, we would not use it.

Can China Pick and Choose?

John Bardach: Let me ask Professor Yuan a hypothetical question. Assume that China ratifies the Convention, and assume that there are sufficient ratifications to make the Convention law; does China intend to pick and choose among the provisions of the Convention and adhere only to those provisions it agrees with?

Yuan: This is a very good question. According to my analysis, if China ratifies this Convention, it would not be a blanket ratification as is usually the practice followed by states. As I mentioned, the main reason for China's adoption of this Convention is political.

Tommy Koh: Because the Convention does not permit reservations (Article 309), if the People's Republic of China ratifies or accedes to the Convention, it has to accept the Convention as a whole. It cannot pick and choose. It cannot say, "We do not like the provisions on delimitation of the economic zone and continental shelf." It cannot say, "We do not accept the application of the regime of innocent passage for warships through the territorial sea." It cannot do that.

Are Traditional Marxist Attitudes Being Modified?

My other point, Paul, is to ask you whether or not the traditional Marxist-Leninist attitude towards

international law has been and is being modified by the present leadership in China. I see certain trends, and I want to ask you to comment on them. First, the Chinese government now has a very distinguished lawyer who is a member of the International Law Commission, who participates in the work of the Commission, Professor Ni Zhengyu.

Secondly, Professor Ni, who is our mutual friend, is the candidate of China for election to the International Court of Justice this year. I sense from observing the Chinese delegation at work in the United Nations and in the Law of the Sea Conference that there is a gradual trend away from this more doctrinaire approach you have postulated to a much more pragmatic approach. Am I correct, Paul?

Certain Views China Will Not Give Up

Yuan: Let me begin with your first question. If and when China ratifies this Convention, is China going to pick and choose? This is a very important question. China is fully aware that this Convention is not like the 1958 Conventions, which allow reservations. But I am quite sure China will not give up its views on certain portions of this Convention, such as its position that military warships passing through the territorial sea must obtain prior consent. China is also concerned about the compulsory dispute resolution mechanisms. I can tell you frankly, China would never accept this. Look at the articles and the Chinese statements over the years. China would not recognize the decisions of the International Court, at least in the foreseeable future. China holds a different view from the Western countries in the interpretation of international law.

I have considered several options China might adopt towards this Convention. The first option may be to sign only but never to ratify. This is possible.

The second option might be that China will ratify it and at the same time issue a statement of interpretation by the Foreign Law Office.

The third option is that China willingly signs and ratifies it. But even in the third option, there would still be room for controversy. Article 83 is one clear example. There are many other hidden troubles in this Convention.

As to your second question, I know Professor Ni very well, but you have to know what status a Chinese legal scholar enjoys in his own country. Who has the final say on important questions of international law? Do you think it is Professor Ni? Far from it. Actually in China, the legal section in the People's Congress is headed by an old cadre with a guerilla background. He is not a lawyer at all, but he knows Marxism and he knows politics. I know Professor Ni

very well, because he was teaching law at the law school where I graduated. He is a very cautious person. You cannot get a real perception from Chinese scholars.

Do Other Socialist Countries Share China's Views?

Rabbie Namaliu: I would like to ask Mr. Yuan about the remark he made on dispute settlement. If, in his view, China is not likely to accept dispute settlement mechanisms that have been provided for under the Convention, what is China likely to accept? What sort of alternative provisions would China accept in relation to dispute settlements?

And secondly, are the views Mr. Yuan expressed on the Convention and international law shared by other socialist countries? Maybe Dr. Kolodkin would like to comment. Mr. Yuan has made a fairly broad statement which, even though expressed in his personal capacity, might be misinterpreted by people like me as representing an ideological viewpoint. Do countries like the Soviet Union share this viewpoint?

Anatoly Kolodkin: To answer the remark of Professor Yuan with regard to Marxism, Leninism, and international law very briefly, I would like to emphasize that Lenin was the author of the theory of peaceful coexistence between socialist and capitalist countries.

The principles of peaceful coexistence are now reflected in the Charter of the United Nations. I am not speaking now on behalf of my government, but as a scholar. I would like to underline that Marxism-Leninism and these principles of the Charter of the United Nations are combined and cannot be separated one from another. Professor Tunkin, president of the Soviet Association of International Law, is the author of the theory of co-agreement of the wills of states. This is the theoretical and practical basis of peaceful coexistence between two systems and the countries that adhere to these systems.

In regard to your question about the attitude and approach of socialist countries, as far as I know, all socialist countries signed the Convention, including China, except Albania. The Soviet Union not only signed the Convention, but we now play an active role in the Preparatory Commission. This role was emphasized at the Seventeenth Conference of the Law of the Sea Institute in Oslo by Ambassador Kolasovski, who is the head of our delegation.[2] The Soviet Union

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2 See A. Koers and B. Oxman (eds.), The 1982 Law of the Sea Convention, 17 L. Sea Inst. Proc. 17-18 (1983).

supports all provisions of the Convention, including Part XI.

Many Countries Made Declarations That Are Like Reservations

Allow me to make one last remark. We know about a number of countries that signed the Convention on the 10th of December, 1982, and made declarations that in substance are not declarations but are reservations. Contrary to the Convention, for example, Chile made the declaration that the EEZ is subject to their sovereignty. As I said two days ago, this is clearly inconsistent with the Convention. France said that, notwithstanding the provisions of the Convention, France refuses to impose only monetary punishment on ships that violate its laws, which is very contrary to the Convention.

The Boundary Delimitation Articles

David Colson: It is curious to me that when the world began to look at the 200-mile zone there did not seem to be a great deal of consideration of just what the world was doing to itself in creating numerous boundary problems between neighboring states all over the world. Depending on how one counts, more than 300 of these problems were created when the world community accepted the fact that coastal states were entitled to 200-mile jurisdictions of some nature. Suddenly we found ourselves confronted around the world with boundary problems that had not theretofore existed. The United States has for itself more than 30 of these problems. Some of them are bigger problems than others. In all cases, they are issues that governments have to deal with, and in some cases, they are very difficult issues. I could only sympathize with Ambassador Koh's position near the end of the Conference in trying to create some sort of bridge between two opposing camps.

Possibly it was not a wise decision to try to deal in this Convention with what was essentially a bilateral problem between states. We ended up at the Conference with two diametrically opposed groups, but not from the perspective of general legal theory. They were all looking at it from the perspective of national interest and trying to get a "leg up," if you will, in the Law of the Sea Convention in their bilateral disputes with their neighbors. This was a very intractable problem, and one that was very difficult to deal with.

Unfortunately, I think, the Conference got off on the wrong foot when it began to juxtapose the equi-distance method against--what, I believe, is generally regarded as a different matter--equitable principles, which is a legal concept. We got into disputes between

states that wanted to use equidistance in one situation and states that did not want to use equidistance. We mixed apples and oranges, and this has created quite a bit of confusion in the international community as to what maritime boundary law is all about.

During the discussions that were held, there was a great deal of maneuvering to try to put equidistance, relevant circumstances, and equitable principles in one order or another to try to create inferences in favor of one side or another. So far as I am aware, there was virtually no discussion on the real legal theory that one might be looking at when one was changing or broadening the continental shelf jurisdiction into something called an economic zone. So far as I am aware, the Conference participants did not really think about the fact that we were adding new elements, new thoughts to maritime boundary law by creating this new zone of jurisdiction.

The Language in the Convention is a Fair Reflection of Customary International Law

Articles 74 and 83 as they eventually emerged are, I believe, a fair reflection of customary international law. Although I do not believe that it advances customary law, I would not take the position that Professor Yuan took, that it simply is a reference to Article 38 of the Statute.[3] I think the Conference made an important statement in taking the position that the delimitation provisions for both the continental shelf and the economic zone are the same. That is an important boundary principle that has emerged from the Conference.

Second, the Conference retained a statement that had been included in the 1958 Convention[4] to the effect that boundaries are to be determined by agreement. People often believe that that is simply a hortatory statement of international practice, but I believe if one looks carefully at the words of the ICJ in the

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3 See page 201 supra. Paragraph 1 of Articles 74/83 reads as follows: "The delimitation of the exclusive economic zone [continental shelf] between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

4 See Articles 6(1) and 6(2) of the Convention on the Continental Shelf, done April 29, 1958, 499 U.N.T.S. 311, 15 U.S.T. 471.

Tunisia-Libya case, both of the full court[5] and of the dissenting opinion of Judge Gros,[6] one will see differently. The jurisprudence on delimitation recognizes that certain principles do not apply--or apply in modified form--by virtue of the fact that boundaries are in the first instances issues to be determined by agreement.

Also, I would note that the reference to "equitable solution" is a new reference and one, although not exactly clear in meaning, that lawyers can deal with.

The last (basically legal) point that I would note is that the delimitation articles (74 and 83) contain a most important statement in paragraph 3.[7] The broad principle that is contained in paragraph 3 of both articles is a statement that I believe reflects customary law at this time, and which is a tremendously important statement in the situation where we have suddenly thrown upon the world an issue that has the facility for creating wars between governments. Once the sovereign rights and the jurisdictions of states are implicated and once states declare boundary positions, if those positions are challenged by other governments, we have the potential of creating very difficult situations between states. I think that the general provision that is put forward in paragraph 3 is good guidance, and it should be looked at carefully by everyone concerned in maritime boundary delimitation.

We are in a situation now where if all of the governments in the world go out and start declaring boundary positions everywhere and staking out maximum positions in each situation, we could have a very difficult time over the next 20-30 years resolving all the disputes. Restraint should be exercised by states as they begin to resolve these issues.

I think we will see in the next two or three years quite a bit of jurisprudence coming from courts and arbitral tribunals on the law of maritime delimitation. The U.S./Canada case is before a Chamber of the International Court of Justice right now. The Libya/Malta

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5. 1982 I.C.J. 249, para. 87.

6 1982 I.C.J. 294, para. 22 (Gros, J., dissenting).

7 Articles 74/83(3): "Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

case is before the Court right now. Italy is seeking to intervene in that case. There is also an arbitration going on between Guinea and Guinea-Bissau. There are two or three other arbitrations that I know are likely to begin as soon as the U.S./Canada case and the Libya/Malta case have been concluded.

Koh: I want to thank David Colson very much for the analysis he gave us of Articles 74 and 83 on the delimitation of the economic zone and the continental shelf. Ambassador Nandan and I, who co-authored these two articles, have never heard praise before for our work, and so we are very grateful to David.

Yuan: I want to ask Mr. Colson what are the delimitation principles in this Convention? All I find is a list of sources of international law which are applicable in all cases where international disputes are involved.

My second question: You have mentioned that paragraph 3 is very important; I agree with you, and my question is, is paragraph 3 mandatory or not? If it is mandatory, does it apply to countries that do not recognize each other?

Colson: I enunciated the three areas in which I thought that delimitation provisions do more than simply refer to Article 38 of the statute and they are again: one, the same article is used for both the delimitation of the continental shelf and the delimitation of the economic zone--that is a very important principle; two, the words "by agreement" have been retained which reinforces a very important principle that the ICJ elaborated upon in the Tunisia/Libya case; and, three, the phrase "equitable solution" has been added following the reference to the statute of the Court and that must have some meaning. There are those three elements that do more than just refer to the statute of the Court.

I think it is rather hypothetical to talk about whether paragraph 3 applies to states that do not recognize one another. It would seem to be a general principle of reasonable neighborliness and would generally be applicable to everyone, I would think.

SOME ASPECTS OF SOVIET STATE PRACTICE ON THE DEVELOPMENT OF OCEAN RESOURCES

by

Anatoly Kolodkin and Anatoly Zakharov

The Legal Practice of the U.S.S.R. on the Continental Shelf

Listed below are the legal acts of the Soviet Union, which regulate activities on the continental shelf:

a) the Decree of the Supreme Soviet of the U.S.S.R. of the 6th of February of 1968 (hereinafter the Decree);

b) a Legal Order of the Presidium of the Supreme Soviet of the U.S.S.R., "On Application of the Decree of 1968," issued in 1969;

c) a Legal Order of the Council of Ministers of the U.S.S.R., "On the Rules of Conducting Activities on the Shelf of the U.S.S.R. and Protecting its Natural Resources," issued July 18, 1969;

d) "The Rules on Protection of the Continental Shelf" of the 11th of January, 1974.

In accordance with the Article 2 of the Decree the U.S.S.R. exercises sovereign rights over its continental shelf for the purposes of exploration and exploitation of its natural resources. This article is consistent with Article 77(1) of the Law of the Sea Convention. All the natural resources of the shelf are under the ownership of the U.S.S.R. by proclamation.

The U.S.S.R. extends its rights to the resources only. It should be noted that there are a few states in the Pacific region that have proclaimed "sovereignty over the sea-bed, continental shelf and air space" (Article 1 of the Philippines decree of 1978) or a "national sovereignty" over the continental shelf (Article 8 of the Act of 1978 of Colombia). These provisions do not conform with Article 77(1) of the Convention, which says: "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources," and Article 78(1), which provides that "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters."

Conforming to the Article 77 language on continental shelf resources is the U.S.S.R. Decree which says: "...to all the physical and juridical bodies of other states, any kind of exploring, researching and exploiting of the continental shelf is prohibited" (unless these rights are provided by the agreements between the U.S.S.R. and those states concerned). The 1969 Act of the Council of Ministers of the U.S.S.R. mentioned above states that, "On the rules of undertaking activities on the shelf, all kinds of human activities are permitted, but only after having been registered."

To promote the safety of navigation, the Decree of the Soviet Supreme of the U.S.S.R. provides for a procedure that requires consent for foreign companies building structures to explore and exploit continental shelf mineral resources, and requires reasonable safety zones around such structures. Structures and installations may not be established where they interfere with the use of recognized sea lanes essential to international navigation.

The Soviet legislation provides fully detailed measures for use against ships that do not comply with requirements relating to activities on the shelf. If a ship does not submit to orders of the fishing guard, or if any resistance is made by the ship, it may be stopped by a warship or by the coast guard. The captain of a warship or of a coast guard ship may demand to board and inspect the foreign ship. The ship should stop any violation and follow to the nearest Soviet port.

General provisions of the legal acts mentioned above were developed and adopted by different ministries and organizations. We mention the Rules of Undertaking Exploration, Research, and Utilization of Sedentary Species promulgated in 1972 as an example. These Rules establish general provisions relating to harvesting sedentary species on the shelf. The Rules

establish the seasonal harvest period, areas of harvesting, quotas, and equipment that can be used. These Soviet legal practices are consistent with the 1982 Convention on the Law of the Sea.

Interim Measures Concerning the Establishment of Economic Zones

In 1976 the Supreme Soviet of the U.S.S.R. issued the decree, "On Interim Measures on the Preservation of the Living Resources and on Regulating Fisheries in the Areas Contiguous to the Coasts of the U.S.S.R.." At that time most countries and those adjacent to the U.S.S.R. had established 200-mile exclusive economic zones. Therefore, taking into account the situation at that stage of the UN Conference, the U.S.S.R. decided to adopt rules necessary for the purpose of preservation and effective utilization of living resources in the areas within 200 miles. These provisions are fully consistent with Articles 56 and 57 of the Convention, unlike the zone of "national jurisdiction" established by Chile which is not consistent with the UN Convention. Article 2 of this 1976 Decree strictly defines the character of sovereign rights of the U.S.S.R. in its 200-mile area.

Some states have adopted acts that express the will of those states to assert greater jurisdiction in their 200-mile zones. For instance, Article 15, para. 8, of the Act adopted by Western Samoa in August 25, 1977, states that "the Head of the Government may establish consistent rules on any issue regarding the exercise of the sovereign rights of Western Samoa over [the 200-mile] zone." We may come to the conclusion that Western Samoa reserves the right to adopt additional rules not provided by the Convention. P. 2, part 12 of the Act provides the right of application of acts as if this zone was within the limits of territory of the state.

To our minds this unacceptable extending of the limits of sovereign rights breaks the balance established by the Convention between the interests of all states, flag states, and coastal states in particular.

Regarding anadromous species, the 1976 Decree provides sovereign rights over such species within limits of the migratory region. This includes the period, "when they are within limits of the U.S.S.R. territorial sea, and economic or fishery zones of other states." This provision is also confirmed by the Convention, Article 66(1), which says that states "in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks." Moreover, we find such a provision in Article 101 of the U.S. Act on Preservation of Living Resources Fishery Management of 1976. Such an approach to

anadromous stocks is considered to be equitable, because the states where anadromous stocks originate spend time and money to renew and preserve the stocks. Only coastal states that possess full knowledge of anadromous stocks can promote effective utilization of those stocks by other states. Such utilization will be exercised on the basis of agreements with the state of origin. The Soviet practice is to give consent to other states to harvest anadromous stocks in its 200-mile zone on the basis of bilateral agreements, such as those between the U.S.S.R. and the U.S.A., or the U.S.S.R. and Japan.

The sovereign rights over exploration and utilization of living resources in ocean areas contiguous to the U.S.S.R. coast includes establishing total allowable catches of each species. Measures on preservation and renewal of living resources are also included. The coastal state will take into account the best scientific evidence available to it, and will cooperate with competent international organizations when necessary. The Ministry of Fishery of the U.S.S.R. will determine quotas and if the U.S.S.R.'s capacity allows a harvest of the entire allowable catch. Foreign fishery boats will be licensed by the Ministry in conformity with determined quotas. All the provisions of the Decree regulating fisheries in 200-mile zones fully conform to the provisions of the UN Convention.

A monetary penalty of 10 thousand rubles may be imposed for the violation of the Decree. In the case of any damage or loss, penalties of 100 thousand rubles may be imposed. Also, on the request of competent authorities protecting living resources, a court may decide to confiscate the vessel and fishing equipment along with any illegally caught resources. Article 73(3) of the Convention states, "penalties for violations of fisheries laws...in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned..." The Decree does not include such a punishment. But legislation of several countries provides for the imprisonment for one year for certain violations. In accordance with the Decree the competent Soviet authorities will notify the flag state of any measure taken by the U.S.S.R. in the case of arrest or detention of a foreign ship. Such a ship will be released after posting a reasonable bond or other financial security.

The Decree is a confirmation of the Soviet intention to settle problems of maritime law in the spirit of international cooperation. In the Preamble of the Decree this is especially emphasized. It states that the Soviet Union encourages the settlement of all the problems of the legal order of the ocean on the

basis of cooperation. This requires the conclusion of a convention that will solve all of these problems, and of the utilization of living resources in particular, taking into account the interests of all the nations and states.

The Settlement of Disputes

On signing the Convention on the Law of the Sea on the Tenth of December 1982 the U.S.S.R. stated that it recognized the arbitration procedure provided for in Annex VII as a general means of dispute settlement. But for the settlement of other disputes relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, the U.S.S.R. designated the special arbitration procedure provided for in Annex VIII. The U.S.S.R. made a statement that it did not accept the compulsory resolution procedure of disputes relating to the delimitation of marine areas, disputes relating to military activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

DISCUSSION

Will the U.S. Pay for Continental Shelf Exploitation Beyond 200 Miles?

Tommy Koh: Let us take a case like the definition of the continental shelf. It is true that the concept of the continental shelf has become part of the customary law, but I hold the view that the UN Convention on the Law of the Sea modifies the existing law by extending the geomorphological concept of the shelf to include the slope and the margin and that this was made in return for a concession on the part of the coastal states to make contributions of revenues from oil and gas exploitation on the shelf beyond 200 miles to the edge of the margin. Can the United States in a case like this claim to enjoy the extension of the continental shelf to the outer edge of the margin without being willing to shoulder the burden of making contributions of revenues from oil and gas exploitation on the shelf beyond 200 miles? Is there not a quid pro quo here? How would the United States justify its view that this part of the Convention is or will be assimilated into customary international law?

Brian Hoyle: Let me try to answer this important question of the delimitation of the outer boundary of the continental shelf. The United States is at the present time a party to the 1958 Geneva Convention on the Continental Shelf. We have not seen any reason to denounce that Convention. We interpret that Convention's use of the term adjacency as meaning the natural prolongation principle. We see the Continental Shelf Convention as being limited and modified and qualified by state practice and the decisions of the ICJ and some arbitral tribunals over the last 15 years or so. None of these decisions really dealt with the

outer limit of the margin. Yet today we do recognize coastal state jurisdiction over the entire natural prolongation of the continental margin.

With regard to the delimitation of the outer limit of the margin, we have not received a request by the Department of the Interior, which leases on the outer continental shelf of the United States, or by any oil company to lease beyond 200 miles. It is not yet a question we need to face. During the last Congress, legislation was introduced that attempted to define the outer limit of the continental margin in a manner that was different from Article 76 of the Convention.[1] The proposed statute was poorly drafted. The definition used would not accomplish what the drafters wanted and would have given the United States less than that which could be obtained under Article 76. I do not know when the United States will delimit the outer edge of the margin or whether we would employ one of the definitions in Article 76. I view the definition in Article 76 as a maximum limit of coastal state jurisdiction. It provides a limit, but not necessarily the exclusive definition that should be used.

The question of revenue sharing is another issue that I hope we do not have to decide too quickly. The provision in the Convention on revenue sharing refers to the International Sea-Bed Authority, and the reaction of any U.S. politician is going to be, "I thought we had gotten rid of that thing; you're not going to come here and tell us that we have to hand over money for offshore oil and gas production to the Sea-Bed Authority." There is no prospective leasing beyond 200 miles offshore in the United States at the present time. The revenue sharing obligation is an obligation that would accrue under the Convention five years after the commencement of commercial recovery from the margin beyond 200 nautical miles. It is a long way in the future and is probably better left alone at the present time.

Northeast Asia

Choon-ho Park: I want to talk about the economic zone and its impact in Northeast Asia. In 1977, Japan extended its fishing zone up to 200 miles, but reserved its application to the west of 135 degrees eastern longitude. That line happens to be right in the middle of the Sea of Japan. This means that the zone is not applied towards the two Koreas and China, for a very practical reason. The west coast Japanese fishermen catch very much indeed in the Yellow Sea and the East China Sea. By not applying the zone towards China and

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1 H.R. 2061, 98th Cong., 1st Sess. (1983).

Korea, Japan meant to continue to fish within 200 miles of the Korean peninsula and China.

The geographical circumstances are very important. In these semi-enclosed seas, the three countries are all situated well within 400 miles of one another, so that none of them is going to be able to claim the 200-mile limit in full. But when South Korean fishermen were asked to leave the North Pacific fishing zones of the United States, Canada, and the Soviet Union, some of them did not come home but loitered around Hokkaido, Japan. This became a conflict between the west and north Japan fishing industries. The north or Hokkaido fishing interests urged the Japanese government to press Seoul to recall the Korean fishing vessels home, and this has become a very serious dispute between the two countries now.

China and South Korea happen to be two odd men out indeed. Both have been very active in supporting the 200-mile economic zone regime at UNCLOS III, but neither has declared a 200-mile zone yet. Each, when asked about this, says it is considering the matter, but, when a Korean or Chinese says he is considering something, it can mean anything. When the two countries do decide to declare economic zones, it will not simply be a matter of declaring or extending the jurisdiction up to 200 miles or even half that distance, because they also have to deal with boundary problems and other disputes. For instance, the 200-mile zone proclamation could not be made without reviewing the 1965 fisheries agreement between Japan and South Korea, nor could it be made without lifting the Peace Line declared by South Korea in 1952 around the Korean peninsula to different distances from the Korean coast.

The continental shelf boundaries between the three countries have to be resolved, but there are some difficulties. For instance, the southernmost point of the South Korean claim in the East China Sea is about 280 nautical miles from the nearest Korean territory. South Korea will have to perspire very much to press that limit to China or Japan. I do not think South Korea will be successful on this point, especially because it claims the shelf limit towards China in the Yellow Sea by the median-line method. South Korea is thus using a kind of hybrid of two different criteria. In the East China Sea towards Japan, it relies on the natural prolongation of land territory but in the Yellow Sea towards China it is using the median-line criterion.

There is one very particular situation in the East China Sea. Because of the claims that may be made, the economic zone boundaries between the three countries may not coincide with the continental shelf boundaries. And there are some instances, in East Asia, where the

surface boundary and the bottom boundary do not coincide.

Court in Japan: Continental Shelf Jurisdiction is Customary Law

Finally, one interesting point with regard to the pick-and-choose application of the 1958 Geneva Convention by a nonparty. In April 1982, a local court in Japan issued a very novel decision. A Peruvian company operated on the Japanese continental shelf. It contended that, because Japan had not ratified the 1958 Convention on the Continental Shelf, whatever income the company made outside of the Japanese territorial sea could not be subject to taxation. But the court decided that the continental shelf jurisdiction is customary law, so that it does not matter whether Japan has ratified the 1958 Convention or not. The final decision is still pending in the higher court now.[2]

Questions Not Yet Addressed

Koh: There are some very important questions that none of the panelists have yet addressed. Is the expanded definition of innocent passage in Article 19 now part of customary law? Can a nonratifying state like the United States have the same rights to use the regime of archipelagic sea lanes passage and transit passage as a state party? And what about the common heritage principles in Part XI?

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2 Tokyo District Judgment No. 116, April 22, 1982, Hanrei Jiho (case reports) No. 1040 at 11 (1982).

The participants meeting in the Asia Room of the East-West Center's Jefferson Hall.

Ambassador Hasjim Djalal of Indonesia explains his view to the other participants.

Professor Anatoly Kolodkin, President of the Soviet Maritime Law Association, makes his presentation. Ambassador Tommy T.B. Koh of Singapore is sitting to the right of Professor Kolodkin.

John Craven, director of the Law of the Sea Institute, talks with Professor Kolodkin during a break in the discussions.

CHAPTER 4

DEEP SEABED MINING

INTRODUCTION

The major law of the sea issue dividing the United States from most of the rest of the nations involves the legal regime for mining the mineral resources of the deep seabed. The United States asserts that any nation can engage in seabed mining because it is one of the freedoms of the high seas. Most other nations and observers feel that these resources are part of the common heritage of humankind and that they can be exploited only under terms agreed upon by all nations--namely, the provisions of Part XI of the Law of the Sea Convention. They argue that seabed mining cannot be seen as the exercise of a freedom of the high seas like fishing because "everyone may catch fish in the same area" but seabed mining cannot be undertaken unless the mining operator has an exclusive claim to a large area of the seabed.[1]

As in any negotiation between states involving different peoples, cultures, economies, and languages, it has been difficult to find a common thread that will tie together the different perspectives brought to the negotiation. This challenge has been made even more difficult by the shift in position by the United States in 1981, when the Reagan administration concluded after its review of the matter that provisions agreed upon by previous U.S. negotiators should be reopened for

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[1] See Ambassador Koh at 230 infra; see also Van Dyke and Yuen, "Common Heritage" v. "Freedom of the High Seas: Which Governs the Seabed?, 19 San Diego L. Rev. 493, 508-11, 544-46 (1982); also in Miles and Allen (eds.), The Law of the Sea and Ocean Development Issues in the Pacific Basin, 15 L. Sea Inst. Proc. 206, 208-12, 236-37 (1981).

renegotiation. The other reason these differences have been so difficult to bridge is that they involve an industry that does not yet exist. One can only guess, therefore, at the type of problems that will arise and the type of regulation that will be needed.

The major participants in this section of the workshop have had extensive experience in negotiating the Law of the Sea Convention from its beginning. Four formal presentations outline the different views on this subject. The first speaker is Ambassador Tommy Koh, the last president of UNCLOS III and now the ambassador of Singapore to the United States. The next speaker is Conrad Welling, vice president of the Ocean Minerals Company, one of the major deep seabed mining consortia; he is also a representative of the American Mining Congress and chairman of the Undersea Mining Resources Committee. He is followed by Elisabeth Mann Borgese, a professor of political science at Dalhousie University, a member of the Austrian delegation to UNCLOS III, an editor of the Ocean Yearbook, and--as she aptly describes herself--a person "with a lifelong commitment to the world community." The final introductory speaker is Anatoly Kolodkin, president of the Soviet Maritime Law Association.

The discussion that follows these papers is kicked off by Brian Hoyle, current director of the Office of Ocean Law and Policy of the U.S. Department of State. After his remarks on the U.S. position, Ambassador Koh responds, commenting also on the economic considerations raised by Mr. Welling. Ambassador Koh states in strong terms that the rest of the world will not permit the United States to mine the resources of the seabed under some alternative regime because to do so would be to "take resources that are part of the common heritage of humankind and that belong to all of us" (page 253 infra). He then says that any U.S. effort to mine outside the Convention's framework will be challenged in the International Court of Justice, and that if "the United States does not obey the decision of the International Court, the United States will find it very difficult to convince the world it is a nation that upholds the rule of law" (page 253 infra).

The discussion that follows turns to the economic issues raised by the speakers, but later David Colson, the U.S. assistant legal adviser most directly concerned with the law of the sea, returns to the question of submitting the matter to the International Court of Justice and the U.S. commitment to the rule of law. In one of the moving and emotional moments of the workshop, he says that he believes the United States would abide by a clear decision by the Court, if the decision reached is "from a legal point of view--and not a political perspective...notwithstanding its

outcome." If the decision were adverse, he adds, "it would be a severe test of our national fiber" (page 261 infra).

The participants returned to the deep seabed controversy on the last day of the workshop, and this dialogue is presented as Part II of the Discussion section. Brian Hoyle goes through the concerns of the United States in greater detail, and the participants are able to analyze each problem individually. Once again, the economics of the industry and the many uncertainties loom large over the discussion. Are the provisions in the Convention too cumbersome and onerous? Is it possible to operate profitably within this system? Which nations were responsible for the awkward language that emerged?

In both discussion sessions, the participants review the problems that emerged during the negotiations and restate their views. The Group of 77--the coalition of developing nations that actually contains over 130 members--argued from a united perspective that they were entitled to special benefits from the seabed resources--the world's "common heritage"--and that the developed nations had agreed to this sharing in the 1970 General Assembly Declaration on Seabed Resources (see Appendix B infra). Several participants attempted to develop the specific substantive content of the common heritage concept, but Professor Bernard Oxman disagreed with this approach and characterized "common heritage" as only a procedural concept, which "requires all states to attempt in good faith to agree upon the substantive content" but which does not have substantive content in the absence of such an agreement (page 259 infra).

In his outline of the reasons for the U.S. decision rejecting the Convention, Brian Hoyle states clearly that the economic factors raised by the regulations in Part XI were not decisive and that the Reagan administration was perhaps more concerned about the balance of decision-making power in the Council of the International Sea-Bed Authority--which he feels is stacked against those nations most interested in seabed mining--and wanted to avoid setting a bad precedent for future international organizations (pages 262-66 infra). Mr. Hoyle concludes with a comment that the participants discuss again in Chapter 9--that the United States has experienced "a feeling of loneliness and an inability to influence international organization" (page 272 infra).

At the end of the second discussion session, Ambassador Hasjim Djalal was asked whether the developing nations were willing to reconsider the provisions of Part XI in light of the concerns raised by the United States. He responded by saying that "many of us...are wary of further negotiations with the

United States," because "[w]e have made continuous concessions which the United States never thinks of as concessions." "[W]e do not know what the United States really wants" (page 279 *infra*).

DEEP SEABED RESOURCES ARE THE COMMON HERITAGE OF HUMANKIND

by

Tommy T.B. Koh

The Resources of the Deep Seabed Are Our Common Heritage

Can the concept that the resources of the deep sea-bed are the common heritage of humankind be viewed as customary law? In trying to answer this question, I want to acknowledge my intellectual debt to Tony D'Amato, R.P. Anand, Anatoly Kolodkin, and Bernie Oxman because in my remarks I will draw upon the doctrinal framework that they have helped us construct. I would also like to discuss whether UN General Assembly resolutions can be used either as evidence of customary law or as generators of customary law.

The concept that the international area of the seabed and its resources constitute the common heritage of mankind was expounded, I think for the first time, at the 1958 Conference on the Law of the Sea by Prince Wan of Thailand, who was then president of the Conference. According to my research, the second person who picked up this idea was President Johnson in 1966 when he commissioned a ship.[1] The third person

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1 Address by President Lyndon Johnson at commissioning of ship Oceanographer, July 13, 1966 (cited in E. Wenk, The Politics of the Ocean 258 (1972)):

(Footnote continued)

who expounded this idea was Arvid Pardo of Malta in 1967.

In 1970, the United Nations adopted a Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction.[2] The declaration consists of 15 principles. No one opposed the adoption of the declaration. The Soviet Union and its Eastern European colleagues abstained in 1970, but they subsequently indicated that they would support the declaration.

Can a resolution such as the Declaration of Principles on the deep seabed be used either as evidence of customary law or as a generator of customary law? A colleague of ours, Jorge Castaneda, the former foreign minister of Mexico, wrote a book published by Columbia University Press entitled The Legal Effects of United Nations Resolutions.[3] I want to draw from his conclusions. First, Castaneda held the view, which I think is generally accepted, that resolutions of the General Assembly are recommendatory in nature and are not binding on member states. Second, resolutions of the General Assembly do not ordinarily generate customary law, nor can they be used as evidence of customary law.

There are two exceptions to these general rules. The first exception is when a resolution of the General Assembly formalizes an existing rule of international law, especially when such a resolution is adopted either unanimously or without opposition. The other exception, which is relevant to our present discussion, is a very small category of General Assembly resolutions which are declaratory of principles of international law. An example would be the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among

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1 (continued)

> [U]nder no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.

2 See Appendix B infra.

3 J. Castaneda, Legal Effects of United Nations Resolutions (1969).

States,[4] which was adopted by consensus. It is the view of Castaneda and of some other international lawyers that such General Assembly resolutions which contain a declaration of principles, if adopted either unanimously or without dissent, can be used as evidence of customary law.

In my view, the 1970 Declaration of Principles on the seabed's resources falls into this category. This declaration, which declares the international area of the seabed and its resources to be the common heritage of mankind, has set in motion an evolution whereby that principle has, in my view, become assimilated into customary law. I do not, of course, rest my case on that Declaration alone, because subsequent to the Declaration we now have the 1982 UN Convention on the Law of the Sea, which has incorporated this same principle, has elaborated a regime, and has created institutions for the exploration and exploitation of this common heritage.

"Common Heritage" vs. "Freedom of the High Seas"

The next question is what is the position of a country that decides to stay out of the 1982 UN Convention? Can such a state claim that the principle that the international area of the seabed and its resources constitute the common heritage of mankind is not yet part of customary law and that the applicable rule of law is the doctrine of high seas freedom? I believe that this is the view taken by the United States government.[5]

The invocation of the doctrine of high seas freedom to justify national claims of exclusive rights to a specific mine site in the international area of the deep seabed causes both doctrinal and practical problems, and I would like to very briefly indicate what these are. Advocates of this point of view have tried to draw an analogy between the rights of nations to catch fish in the high seas and the right to recover nodules from the deep seabed. It seems to me that there is a fundamental difference between the right to catch fish in the high seas and recovering nodules in the deep seabed. The difference is that in the case of fishing, the fishing nation is not claiming the exclusive right to catch fish in a demarcated area of the high sea. Everyone may catch fish in the same area. In the case of deep seabed mining, it is not

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[4] G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970).

[5] See Presidential Proclamation of March 10, 1983, Appendix A infra, at 553, para. 13.

possible for a mining company to undertake such a venture unless it has exclusive rights to mine the manganese nodules in a fairly large area. It must have this exclusive right or the venture cannot be economically feasible. Can one derive from the doctrine of the freedom of the high seas such an exclusive right? My answer is no.

The countries that have decided to stay out of the 1982 Convention have tried to repair the inadequacy of this point of view by suggesting that if they and other like-minded countries were to enter into a reciprocating states regime, whereby they would avoid conflicts among the claims of their mining companies, then they could achieve their objective of giving to their mining companies exclusive rights to specific mine sites.

Can a reciprocating states regime be made to work at a practical level? Can it be justified legally? In my view, a reciprocating states regime is unlikely to work for several reasons. It can only work if all the countries that are planning to undertake seabed mining join in such an arrangement. But if some of the seabed mining countries do not join in such an arrangement, then it is not possible to preclude overlaps or conflicts in the claimed mine sites. We know that three of the seabed mining countries, the Soviet Union, France, and Japan, have already signed the Convention. As you have already heard from Satya Nandan, the Soviet Union has applied to be registered as a pioneer investor, and to do that they had to indicate the coordinates of the sites in which they wished to undertake exploration.

Japan and France have not yet made such applications, but I would point out to them that as signatories to the Convention they have an obligation under the Vienna Convention on the Law of Treaties not to do anything to undermine the object and purpose of the treaty.[6] I wonder if it is consistent with that obligation for France and Japan to continue to participate in negotiations with the United States, the British, and the West Germans in order to ensure that their claimed sites do not overlap?

The Views of the International Court of Justice

Can one justify a reciprocating states regime legally? Can one say that it is consistent with international law? Here I want to divorce my legal views from my political stand. It is very hard to do because all of us are biased in our political

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6 Vienna Convention on the Law of Treaties, May 22, 1969, art. 18, U.N. Doc. A/Conf. 39/27.

positions, but if I may just take off my diplomatic hat and put on my hat as a law professor, I would concede to my adversaries like David Colson and Brian Hoyle that they have an arguable case. I am certainly not dogmatic enough to say that their case is very clearly without any legal basis. However, I hold the view that if the question were put to an authoritative judicial body, such as the International Court of Justice, whether a reciprocating states regime is compatible with existing international law, the court is likely to rule against the mini-treaty. David Colson has assured us that the United States remains committed to the rule of law. I invite him to support a proposal that I have been making for the last two years, which is that at an appropriate time we should refer this question to the International Court of Justice for an advisory opinion. If David Colson and Brian Hoyle win, I will eat my humble pie and say good luck to them. But if the Court rules against them, I hope that David Colson's statement that the United States remains committed to the rule of law will be honored.

A VIEW FROM THE INDUSTRY

by

Conrad Welling

My experience comes from the free enterprise system, where risk capital plays a dominant part in whether a planned industry becomes a reality. I have been involved in raising a lot of risk capital, and I have seen the results of a number of highly successful endeavors. One successful example is the silicon microchip industry.

One of the reasons for the success of the microchip industry in my part of the world has been the minimal government interference in the early development stage essential to maximum growth for a new industry.

As a representative of the American Mining Congress and as chairman of the Undersea Mineral Resources Committee, I want to inform everyone that we are in constant conflict with our own national government to hold down the regulatory interference. Some regulatory interference is necessary, especially in the environmental and safety areas, where it is essential for the support and welfare of all.

It is not, however, in the interest of the development of this new seabed mining industry to impose a heavy regulatory burden upon it. We do support the Reagan administration's position opposing Part XI of the Law of the Sea Convention. The International Association of Manufacturers, the American Petroleum Institute, and the National Oceans Industry also support this viewpoint.

There are good reasons for supporting this viewpoint. In my 40 years of involvement with the oceans and offshore mineral development, I have seen economics and risk play important roles in whether new industries become reality. Risk capital is a scarce commodity and difficult to arrange. For our purposes, I have raised $133 million just for research and development, and I estimate another $1 or $2 billion of risk capital will be needed to make the mining of manganese nodules a success.

When the Law of the Sea Conference first began its discussions, we strongly supported it. Later discussions began to dismay us, because we knew the high level of risks involved in seabed exploitation and the difficulty of raising capital for it if the regulatory burdens became too onerous. The industry began to lose its attractiveness because of the long protracted operations and the difficulty of utilizing the best technology available as implemented by policies in Part XI of the treaty. Because of these restrictions, we could not create an environment favorable to attracting the necessary capital to exploit these resources.

Not only will the mining industry fail to increase its capabilities and production methods because of the failure to begin mining, but the whole world community will suffer from a lack of increased economic development.

What are these risks? There are four main risks in mining: technical, economic or market, environmental, and legal. From the initial research and development stage we have found the technical risk has decreased and is now not so high; it is manageable. The economic risk goes in cycles and only delays the time until mining begins. The environmental risks are there and can be dealt with. The legal risks are very high under the treaty text of Part XI.

Risk capital follows the areas with the least risk. The risks involved with mining the seabed are now greater than the potential capital return. Other areas have less risk and higher capital return, and that is where the risk capital is going, not into seabed mining.

We will all suffer from the lack of risk capital for development, because without it our economy will not grow. That means we have to decrease the risks and increase the rewards where we can.

The discussants and delegates to this workshop have done a disservice by not considering the risk of this enterprise as compared to the capital return and how to raise the capital and also the rewards of receiving free technology.

It is to the benefit of mankind when technology is transferred. This has already occurred in private

contracts between multinational corporations and states and it has highly benefitted the world. But transfer of technology is not that easy to define or to encourage. For example, when the scientist in the laboratory solves the technical problems, he does not have the technology. When the engineer in the field develops the pilot plant, he does not have the technology. When the executive of a large corporation has his first plant on line, he does not have the technology. Technology only occurs when the plant is giving an adequate return on the investment dollar, and that is when the technology is transferrable.

We want an authority that can provide an environment for the development of the oceans. Although we are opposed to Part XI, we are not opposed to the concept of the welfare of humankind.

To regulate the ocean, one must first understand the ocean and its physical parameters. One of the main physical parameters of the ocean is that it is opaque to electromagnetic energy. We cannot use the many devices involving electrical wavelengths to research the ocean. When we do use these devices, the information received is many orders of magnitude less than the information received when working with normal air or space. That is why it has been only recently that exploration of the ocean has been successful using anti-submarine devices such as sonar.

Another factor is that the ocean is made up of two provinces: the deep seabed and the continental shelf. Most of the oil and gas is on the continental shelf. I estimate that 90 percent of all the ocean wealth will be in the exclusive economic zones. Part XI will only involve about 5-10 percent of the mineral wealth of the oceans. The Convention has overemphasized the value of manganese nodules.

MAKING PART XI OF THE CONVENTION WORK

by

Elisabeth Mann Borgese

I am not speaking as a member of the delegation of Austria, I am not speaking for Canada, I am speaking merely in an individual capacity and as a researcher and as somebody with a lifelong commitment to the world community.

We all know that Part XI of the Convention is defective. We all wanted to make it better if possible, but then came the moment in 1981 when the choice was not between this Convention and a better convention but between this Convention and no convention at all. If we had started to unravel things at that time, the whole Convention would have fallen apart. We had to take this Convention the way it was presented. It is our platform, and we have to see what we can do with it. How can we make up for the defects? How can we strive to achieve the result of universal acceptance, as we tried to do in 1982, and as I still think we can do?

I am not going to talk about the past. I want to talk about the future, but there is one little paradoxical thing that I want to point out and that often gets lost in the discussion. The worst defects to which our colleagues from the United States are now objecting have been introduced by the United States. I will discuss three of them. First is the idea that we should settle in advance every detail of organization and finance for an industry about whose future we admittedly know nothing. This approach has left us

saddled with Annex III, which is very difficult to operate with and very difficult to apply technically. That was the U.S. contribution, because they lacked confidence in this new International Sea-Bed Authority and did not want to leave any discretionary power to it, and so everything had to be fixed in advance for 25 years.

The second heritage from the United States is the parallel system, which, as any systems analyst will tell you, is the most cost-inefficient system we could have devised. We are stuck with it now and will have to see what to do with it.

The third problem is the problem of decision making, which has become so immensely complex that it will be very difficult to operate from a business point of view.

The Future

Most of these problems are academic because some fundamental changes have occurred that force us to look at the problems in a quite different manner. The first fundamental change involves the assumption that commercialized production would be underway by the year 1985. The Authority would make money by that time. We all know that this is not the case. The protracted recession, the instability of metal markets, and the superabundance of land-based resources have played havoc with this prediction.

The second fundamental change is that ocean mining will certainly not be restricted to the mining of manganese nodules. At first we heard about the sulfides. Now we hear about the crusts, and there will be other discoveries.

The third fundamental change is that mining will not be restricted to the international seabed area but will be going on primarily in areas under national jurisdiction.

These changes force us to look at the Authority in a very different manner because they alter the assumptions on which the Convention was based. If they are no longer valid, then we will have to take notice.

The Preparatory Commission

How have these fundamental changes affected the task of the Preparatory Commission and the special commissions that have been very well and promisingly organized? The main task that the Commission now has is to manage the transition from the ideas and ideals that we had in the 1960s and 1970s--when we conceived Part XI--to the economic, technological, and scientific realities of today, which are so different. Let me discuss the five tasks the Commission has to fulfill:

The first is to make preparations for the International Tribunal for the Law of the Sea. Our colleague, Ambassador Gunter Gorner of the Democratic German Republic, is a very lucky guy because he can just take the Convention the way it is and proceed on that basis. His work is not affected by the changes that have occurred.

The second is the drafting of rules and regulations for the mining code. Here I see some very grave dangers. I see the danger that we may fall into the same trap that we were lured into during UNCLOS III. We may again make fixed and final rules and regulations for a situation we do not understand. There will be no commercial mining until the beginning of the next century, and we do not know exactly what economic, technological, and political situations will take place. Let us not impose upon ourselves a fixed frame that will prevent us from responding at the time needed to these problems as they arise. This is a difficult problem this commission will have to face.

The third task, entrusted to the Plenary and the General Committee is the administration of Resolution II on Preparatory Investment Protection, to establish an interim regime for exploration, research, and development for the contractor's side of the parallel system.[1] Incidentally, we encounter here another very strange paradox. I remember when that resolution was being negotiated. Those of us that had the common heritage concept and the opportunities for developing countries at heart were very, very unhappy. We thought it was a sellout to the United States and to Western Europe. Well, look what happened. The two pioneer countries who really are interested in this interim regime for exploration, research, and development are neither the United States nor Western Europe, but rather the Soviet Union and India. This resolution has worked out in ways that were not in the minds of those who originally proposed it. I am delighted that the task of elaborating this interim regime for exploration, research, and development is in the hands of the Plenary Commission under the leadership of President Warioba.

The fourth task is to take care of the problems of land-based producers. Here again I see a very

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1 Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules, in U.N. Doc. A/CONF. 62/L 132/Add. 1 at Annex IV (April 22, 1982), reprinted in The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index 177 (U.N. Sales No. E.83.V.5, 1983).

difficult task before us. Our colleague from Indonesia is well prepared to handle this. But we might fall again into the same trap of nailing ourselves down in advance before we know the circumstances we will have to face. As I said earlier, the mining will not be restricted to manganese nodules or to the international area. This development puts the whole problem of production limitation, and compensation into a totally new context.

In the long term, I see three ways of coping with those problems. The first one is to encourage the land-based producers to participate in ocean mining as fast and as much as possible. This can be done by making use of the capacity that some have in the processing sector or by encouraging them to join joint ventures. The second measure would be to encourage the pioneers and to give them incentives to establish new industries in the countries of the land-based producers to contribute to a diversification of their economies. For example, if a pioneer establishes a bioindustry in one of those countries, it ought to be given a certain incentive by the commission. The third way would be, in the long term, to establish a revolving fund for industrial diversification on the pattern that we have for the revolving fund for exploration of hard mineral resources. In this way, the new Convention and the order that it establishes for the ocean could contribute to enhancing diversification in those countries to liberate them from the post-colonial extraction economy with its overdependence on the export of one or two commodities, which is not conducive to development.

The fifth task is to make preparation for the Enterprise, entrusted to Special Commission II under the able leadership of our colleague from Trinidad and Tobago. What can that commission do in the light of the changed circumstances? The first thing is to take notice of these changes and to realize that activities in the foreseeable future in the Area will be exploration, research, and development. What we have tried to do is work out a proposal for a joint enterprise on exploration, research and development which would be the counterpart to Resolution II. It would establish an interim regime for exploration, research, and development for what in the future is going to be the public international part of the parallel system.

Who could be the members of such a joint venture? They could be, on a voluntary basis, some of the pioneer investors. They could be other countries, developed and developing, who might be willing to invest in a joint enterprise of that kind. It probably would be a classical joint venture (and not a joint venture corporation) which would leave to the members

their legal individuality. The joint venture would need a budget of about $200 million over a five-year period, and here I come to the question of risk capital for this exploration, research, and development phase. Half of the $200 million could be raised by the commission over a five-year period; $20 million a year is not a financial problem but a problem of political will. The other half, $100 million, could be divided among the members of the joint venture and could be divided between industry and between their governments. There is precedent for this approach. The European Economic Community has a joint enterprise of that kind for research and development for advanced technologies, especially biotechnologies, where the community pays half and the member countries and their industries, the other half.

The advantages of such an enterprise for the industrialized countries would be to reduce their risk capital. For the developing countries, they would come into the enterprise and gain access to advanced technology. For the commission, it would create an infrastructure for the future of the public sector of the production system. I am encouraged to see that people like John Flipse are already thinking pretty much in that direction. My hope would be that U.S. companies would join such an enterprise and that government activities would follow, with industries leading the way. We might still reach the goal of a universally acceptable regime through this approach.

THE COMMON HERITAGE OF MANKIND OF THE SEABED: THE NOTION AND SUBSTANCE

by

Anatoly Kolodkin

For the first time in the history of the law of the sea, one of the sea areas--the deep seabed, ocean floor, and subsoil--and its resources acquired a specific status that differs significantly from the status of all other sea areas.

The current legal classifications of the sea areas are:

(1) areas within the territory of a state and subject to its sovereignty, i.e., internal waters and the territorial sea with a maximum breadth limit of 12 nautical miles;

(2) areas beyond the territory of a state and not subject to its sovereignty, but where a coastal state can exercise sovereign rights to explore and exploit natural resources and also jurisdiction for strictly limited purposes (economic zones, fishery zones, continental shelf, contiguous zones) with a maximum breadth limit of 200 miles for economic zones and 350 miles for a continental shelf;

(3) water areas that are not subject to national sovereignty, sovereign rights, or jurisdiction (res communis);

(4) land territories that are outside national sovereignty and jurisdiction (islands, reefs, etc.) but which could be discovered and might be appropriated (res nullius);

(5) areas of the seabed, ocean floor, subsoil, and resources beyond the limits of the continental shelf, which are now the common heritage of mankind.

According to Article 136 of the 1982 Law of the Sea Convention, the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction and their resources are the common heritage of mankind. Article 133(a) defines "resources" as "all solid, liquid or gaseous mineral resources in situ...."

The development of the concept of the common heritage of mankind is a unique historical event that can have a significant influence on the present world and international order. The concept is directly linked to "the idea of a new international economic order."[1]

What is the essence of this concept? For the seabed and ocean floor, this concept appeared in the middle of the 1960s,[2] and for the moon and other celestial bodies and their resources, in the beginning of the 1970s.[3] Some commentators cite documents in which this concept appeared prior to the 1982 Convention or assert that it was originally put forward by Malta and other developing countries.[4] In reality, one of the pioneers of this concept, the United States, now refuses to recognize it. In 1966, President Johnson stated: "We shall ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings."[5] President Nixon in his statement on May 23, 1970, called on all nations to approve a

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1 Larshan and Brennan, The Common Heritage of Mankind, Principles in International Law, 21 Colum. L. J. 306 (1983).

2 Dekanosov, The Meaning of the Common Heritage of Mankind in International Law, in Soviet Yearbook of International Law 142 (1982).

3 U.N. Doc. A/AC 105/196 (1977), Annex 1 at 4, 13, 21.

4 G.A. Res. 2340 (XXII), U.N. GAOR Supp. (No. 16) at 14, U.N. Doc. A/6716 (1967).

5 Address by President Lyndon Johnson at commissioning of ship Oceanographer, July 13, 1966 (see note 1 at pages 228-29 supra).

treaty in which "they would renounce all national claims over natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters and would regard these resources as the common heritage of mankind."[6] In international legal instruments, the concept of the common heritage of mankind in respect of the area first found its place in the Declaration of Principles of 1970,[7] and later was included in the Charter on Economic Rights and Duties of States (Art. 29) in 1974.[8]

The first component of the concept is reflected in Article 137(1), which states that

> No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

Thus, the area and its resources cannot be subjected to appropriation, sovereignty, or even sovereign rights of a state.

In this aspect, the legal regime of the seabed, ocean floor, and subsoil is analogous to the legal status of the high seas. The 1958 Geneva Convention on the High Seas, Article 2, and the 1982 Convention, Article 89, also establish that no state may claim or appropriate any part of the high seas and subordinate it to its sovereignty. At the same time, all states maintain their right to make reasonable use of the high seas. What precisely do the principles of non-appropriation, non-subordination, and common use mean?[9] And what is the difference between the status of the deep seabed and the high seas?

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6 U.S. Dept. of State, United States Policy for the Seabed, 62 Dept. St. Bull. 737 (1970); Caron, Municipal Legislation for Exploitation of the Deep Seabed, 8 Ocean Dev. & Int'l L. 261 (1980).

7 See Appendix B infra.

8 G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

9 See Koroma, The Future of the Common Heritage of Mankind, in Koers and Oxman (eds.), The 1982 Convention on the Law of the Sea, 17 L. Sea. Inst. Proc. 24 (1983).

The president of the Third UN Conference on the Law of the Sea stated at the 8th Session that the concept of the common heritage of mankind needed further refinement. Some scholars have tried to help in this matter. Professor Bin Cheng has written that the concept of the common heritage includes the impossibility of appropriating territory by any state, but at the same time it allows states to use the region in accordance with general international law such as to acquire natural resources or to conduct military tests. These areas and resources cannot be used without an international community (as in the case of the Moon Treaty of 1979) and cannot be left to the discretion of individual states or persons.[10]

American authors Larshan and Brennan include four elements in the meaning of the common heritage of mankind: (1) non-appropriation; (2) participation of all nations in the management of this region; (3) distribution of benefits from the exploitation of resources; (4) uses exclusively for peaceful purposes.[11] These elements are very significant, but they do not explain completely the meaning of the term. In my opinion, the development of material benefits and their acquisition by all is an integral element of the principle of the common heritage. Because these areas are the common heritage of mankind, wrote an author of one of the reports of the Commission to Study the Organization of Peace, all nations should receive benefits from these areas and receive profits from those who wish to exploit the resources of the seabed.[12]

A representative of Brazil in the Seabed Committee stated that the concept of the common heritage presupposes a use of this heritage and an equal distribution of profits among those who have interests in common property, even though all are not directly participating in its exploitation.[13] Thus the first

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10 Bin Cheng, The Legal Regime of Airspace and Outer Space: The Boundary Problem, Functionalism vs. Spatialism: The Major Premise, 5 Annals Air & Space L. 323, 332 (1980).

11 Larshan and Brennan, supra note 1, at 305.

12 19th Report of the Commission to Study the Organization of Peace, The United Nations and the Bed of the Sea 14 (1969); R.R. Simmonds, The Resources of the Ocean Bed 27 (1969).

13 U.N. Doc. A/AC.138/SC.1/SR.5 at 43 (March 18, 1969).

two components of common heritage are that each state has the right to have its own share from the exploitation of the seabed and its resources and each state must receive its share even if the state is not participating directly in the exploitation of the seabed and its resources.

The third component of the concept is that the world's population as a whole is not in a position to manage the use of the seabed and its resources, and "a trustee" is needed to conduct such a management on behalf of mankind.[14] The secretary-general of the United Nations reported in 1969 that some delegations favored the creation of an international entity to serve as trustee.[15] Thus it is clear that the principle of the common heritage can take form only through a special international mechanism, which in the 1982 Convention is the International Sea-Bed Authority. The Convention also states that all benefits derived from the deep seabed shall be equitably shared through an appropriate authority on the seabed, and such a distribution shall be carried out for the benefit of mankind "taking into particular consideration the interests and needs of the developing states" (Article 140(1)). As to the resources of the seabed, the concept of the common heritage of mankind acts in respect of the resources of the Area only until these resources are extracted and separated from the surface of the seabed,[16] but the extraction of the mineral resources of the Area may be executed only in accordance with provisions of Part XI of the 1982 Convention and the regulations and procedures of the International Sea-Bed Authority.

Thus, we have three components of the meaning of the concept of the common heritage of mankind, which find a firm basis in the Convention. The fourth element involves the peaceful uses of the area (Article 141). The peaceful uses doctrine has been discussed in other treaties such as the Treaty on the Moon, 1979.[17] The Treaty on the Moon also discusses

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14 Pacem in Maribus III, A Constitution for the Oceans 2 (Report of Study Project VI, 1972).

15 U.N. GAOR Supp. (No. 22) at 91, U.N. Doc. A/7622 (1969).

16 Dekanosov, supra note 2, at 149.

17 Professor Bin Cheng has stated that the Treaty on the Moon was the first agreement which "gave power to the concept of the common heritage of mankind." Bin Cheng, The Moon Treaty: Agreement Governing the

(Footnote continued)

the link between the common heritage of mankind and an international mechanism in Article 11(1): "the moon and its natural resources are the common heritage of mankind." In Article 11(5), the states parties then undertake to establish "an international regime...to govern exploitation of the Moon and its natural resources," in accordance with Article 18.

Some U.S. entrepreneurs and officials refuse to accept these views and argue that a "freedom of exploration and exploitation of the seabed" exists as a component of the freedom of the high seas. They argue that such a freedom may be applied contrary to the 1982 Convention, allowing them to undertake unilateral actions in respect of the deep seabed and ocean floor.[18]

The U.S. position in opposition to the concept of the common heritage of mankind can be easily explained: the U.S. monopolies prefer a freedom of unilateral penetration and access to the resources of the seabed.[19] Thus, these monopolies promoted the U.S. Deep Seabed Hard Minerals Act adopted in 1980,[20] which permits unilateral exploitation of the seabed minerals.

The legitimacy of this unilateral approach is not supported by a number of U.S. scholars. G. Biggs feels that the attempt to use the doctrine of the freedom of the high seas by certain states or corporations for purposes of unilateral exploitation does not find

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17 (continued)
Activities of States on the Moon and Other Celestial Bodies Within the Solar System Other than the Earth, 33 Current Legal Probs. 213 (1980).

18 See, for example, Opinion of the Law Offices of Northcutt Ely, International Law Applicable to Deepsea Mining 63, submitted to Deepsea Ventures, Inc. (Nov. 14, 1974).

19 J. Grolin, a participant in UNCLOS III, has listed the deep seabed mining consortia which incorporates companies of various countries: Kennecott (U.S.A., U.K., Canada, Japan), Ocean Mining Associates (U.S.A., Belgium, Italy), Ocean Management (Canada, U.S.A., Japan), Ocean Minerals (U.S.A., Netherlands). Grolin, The Future of the Law of the Sea: Consequences of a Non-Treaty and Non-Universal Treaty Situation, 13 Ocean Dev. & Int'l L. 26 (1983).

20 Pub. L. No. 96-283, 94 Stat. 553, 30 U.S.C. secs. 1401-1605.

support in international law.[21] He concludes that the U.S. legislation promoting private exploration and exploitation of the seabed prior to the establishment of an international regime contradicts the concept of the common heritage of mankind that is now a norm of international customary law. This "legislation may create serious conflict situations concerning the jurisdiction." He concludes that these bills are not "in conformity with accepted principles of international law."[22] Another American author, D. Arrow, also supports the idea of subordinating seabed activities to the international regime foreseen by the Convention.[23] Professor J. Van Dyke and Chris Yuen also conclude that "deep seabed mining is not a freedom of the high seas."[24] The concept of the common heritage was confirmed in two resolutions of the UNCTAD. According to the UNCTAD resolution 108(v), "any unilateral actions" connected with seabed exploitation undertaken prior to the adoption of the Convention on the Law of the Sea "would not be recognized by the international community and would be invalid according to international law."[25]

Access to the seabed and its resources may be allowed only through that international mechanism which the Convention establishes to act on behalf of the whole of mankind. Some American authors who recognize this would nonetheless like to change Part XI to "improve" the rules and procedures of the Authority. They argue that we need to correct "a little" the philosophical basis of the status of the area and the

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21 Biggs, Deep Seabed Mining and Unilateral Legislation, 8 Ocean Dev. & Int'l L. 223 (1980).

22 Id. at 224.

23 Arrow, The Customary Norm Process and the Deep Seabed, 9 Ocean Dev. & Int'l L. 15 (1981).

24 Van Dyke and Yuen, "Common Heritage" v "Freedom of the High Seas": Which Governs the Seabed?, 19 San Diego L. Rev. 493, 514 (1982); also in Miles and Allen (eds.), The Law of the Sea and Ocean Development Issues in the Pacific Basin, 15 L. Sea Inst. Proc. 206 (1981).

25 U.N. Doc. A/CONF. 62/79 (1979).

concept of the common heritage. Professor B. Oxman,[26] for instance, has argued for an improvement of the "institutional" provisions of the Convention, i.e., provisions of Part XI concerning the Authority, declaring all other provisions of this part to be norms of customary international law and opinio juris.

To conclude, four fundamental elements compose the notion and legal substance of the concept of the common heritage of mankind:

1. The deep seabed and its resources can neither be subject to the sovereignty of any state nor appropriated by any state or its natural or juridical bodies.

2. Economic and other benefits from the exploration and exploitation of the deep seabed and its resources are to be distributed for the interests of all nations but taking into account the special interests of developing countries even if they do not conduct any such exploration and exploitation.

3. Unilateral actions of states to appropriate or exploit the deep seabed and its resources are not allowed. Unregulated and uncontrolled access to the deep seabed and its resources is excluded. At the same time, the so-called parallel system shall be preserved. States as members of the international community and sovereign subjects of international law cannot be refused their right to participate in the exploration and exploitation of the deep seabed and its resources, but this right shall be exercised only through the Authority.

4. The area of the deep seabed which is the common heritage of mankind shall be used exclusively for peaceful purposes.

These elements are elaborated and expressed in the 1982 Law of the Sea Convention.

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26 Oxman, The Customary International Law in the Absence of Widespread Ratification of the United Nations Convention on the Law of the Sea in Koers and Oxman (eds.), The 1982 Convention on the Law of the Sea, 17 L. Sea Inst. Proc. 668 (1983).

DISCUSSION: PART I

The U.S Position on Deep Seabed Mining

Brian Hoyle: Ambassador Koh very ably presented the case of those who argue that the common heritage is customary international law today. He argued also that any deep seabed mining outside of the Law of the Sea Convention would be illegal. The United States does not share that view.

I would hope that in the period between now and the time that deep seabed mining becomes a reality those who intend to operate within the Law of the Sea Convention and those who intend to operate outside the Law of the Sea Convention can avoid a collision course that will result in mutually assured destruction, to borrow a phrase from nuclear warfare terminology. That is surely what we will achieve if we proceed on this collision course.

At the present time, the majority of countries with the intention and ability to engage in deep seabed mining have not signed the Law of the Sea Convention. Two important ones have, and possibly a third and fourth will, depending on the status and the future development of their programs. But the 1982 Law of the Sea Convention is not in force today and will not be in force for some time in the future. The reciprocating states agreement or "mini-treaty" is not in force today either. The commercial production of deep seabed minerals is not on the immediate horizon. A lot can happen in the meantime.

I would argue that it is in the interest of both those nations that have signed the Convention and those that have not to allow some mutual coexistence. Some argue that the Law of the Sea Convention is the only basis for deep seabed mining and that any commercial production outside the Convention is illegal. Some of the countries that have not signed the treaty argue that the Law of the Sea Convention and Part XI is likely to be a party that no one will come to. There may be an International Sea-Bed Authority. We believe in good faith, however, that there will be no private mining under this agreement, under Part XI. It is simply too complicated for what, as Conrad Welling so ably pointed out, is an industry that has never engaged in commercial production before and one in which the risks are high. We believe the regime set out in Part XI is massive overkill. There is no need for all of this.

The Mini-Treaty

The reciprocating states agreement that we are at the present time negotiating outside the treaty is not a mutual recognition of rights agreement. It is a noninterference agreement among those countries with the capability of engaging in seabed mining in which each will agree not to interfere with each other's activities. A long time will pass before deep seabed mining becomes a commercial reality, and a lot can happen in the meantime. There can be a reconciliation of the two regimes, or there can be coexistence. But at the present time it is much too early to embark on a system where we both aim missiles at each other's systems, because we will surely ruin both. No bank will lend money to an operation pursuant to a contract licensed by the International Sea-Bed Authority if a company operating outside of the Convention has stated a claim to the same site.

We can discuss decisions of the International Court of Justice, and possibly the Court might go either way, as Ambassador Koh said. But the fact is there would still be a cloud on title if a nation continued to grant a license outside the Convention. The ICJ's decision is not going to be dispositive as far as a banker is concerned. The bankers with whom we have talked think the Law of the Sea Convention is not a regime under which investment can be made. They think the regime under the Convention imposes too much regulation, too much bureaucracy, and too great a risk.

Professor Borgese has observed that it was the United States that asked for too much detail in the Convention. It is true that our own domestic experience suggests that in dealing with regulatory agencies detail is absolutely necessary. In the United States, mining companies have had more than a hundred

years experience with the Department of the Interior, and yet they do not have a great deal of trust in the department because they are never quite sure how the department, in applying mining law, is going to exercise its discretion.

How can we trust an International Sea-Bed Authority that has no track record but has a massive bureaucracy? It did not give the people in the United States a great deal of comfort when the UN Secretariat suggested to the Government of Jamaica that 1,000 housing units for employees of the Seabed Authority would be needed by 1990, and 2,000 units would be needed by 1995. This means that approximately 2,000 people will be regulating an industry that by 1995 probably will have only 400-500 people working for it. Our own Department of the Interior in the United States has only about 20,000 people to regulate all the public lands of the United States, offshore oil and gas development, national parks, and so on. This is the sort of thing that does not inspire confidence in potential investors.

But whether we are right or whether those who argue that mining will take place under the 1982 Convention are right, only time will tell. In the meantime, I would suggest that it is in both our interests to try to coexist, because neither of us is in a position to forecast the future so well as to determine what the outcome will be.

Disappointment With the Attitude of the U.S. Mining Industry

Tommy Koh: I would like to reply to some of the comments made by my good friend Connie Welling and then also to the remarks made by Brian Hoyle. In my initial remarks, I did not address the substance of Part XI, which was the thrust of Connie's remarks.

I would like to express my disappointment in and disagreement with the attitude the American mining industry has adopted. Connie Welling has said that he and his colleagues in the industry regard Part XI as being unacceptable because the political and legal risks are too high, because it does not create an investment environment that will attract venture capital.

Connie, you and I both come from free enterprise economies. I think that my economy is far less regulated than yours. There is a far greater national consensus in Singapore that reveres the profit motive than in the United States, so we are philosophically not enemies. But I want to tell you several things.

First, you and your colleagues have always demanded that those who wish to exploit the resources of the seabed must be given reasonably assured access to those resources. Have the Convention and the

related resolutions given you such assured access to the resources? The answer is yes. Resolution II, which Elisabeth Borgese discussed earlier,[1] not only guarantees you access to resources, but it took a step unprecedented in any conference. It names the states, the corporations, the consortia that are, at present, investing research and development money in seabed mining. This is an unprecedented step. When I negotiated this resolution and persuaded the Group of 77 to accept it, people like Elisabeth Borgese threw rotten eggs at me and said it was a sellout. Where is the political or legal risk about guaranteed access to the resources?

Second, you say that the fiscal regime in the Convention is onerous. This is not true. An American colleague of yours, Ron Katz, has compared the tax system in the Convention on seabed mining with tax systems of land-based mining,[2] and he found that the tax system in the Convention is not only more favorable but has a much more progressive structure. The tax bite of the Authority varies depending upon the profitability of the project over its lifetime and the profitability of the project on a year-to-year basis.

Production Limitations and the Transfer of Technology

Third, you object to the provisions in the treaty on production limitation (Article 151). I can understand ideologues like Brian Hoyle objecting to this on the ground that it is an ideological notion offensive to his economic philosophy. But I cannot understand the industry objecting to it, because your own American experts have in a paper prepared for the United States government shown that the production ceiling will not have a bite in practice.[3] The ceiling was carefully worked out so that it is high enough to accommodate all those who are very likely to enter this industry in the foreseeable future. It may be ideologically offensive, but in practice it is not going to have any bite.

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1 See page 238 supra.

2 Katz, Financial Arrangements for Seabed Mining Companies: An NIED Case Study, 13 J. World Trade L. 209 (1979); Katz, A Method for Evaluating the Deep Seabed Mining Provisions of the Law of the Sea Treaty, 7 Yale J. World Public Order 114 (1980).

3 L. Antrim and J. Sebenius, Incentives for Ocean Mining Under the New Law of the Sea, in B. Oxman, D. Caron, and C. Buderi (eds.), Law of the Sea--U.S. Policy Dilemma 79 (1983).

Fourth, you object to the mandatory sale of technology. Again, the same paper prepared for the United States government[4] showed that, in fact, seabed mining technologies are available in the open market and that the provisions of the Convention on the mandatory sale of technology are very unlikely to be invoked, because before they can be invoked the Enterprise would have to show that the technology or equivalent technology is not available in the marketplace.[5] I think the experience in India supports my thesis because the Indians have been able to develop ocean mining technology through a combination of indigenous technology and technology that they have been able to purchase on the open market.

The Dispute Will Be Submitted to the International Court of Justice

I will respond to Brian Hoyle's statement that we should "practice tolerance" as follows: An alternative regime to the Law of the Sea Convention is unacceptable because it would take resources that are part of the common heritage of humankind and that belong to all of us. If the United States does engage in seabed mining through an alternative regime, I will challenge it by bringing an action to the International Court of Justice. If the United States does not obey the decision of the International Court, the United States will find it very difficult to convince the world that it is a nation that upholds the rule of law.

2,000 Housing Units for the International Sea-Bed Authority?

Jon Van Dyke: Ambassador Nandan, could you comment on Brian Hoyle's concern about the request for 2,000 housing units in Jamaica for the International Sea-Bed Authority? Could you give us a little background about that?

Satya Nandan: I heard of no such request being made by the Jamaican government. I know that they anticipated things to move fast and that the Sea-Bed Authority might come into being very quickly. They were anticipating difficulties with housing if a lot of

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4 Id.

5 See also Van Dyke and Teichmann, Transfer of Seabed Mining Technology: A Stumbling Block to U.S. Ratification of the Law of the Sea Convention?, 13 Ocean Dev. & Int'l L. 427 (1984), and in Johnston and Letalik (eds.), The Law of the Sea and Ocean Industry, 16 L. Sea Inst. Proc. 518 (1982).

delegations moved down there along with the Secretariat. But I think that was a miscalculation. There seems to be no such urgency, and certainly nobody has thought in terms of 2,000 houses to be made available by the Jamaican government. I do not know where that figure came from.

There was a seminar in Jamaica on the broader question of making Jamaica a center for international organizations, or yet another center, as it were. In that context, I believe that the Jamaicans spoke of a large influx of international civil servants, a large number of missions, something like a hundred that might be established there. I take it in that context that something of this kind may have been referred to, but not, I am sure, in the context of the Sea-Bed Authority alone.

Hoyle: I have in my office a cable on a UN Secretariat letterhead to the Government of Jamaica in which the UN Secretariat suggested to the Government of Jamaica about a year and a half or two years ago that Jamaica have 1,000 housing units in Kingston available by the year 1990 and 2,000 by the year 1995. We were sent this by the U.S. mission in New York, and quite frankly, we could not believe it. We have either been the victims of disinformation or this actually happened.

Nandan: Was the cable from our office [the UN Law of the Sea Secretariat]?

Hoyle: I am not sure. The cable referred to the Sea-Bed Authority and the Enterprise. The housing would be for members of the working staff of the Sea-Bed Authority and the Enterprise.

Nandan: I must say, I am shocked at that estimate, if it does exist. I do not think anything like that has come out of our office. I know that Bernardo Zuleta (under secretary general), who unfortunately is no longer with us, would not have authorized such an estimation.

Conrad Welling: I personally saw a study made by the United Nations about three or four years ago that had exactly the same numbers. It was a study looking at the future requirements of the Sea-Bed Authority in Jamaica, and the same numbers were in that study. It went into quite a bit of detail as to the staffing requirements, the size of buildings that would be needed, and housing requirements.

Nandan: I am aware of that study. It was done some years back before we reached the final stretches

in the negotiations. It was an estimate based on a number of considerations as though there were no facilities available. It was not related to any particular center. At the time, it was very hypothetical; I know that study still exists and is in serious need of revision in light of recent developments.

John Craven: I do not really think this discussion is relevant to this workshop. Those of us who have been involved in any planning effort know that estimates can range all over the place.

Hoyle: I disagree with you, John. I think this question is relevant. All the way through the seabed negotiations, the studies on the size of the Sea-Bed Authority, the size of the Enterprise, and their costs were pretty shattering to one familiar with domestic bureaucracies in a country like the United States. Only when the United States announced that it would not participate in the Sea-Bed Authority were some of these things down-sized. Reality did not set in until the United States announced that we would not be paying a quarter of the cost of this venture. And I think had we not refused to sign this treaty, you would not see the down-scaling that you are seeing now.

Koh: I frankly think that Brian's statement is an example of superpower arrogance. There is absolutely no evidence to suggest that the very prudent attitude of those of us who are signatories, on the size of the bureaucracy, the number of people to be posted to Kingston, is in any way related to the refusal of the United States to sign the Convention or to pay its share of the costs attributable to the work of the Preparatory Commission.

Risk Capital and Royalties

Welling: I would like to return to Ambassador Koh's statement concerning Ron Katz's comparison of the regulatory nature of the deep seabed regime in Part XI of the Convention to national regulations of land-based mining, where he argues that land-based systems are subject to greater regulation than the proposed ocean regime.[6] I would answer simply that Ron Katz does not raise risk capital. I do.

Ambassodor Koh also referred to royalties and the common heritage of humankind. The mining industry is not opposed to paying royalties. Perhaps the percentage of royalty payment noted in the U.S. Deep

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[6] See note 2 on page 252 supra.

Seabed Hard Minerals Resources Act is not enough, and it could be raised as the industry became healthier.[7] The problem is that no risk capital can be generated under the current program because of the risk involved.

Is Seabed Mining Important Enough to Justify U.S. Rejection of the Convention?

Hasjim Djalal: I would like to make three comments. First, why should the U.S. free enterprise system rule this Convention. Indonesia is primarily free enterprise, too, but there are other systems available in the world. Not everyone agrees with the U.S. system anyway, so why should we impose a free enterprise system on an area that is not part of the United States?

Second, the United States has declared an EEZ, but what motivates the United States to risk being the odd man out in the world community over the other terms in the Convention? Are the seabed resources important or not? If seabed resources are unlikely to be developed for decades, why has the United States rejected the Convention on this ground alone?

Third, I agree with Elisabeth Borgese that the detail in the regulations on deep seabed mining has been a waste of time. We are being drowned in detail. Poor countries do not have the technical expertise to evaluate all this data; they are overrun with technical detail.

Welling: In response to Ambassador Djalal's question on why we have to use the free enterprise system, I would point out that under any system there is a limited amount of risk capital. I am not trying to impose the free enterprise system on anyone. I am just working from my own experience.

Would Investors Prefer to Operate Under a Mini-Treaty?

Nandan: Can risk capital be raised under a mini-treaty? Mining under a mini-treaty might involve even more claims in an international tribunal and more risks than would mining under the Law of the Sea Convention.

Welling: In response to Ambassador Nandan's question whether risk capital can be raised under a mini-treaty, I would answer that risk capital will go

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[7] Pub. L. No. 96-283, 94 Stat. 553, 30 U.S.C. secs. 1401-1605 (1980). This statute imposes a special tax on seabed miners of 0.75 percent of the processed value of the metals. 30 U.S.C. sec. 1472(a) (1980).

wherever there is the least difficulty of retrieving the original investment and maintaining a respectable profit. The people with the money will look for the best investment. I merely try to make it acceptable to the ones with the money.

An Expensive and Technologically Challenging Undertaking

Craven: I want to emphasize the point Connie Welling made, and that is that the resource development of the ocean has often been greeted with disaster because we are forced to work with land-based engineers. It is like asking an engineer who drives a vehicle in the right lane of traffic to design a road interchange for left-lane traffic. The United States has concluded that we cannot partake in ocean development without a complete team who truly understand the dynamics of the oceans.

Because of this problem, it is expensive to do ocean mining. Professor Flipse has stated that even if all regulation and taxes were discontinued, it would not today be economical to mine.8 Thus, we really do not know if Connie Welling's argument is correct.

Risk Capital Will Be Raised

Elisabeth Mann Borgese: I have four points. First, we will raise the risk capital and we will show Connie Welling.

Second, industries will always argue about increased regulation, but they learn to adapt to it. For example, when President Truman announced the proclamation on the continental shelf beyond 3 miles, the oil industry rose up in turmoil and declared "creeping communism" was before us. Now, the industry is able to live with it.

Third, we should shift our emphasis from transfer of technology to co-development of technology, which has a number of advantages. It costs less. And it has a component of training and adaption to a particular need.

Fourth, the concept of common heritage includes the four categories mentioned by Professor Kolodkin9 and also two more: environmental protection and conservation for the future.

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8 Flipse, The Economic Viability of Deep Ocean Mining in E. Miles and S. Allen (eds.), The Law of the Sea and Ocean Development Issues in the Pacific Basin, 15 L. Sea Inst. Proc. 322, 353 (1981).

9 See Professor Kolodkin's presentation at 244-48 supra.

The Content of the Common Heritage Principle

Anthony D'Amato: In addition to the Kolodkin/Borgese formulation on the content of common heritage, there is a seventh component, the ability to restrict mining that has an adverse effect on land-based minerals sold on the market. This is an economic concept. This seventh component might degrade the concept itself to protect certain nations. Then we would not be talking about the law of deepsea mining, but rather we would be talking about cartels and protectionism and favoring certain interests at the expense of others. This is a far cry from the concept of "common heritage."

Borgese: The concept needs to be developed. Good management includes production planning, which may include limitations if they are for the common good. However, limitations are not necessarily the best way to serve the common good.

D'Amato: Two alternatives to overcome the negative effect of restricting ocean mining in favor of land-based producers might be to limit dumping or to diversify the economies of land-based producers so the adverse effects will not be high.

Anatoly Kolodkin: There are only four legal principles of common heritage. The principles referred to by Borgese and D'Amato are implied principles. The legal principles resemble the principles in the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.[10] The environmental, conservation, and limitation principles are types of activity, not concepts of common heritage. However, these principles can be implied from common heritage.

Ved Nanda: In reference to Ambassador Koh's statement on the change from "freedom of the seas" to the "common heritage," it is implicit in this change that even reasonably balanced uses of the ocean are not valid unless undertaken within the Convention's framework. Whether common heritage is a developed norm or not depends not only upon evidence of resolutions, declarations, and reiterations but also upon the expectations of the international community. Common heritage is not just a declaration; it is not just a resolution; it is a developed norm by now.

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[10] G.A. Res. 34/68 (XXXIV), 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/46 (1979).

Anatoly Zakharov: I have two comments. First, Part XI of the Convention on seabed mining is not perfect, because it is made by man and not by the Lord. Man is not perfect. Second, the U.S. proposal to conduct mining outside the Convention's rules is a regime of anarchy.

Bernard Oxman: I had intended to make some remarks designed to persuade David Colson and Brian Hoyle to accept the common heritage principle as customary law. But, in view of the manner in which participants here have been using the concept, I hesitate.

First, the Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction[11] was not intended to establish a legal regime itself. It was intended only to be a guide for negotiation. The developing countries pressed for this interpretation because they feared the United States would invoke the Principles as an established set of norms to justify interim mining in the absence of a Convention.

Second, "common heritage" is not common property, as the Sri Lankan delegation itself stated. There can be no reading of substantive content into the principle. The common heritage principle acquires substantive legal meaning only from the text of an internationally agreed regime. The United States has consistently maintained that "common heritage" would mean whatever was included in a generally accepted treaty. I know of no principles of customary law that would bind a nonconsenting nation to respect all decisions of an international regulatory body, such as the Sea-Bed Authority, of which it is not a member. I appeal to those who want to see an eventual reconciliation on deep seabed mining not to read their substantive preferences into the common heritage principle.

The common heritage principle does have procedural significance. It requires all states to attempt in good faith to agree upon the substantive content of a regime.

Some have suggested that the question of the meaning of "common heritage" be submitted to the International Court of Justice. It would be difficult to pose the question in a way that would not split developing- and developed-country judges on the issue.

Third, I will go so far as to say that David Colson and Brian Hoyle should read Part XI, section 2,

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[11] See Appendix B *infra*.

again because it is not inconsistent with U.S. law and U.S. views as I understand them.

Van Dyke: In the article I wrote three years ago with Chris Yuen, we discussed the notion of the common heritage of humankind and concluded that this concept could be defined as having at least three universally accepted elements.[12] First, developing nations must receive genuine benefits from the resources of the deep seabed. Second, no nation can claim exclusive rights to any deep seabed mining site. Third, if a generally agreed-upon treaty does come into force, it will be binding on all nations. The elusive question is: When can a treaty be described as "generally agreed-upon"?

Submission of the Issue
to the International Court of Justice

David Colson: I would like to comment on the possibility that the legal questions concerning deep seabed mining might be presented to the International Court of Justice for an advisory opinion. This move would have ramifications that go far beyond deep seabed mining. I would like to restate that my comments are quite personal, and I will try to speak with some care.

I have heard that there has been consideration given to asking for an advisory opinion on the question of whether the United States is acting lawfully or not in furthering an alternative regime to that set up by the Convention. I have not heard that the proposal might be to take the issue to the Court jointly. The general prospect of an advisory opinion has certainly not escaped our notice in our internal deliberations. This prospect has been considered in relation to the various costs and benefits that are associated with the decisions taken by the United States. I do not believe that the simple fact that a state might not join in going to the Court on a general question or for an advisory opinion means that the state is not committed to the rule of law. Simply because a state or individual might try to stay out of court on a certain matter does not mean that they reject law or that they reject legal institutions.

I do not believe I could work for the United States if I believed that the United States was not

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12 Van Dyke and Yuen, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed? 19 San Diego L. Rev 493, 521-43 (1982); also published in E. Miles and S. Allen (eds.), The Law of the Sea and Ocean Development Issues in the Pacific Basin, 15 L. Sea Inst. Proc. 206, 221-35 (1981).

committed to the rule of law or, as Ambassador Koh said, that we might be hypocrites. I can only assume that if the United States is confronted with a legal challenge to our deep seabed mining practice outside the Convention, even in the form of a request for an advisory opinion, we would not avoid the challenge, and we would meet it with legal skill and great vigor.

I do not know whether Ambassdor Koh is right on the law. In fact, I believe that he is wrong on the law. If you can get past the politics of these questions, some very fundamental, straight, clear legal issues that are important to all states are implicated by this whole matter. Once you move beyond the politics and emotions of the issue, you reach fundamental legal questions that go to the sovereign equality of states.

I cannot be sure whether the United States would succeed in meeting such a challenge. I can only assume that if we were given a fair opportunity to appear before a forum that dealt with the legal issue from a legal point of view--and not a political perspective--that the United States would abide by a clear decision, even if only an advisory opinion--notwithstanding its outcome.

I agree that if this were to be an adverse decision, it would be a severe test of our national fiber. I can only say that if the United States did not accept such an adverse decision, I would reluctantly but happily come back and eat my humble pie and retract what I said earlier, that the United States remains committed to the rule of law. I suppose that it would also be a watershed for me, and I would probably have to come back in my personal capacity rather than as a representative of the U.S. government.

DISCUSSION: PART II

U.S. Concerns About the Convention's Provisions on Deep Seabed Mining

Jon Van Dyke: Brian Hoyle told me outside these formal sessions that even if the U.S. mining companies felt they could mine economically under the Convention as written, the United States would not sign the Convention. I would like to ask him to describe the other concerns the United States has with the Convention.

Brian Hoyle: In 1981, when the Reagan administration began to review the seabed mining text of the Law of the Sea Convention, two groups of problems were identified. The first group related to national access and corporate access to the minerals. For us, national access and corporate access to seabed resources are the same thing, because the United States does not intend to form a government corporation to mine the seabed minerals.

Some of the concerns we had were (a) when a company is prepared to go from exploration to production, whether a production allocation will be available in a timely manner or whether there will be a bottleneck which would distort the investment perspective; (b) once the operator is producing commercially, whether the value of the investment can be nullified by an order shutting down the operation; (c) whether the operator has remedies that could be used to force the Sea-Bed Authority in a timely manner to permit operations again, if the problem has been corrected; (d) whether the operator could be forced to renegotiate the mining contract during the life of the operation; and (e) whether the duration of the operation would be long enough to allow the operator to recoup its investment and earn a profit. These are the problems one finds from the investors' standpoint.

The second group of problems identified--the governmental concerns--are (a) with the organization of the International Sea-Bed Authority, (b) with the individual bodies within the organs of the Sea-Bed Authority, (c) with the powers and functions of the Sea-Bed Authority, and (d) with the influence the United States would have in that organization--whether or not we could protect the interest of the United States in access to the seabed and protect the interest of our companies in a day-to-day sense. There are other problems relating to precedent. You hear a lot about technology transfer. Those who think the United States did not sign the Law of the Sea Convention because of technology transfer have overblown the role of this one issue. It was an important consideration to us, but it was one of about a dozen major considerations in our decision. It does have a precedential aspect as far as other negotiations are concerned.

Concerns About Setting a Bad Precedent

The precedential aspect itself was the creation of the International Sea-Bed Authority and the general regime for the exploitation of resources beyond national jurisdiction. This is the first international organization with management powers. In the opinion of the United States, at least, we better do it right the first time. We did not believe we could accept an organization that was so flawed in its concept, in its execution in the Convention, and in the powers of the United States in the Council.

Kissinger Statements in 1976 Not Inconsistent

We are accused of reneging on the parallel system, and the statements of Secretary Kissinger in 1976 are often used as evidence that the Reagan administration reneged on some sort of commitment.[13] One thing that

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[13] Secretary of State Henry Kissinger said in 1976:

> [T]he United States would be prepared to agree to a means of financing the Enterprise in such a manner that the Enterprise could begin its mining operation either concurrently with the mining of State or private enterprises or within an agreed timespan that was practically concurrent . . . [T]his would include agreed provisions for the transfer of technology so that the existing advantage of certain industrial states would be equalized over a period of time.

(Footnote continued)

is never cited by those who criticize the United States for not signing the Law of the Sea Convention is that at the time Henry Kissinger said the United States could accept the parallel system of production controls, some financing of the Enterprise, and some degree of technology transfer, he also said that the United States must have influence in the organs of the International Sea-Bed Authority commensurate with our economic interest in the activity.

U.S. Wanted Weighted Voting

To the United States, this meant weighted voting. Weighted voting is used in most international economic organizations. The United States proposed weighted voting; it would have made a great deal of sense. For example, Indonesia would have had a large vote under a weighted voting scheme. All the land-based producers would have had substantial influence. The mining countries would have had substantial influence. Those countries most affected by seabed mining--either as producers from the seabed, producers on land, or consumers of the minerals--would have had the major influence in the Sea-Bed Authority. Countries with virtually no interest in seabed mining would have had very little influence.

Van Dyke: Was there a specific formula that the United States tabled on weighted voting?

Hoyle: We tabled a specific formula privately and talked to quite a few delegations about it.

Van Dyke: What percentage would the United States have had?

Hoyle: I do not know what the precise percentage was. There were a number of proposals, but one that might have flown was one that would have required a concurrence of three-quarters of the votes of the land-based producers in order to achieve any action. There were different formulas for chambered voting where you would have had something on the order of four different chambers representing different interests and you would have needed votes within each chamber

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[13](continued)

75 Dept. State Bull. 395, 398 (remarks of Kissinger at reception for heads of delegations to UNCLOS III, Sept. 1, 1976). See Van Dyke and Yuen, supra note 12, 19 San Diego L. Rev. at 527-28; 15 L. Sea Inst. Proc. at 224 and 266.

amounting, to say, four out of six countries and then totaling across, say, three out of four chambers.

Sea-Bed Council Seen As Hostile to Mining

What you have now in the Convention is a Council of 36 members in which there would be a maximum of seven or eight seabed mining countries. There would be a minimum of three Eastern European socialist countries, and I think there would be six land-based producers plus probably a couple more in the geographic distribution. I would accept for the sake of argument that the United States would have a guaranteed seat on the Council, although it can be demonstrated that the provision in the Convention does not in fact guarantee the United States a seat.[14] Even if we did have a seat on the Council, with the small number of seabed mining countries in a regime that is basically hostile to seabed mining, I think it would be very difficult for the seabed mining countries to protect their interests. This problem would exist even assuming on a given issue the mining countries have an identity of interest--and those of us who have tried to negotiate among seabed mining countries know that it is very difficult to find an identity of interest among these countries.

Van Dyke: So the weighted voting proposal was not along the lines of the International Monetary Fund, where the United States has about 20.22 percent of the vote--it was a more complicated system?

Weighted Voting Rejected by the Group of 77

Hoyle: We did have a proposal at one time that would have been something on the order of the system used in the IMF. That one would not fly. And basically, the whole concept of weighted voting was rejected for ideological reasons by the Group of 77 [the developing nations].

Van Dyke: Have these various proposals ever been made public to enable observers to understand the U.S. position?

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[14] Article 161(a) assigns one of the 36 Council seats to the largest consumer of commodities produced from the categories of minerals to be derived from the Area. Although the United States is presently the largest consumer, should it lose that status it would have to be elected from among the other categories of members (largest investors, land-based producers, or geographical regions).

Hoyle: I do not know that any of them have ever been made public.

Tommy Koh: I think they are available in the Conference documentation.

Hoyle: Some of them may never have been tabled officially in the Conference.

Van Dyke: At what point in time did Article 161 (on the decision-making structure of the Council) come into being in its present form? Was that one of the last items to be resolved?

Koh: It was agreed upon in the summer of 1980.

Hoyle: Yes. We avoided the question of voting in the Council until around 1979 or 1980. Before then, various articles were put into the drafts, but they were not ones that were really negotiated. This issue was left to the end.

Van Dyke: Did Elliot Richardson, U.S. ambassador to the Convention under President Carter, agree to the present language?

Hoyle: Richardson negotiated the present language. One of my concerns with the present language is that the issues upon which consensus must be had are only the political issues, not questions involving the day-to-day management of seabed mining operations. Consensus is required for such issues as whether revenues could be shared with national liberation groups. Unfortunately, it is not required for such issues as protection of stop orders, say on the issue of a shut-down in an emergency, or for a Council decision to allow a miner to start up again, or whether there should be even an emergency order issued.

Competing Interests Influenced the U.S. Position

Bernard Oxman: This is an example of the problem you have negotiating on behalf of the United States. Mr. Hoyle is correct that an emergency stop order can be issued by a three-fourths vote of the Council, but it only remains in effect for 30 days unless it is confirmed by consensus.[15] The problem we had was not

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[15] Article 162(2)(w) gives the Council the power to "issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area." Article
(Footnote continued)

that developing countries or the land-based producers wanted the Authority to be able to impose an environmental stop order by a relatively small majority--it was the American environmentalists.

A number of the provisions in this treaty that can be criticized from the environmental point of view are there because there were other American interests strongly on the other side. This is the explanation of the provisions on land-based sources of pollution to which Professor Burke refers.[16] The American domestic agencies would not let us negotiate on the question of how you drain crankcases in Kansas, which is the ultimate issue of land-based pollution. Conversely, I can imagine that Mr. Welling would worry about those 30 days, but he has a problem there not because of the Group of 77, but because of the pressure we had within the United States. This is a problem for every country. We should not assume that any country has monolithic interests on any given subject.

The Problems Created by the Concept of the Equality of Sovereign States

Hoyle: I am not sure now is the time to give you my lecture on the problems of the Treaty of Westphalia[17] and the concept of state sovereignty and the equality of states, but it is relevant to modern notions of international decision making. The concept of the equality of states was originally designed as a defensive principle in the Treaty of Westphalia to protect one state from another and to avoid intervention by one nation in the affairs of another. Because the number of states has grown vastly over the last 20 or 30 years, there has been a change in the

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[15](continued)
161(8)(c) and (d) specify the voting percentage and procedure required.

[16] See page 422 infra.

[17] The Peace Treaty of Westphalia (1648) formally accorded to the princes and potentates of the Holy Roman Empire a qualified international legal status and equality as states, at least among themselves. It is also claimed by some to have established the principle that before the law of nations, the legal rights of the greatest and smallest states are identical. See Dickinson, The Equality of States in International Law 231-33 (1920); see also Dumont, Corps diplomatique du droit des gens, pt. 6, sec. I, at 450 cited in Sorensen, Manual of Public International Law at xxxiii, 14 (1968).

principle of sovereign equality of states from a defensive principle to an offensive principle. This change is exemplified by the Group of 77. There are now approximately 120 members of the Group of 77. There are probably about 13-15 Western industrialized countries and 13 members of the Eastern European group of socialist states.

One of the predominant themes in American history has been the fear of the tyranny of the majority. If one goes back and reads Federalist Paper No. 10, one finds a very cogent and articulate description of the fear of the tyranny of the majority, of the haves versus the have-nots. I think that what we are seeing today in international organizations is to some extent a tyranny of the majority. This tyranny of the majority did not exist in the Second and Third Committees. I suggest the reason it did not is because we were dealing with real, hard existing problems that needed a solution now.

Ideological Confrontation on Seabed Mining

The First Committee (on the resources of the deep seabed) was designed almost for the purpose of ideological confrontation. We are not dealing with an industry that is actually operating. No one on any delegation, no one in the seabed mining industry, can give you an empirical description of seabed mining. An ideological confrontation occurred, and those of us who participated in it now understand medieval scholasticism and the kinds of meetings in which Thomas Aquinas would have found himself at home. As Bernie Oxman said to me the other day, "Trying to reconcile the views of the First Committee was like trying to reunite the Christian churches."

Everyone agreed, I think, that we were trying to create a regime that would allow seabed mining to go forward. Some of us wanted more encouragement of it than others did, but once you got beyond the general principle, each country or many countries had an ideological position that they would not give up. A situation existed in the First Committee early in the Conference, which set a tone that was later irreconcilable, of certain countries trying to dominate the Group of 77 and seeking positions in the Group of 77 that could be used in other international economic negotiations. This led the Group of 77 in directions that were really contrary to the interests of those members of the Group of 77 who did not identify their national interests immediately with those few leaders. Large numbers of the Group of 77 delegates were uninstructed. Even within the industrialized countries, a split existed between those who wanted to have mining take place and certain ones who did not.

Few Countries Truly Backed Seabed Mining

There might have been a maximum of eight countries in the Conference who really had an interest in seeing seabed mining take place. We could not even obtain a statement in the principles of the Sea-Bed Authority which said that one of the purposes of the regime was to encourage the development of deepsea mineral resources. The best that could be obtained was a very vague reference in Article 150 that seabed mineral resources will be developed for the benefit of all mankind.[18] Now, ask someone from Peru what that means. They do not want seabed mining to take place because they do not want competition to their land-based resources. All efforts to create any kind of a regime that would really encourage the development of seabed minerals were rebuffed.

Koh: Brian, it is not true that Article 150, which sets out the policies relating to the activities in the deep seabed, does not contain even one policy statement encouraging the development of the resources in the Area. It is not true. We could not get a stronger statement than we have here, and Ambassador Nandan tried very hard to persuade the land-based producers like Hasjim Djalal (from Indonesia) and others to permit him to strengthen the language. But if you look at Article 150(a), the very first principle, what does it say? It says "Activities in the Area shall...be carried out...with a view to ensuring: a) the development of the resources of the Area." So it is not true when you say that Article 150 does not even contain a statement encouraging or promoting the development of the resources of the Area.

Whole System Designed to Inhibit Development

Hoyle: One of the problems is that, to anybody who was involved in the First Committee, Article 150 is written in code. Article 150 does not really say what Article 150 appears to say. A large number of the principles contained in Article 150 date back to the early years of the Conference. Do you remember the principle ot complementarity? That is hidden in Article 150(e).[19] You still have the concept in there,

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[18] Article 150(i) states that: "Activities in the Area shall,...be carried out...with a view to ensuring:...the development of the common heritage for the benefit of mankind as a whole..."

[19] Article 150(e) states that: "Activities in the Area shall...be carried out...with a view to
(Footnote continued)

and I would agree with you, Tommy, that if the provision you cited had originally been put into Article 150 and had stayed there, that it would have been something that demonstrated a commitment to the development of resources. But given the history and the ability to control Article 150 by those who did not want to see seabed mining developed, I think that what we have is a very weak inability to really turn the system around. It is endemic to the whole system that it seemed to be designed more to inhibit rather than to encourage the development of these resources, which is too bad because the developing countries can only benefit if these resources are developed.

U.S. Cared Only About Access to Resources; Developing Countries Wanted World Benefits

Hasjim Djalal: I think it should be emphasized that from the very beginning we knew there were two opposing views on this. We knew that the objective of industrial countries, especially the United States, was the exploitation of seabed resources, no matter what the cost and no matter what the conditions. As long as the resources are available to the United States, they couldn't care less about anything else.

But those are precisely the things that developing countries do not like to see. We would like to see the resources being developed, not for the benefit of one country, but for the benefit of the community of nations as well. The different opinions took some years to harmonize.

We finally came up with a reasonable, rational management of the resources so that the industrial countries will get their resources and the developing countries will obtain benefits from it--the victimized countries will not be victimized too much. In the end, we developed what we believe is a balanced formula in Article 150. Brian Hoyle knows very well it was not easy to reach agreement on Article 150. I can see the United States does not get everything it wants, but neither do we. In the end, you get in the first paragraph that the purpose of the seabed mining is for "the development of the resources of the Area" (Article 150(a)), without any of the qualifications that were in

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19(continued)
ensuring:...increased availability of minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals..."

the earlier drafts.[20] This is one case, like so many other cases, where the negotiations resulted in a compromise solution that we thought everyone would be able to live with.

U.S. Senate Opposed the Review Conference

Hoyle: Another problem for the United States is the Review Conference. The Senate of the United States is very jealous of its constitutional prerogative to give advice and consent to treaties. It is very distrustful of the executive being willing to accept these without the Senate giving its advice and consent. I think the Review Conference provision alone (Article 155)--even if the rest of the treaty looked good--would be a major obstacle, if not an insurmountable obstacle, to the Senate of the United States giving its advice and consent to the Law of the Sea Convention. One can argue that this is irrational--that the Senate could have been educated--but we tried to educate the Senate about the Vienna Convention on the Law of Treaties.[21] The problems of the Senate with the Vienna Convention on the Law of Treaties, I think, are much milder from a constitutional perspective than the Review Conference provision.

The argument was made internally in the United States, "Well, we can opt out of the Convention," but we cannot opt out only of the seabed mining regime. We would have had to opt out of the entire Convention. And that might not do us any good because we could not get back to the status quo ante. If we mined under the

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20 The final Convention text separates Article 150 subparagraph (a) [see text] and subparagraph (b): "Activities in the Area shall. . . be carried out...with a view to ensuring: (b) orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;..." Earlier drafts had combined (a) and (b) in a single subparagraph. See Draft Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/L.78 (1981).

21 The U.S. Senate has not ratified the 1969 Vienna Convention on the Law of Treaties because of a disagreement with the executive branch over the meaning of Article 46 of that Convention, a disagreement that relates to the question of the power to enter into executive agreements without Senate concurrence.

seabed mining regime in the 1982 Convention for 25 or 30 years and then opted out, I doubt we could continue mining under the customary international law of 1982.

The United States Has a "Feeling of Loneliness"

These sorts of problems are endemic. One sees a growing concern in the United States for the behavior of international organizations in general. Our recent concern with UNESCO--we stated in December 1983 that we would opt out of UNESCO in a year if major changes do not take place--is a result of a feeling of loneliness and an inability to influence international organizations.[22] We have a feeling that international organizations are becoming politicized in a way that is inimical to the interests of the United States and other countries with broad civil liberties and a representative democratic form of government. Quite frankly, we feel that a lot of the work being done by these organizations is inimical to our interests.

The whole concept of a new international information order being developed in UNESCO reminds me of Spiro Agnew's speeches during the Nixon administration. Developing countries are demanding a new international information order because they do not like what Reuters and the Associated Press are saying about them and want to control what appears in the international press. It is a concept that is very foreign and very unacceptable to those nations who believe in a free press.

President Reagan's Objections to the Convention Are Ideologically Based

Koh: I was intrigued by Brian Hoyle's statement that even if the U.S. mining industry were to find it possible to operate economically under the Convention, this administration would still not become a party to it. This confirms my view that the Reagan administration's objection to Part XI is not based on pragmatic grounds, but is based upon principle or ideology.

I would like to enumerate for you what in my view are the real reasons why this administration opposes Part XI. First, the administration is fundamentally opposed to the concept of the common heritage of mankind and fears that if it becomes a part of customary law and is applied, in this instance, to seabed resources, it may be extrapolated to other areas, to other resources.

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22 This comment is discussed by the other participants in Chapter 9, pages 524-30 infra.

Second, this administration is fundamentally opposed to the creation, as Brian Hoyle admitted, of the International Sea-Bed Authority, and even more so to the Enterprise, an international public enterprise that will be undertaking mining activities in the seabed. They find this ideologically offensive.

Third, this administration finds objectionable the composition and distribution of voting power in the Council. I want to say to Brian that there has been a fundamental shift of American objectives with respect to voting in the Council of the Sea-Bed Authority. Until 1980, the objective of the United States was to ensure that the Council would be unable to adopt decisions that were inimical to the interests of the United States, and I believe that Ambassador Richardson and others succeeded in 1980 in negotiating language in Article 161 that enabled the United States to protect its mining interests by blocking any decisions that are inimical to its interests. This is the purpose of the three-tier decision-making process. On most of the important issues, it will be impossible for the developing countries to impose a decision in the Council because it requires a three-quarters majority and the developing countries would lack such a majority. In the really critical areas, consensus would be required and the United States could alone block any decision opposed to its interests.

What the Reagan administration wanted in 1981 was power in the Council to enable the United States--acting together with Japan, the United Kingdom, and West Germany--to impose decisions on the Council. That goal is simply not achievable in this day and age. The international community is not prepared to accept the creation of a major international institution in which such power is given to four countries, however important they are. I think this administration has to understand that at this point in the evolution of the international community, it is no longer possible to compose institutions in which we would give to the great powers a veto power or a system of weighted voting in which four countries would be able to impose their views on the rest of the international community.

Carter Administration Bureaucrats Wrote Reagan Review

Hoyle: I would like to clarify one misconception on whether the Reagan administration is composed of ideologues and whether the administration's decision was ideologically motivated. I quite frankly think what you saw in the U.S. decision in Part XI was something you might call "the bureaucrats strike back." During the transition period between the time that Jimmy Carter was defeated and Ronald Reagan took over, quite a few of us who had been involved as so-called experts in the U.S. delegation during the Carter admin-

istration pointed out to the Reagan transition team where the bodies lay in Part XI of the text and why the system would not work. We managed to find a sympathetic ear. Indeed, one political appointee, Ted Kronmiller, had been a member of our Committee One team during the Carter administration in 1977. When we wrote the review for the Reagan administration, it was written by the experts on the Carter administration's delegation; it was not written by the Reagan administration appointees.

The defects in Part XI that were pointed out to the new administration were not something dreamed up by some ideologues who blew in from California. They were written by people who had been on the U.S. delegation, who had been involved in this negotiation, who knew full well and in very great depth what was in Part XI and what needed to be changed if the United States seriously intended on being a part of this Convention. The bureaucrats listened to by the Reagan administration were not listened to by the Carter administration for a variety of reasons that I do not think need to be gone into at this point. But I would like to clear up this misconception that some crazies blew in from the west and overturned what was a rational system.

Djalal: I would like to ask Brian Hoyle if he could indicate to us who were the bureaucrats who made the recommendation to the Reagan administration on seabed mining?

Hoyle: Most of you who were involved in the seabed mining negotiations know Milt Drucker, Lou Cohen, Bill Schall, myself, others who sat either patiently or impatiently through the negotiations. In my case, I opted out of the Carter administration law of the sea team to try to work on the domestic seabed mining program, because I saw no future in the way our delegation was negotiating. I do not think anyone involved in the seabed mining negotiations would consider Milt Drucker to be an ideologue, and yet he was one of the main draftsmen of the review papers for this administration. I am picking up quite a reputation as a man of principle and an ideologue by going around giving speeches advocating the Reagan administration position. Those who knew me at the Conference or knew me in the U.S. delegation know that I had some pretty strongly held feelings, but they were feelings based on whether I thought the system would work or not, not feelings based on any kind of ideology or political principle.

Does U.S. Industry Oppose the Convention for Noneconomic Reasons?

Koh: To return to Brian Hoyle's assertion mentioned above, I would like to ask Connie Welling what the American industry would do if it determined it could operate economically under the Convention and the U.S. government nonetheless refused to join the Convention?

Conrad Welling: To answer your question, we would have to look at it on a case-by-case basis. If we have looked at it, and, being very pragmatic, if the opportunities were there, then we would look at it from a total risk and reward point of view.

Van Dyke: And if the rewards out-balance the risks, what would you do at that point?

Welling: We would go ahead and look at how we could exploit the resource.

Van Dyke: Would you try to persuade the administration to sign the Convention?

Welling: From my point of view, this would not be necessary, because we will receive a license to mine from the U.S. government and already have an agreement with the other five consortia not to interfere with each other's claims. The original claims have been modified so that there are no overlapping claims now. The only interference might come from the Russians, but they do not now have the technology to do so, and it will take them a long time to develop the necessary technology.

I oppose the Convention from the fundamental point of view that it is not in the best interests of the development of the ocean. Because I have spent so much time in this area, I would like to see it developed for the benefit of all mankind. Because the Convention limits me to operate in only a certain area, it would enable only part of this goal to be achieved and not the real goal that I think is important to all of us.

Voting Power in the International Sea-Bed Authority

Elisabeth Mann Borgese: Brian Hoyle has drawn our attention to the problem of representation in international organizations. We are all aware of the linkages between voting and the structure of a decision-making body. I think that in the case of the International Sea-Bed Authority the problem has never been clearly solved. Developing countries wanted a very broad, comprehensive scope of responsibilities for the Sea-Bed Authority. The industrialized countries wanted to narrow its powers as much as possible. We

have built into the text of the Convention this contradiction.

The activities of the Authority include scientific research, the regulation of environmental problems, the enactment of environmental policies, and many other activities. In Article 1(1)(3) of the Convention, however, the term "activities in the Area" is defined very narrowly as relating only to manganese nodule mining. This is a contradiction that has never been resolved and that is at the root of this problem of representation and voting. If the Sea-Bed Authority is indeed a political intergovernmental body, then we must enact principles of international democracy. We cannot resort to weighted voting. We must find some other criteria. If it is a nodule mining business, then demands that voting be weighted in proportion to the investment are perfectly legitimate. The way I would have liked to see it solved, and the way maybe we can resolve it 20 years from now when we meet for the Review Conference, and 20 years come and go pretty fast, would be to have democracy in the Council, and voting in proportion to investment in the Enterprise. Similar problems will be faced in the other ocean institutions.

One principle that commends itself is <u>regional representation</u> as a basis for decision-making bodies. The trouble that we have had so far in the Preparatory Commission is that the regions are so poorly defined. Regional groups that we now deal with are not truly regions. In the next few years, the definition of true regions will be a very fruitful field of research and investigation. Perhaps in the future, when something like the Regional Seas Programme is in place and covers the globe, the regional seas organizations might serve as a basis for representation.

The restructuring and strengthening of the future ocean institutions will be an important feature in the making of the law of the sea over the next decade. One aspect of this is internal to each organization; the other aspect is the coordination among them. We need a cohesive, holistic ocean policy applied by each UN agency. This cannot be done at the secretarial level; it has to be done at the policy-making level. One idea would be to have a meeting every one or two years of all the policy-making bodies of the agencies involved. Here they would discuss ocean policy in the making and coordinate the policies that will be left to them to enact and realize autonomously.

<u>Concerns of the Pacific Islanders</u>

<u>Rabbie Namaliu</u>: Even though seabed mining is of no immediate concern to the region, it is something that obviously is going to be of long-term interest to

the Pacific, particularly inasfar as countries like Papua New Guinea are concerned, because we are already a land-based mineral producer. Other countries like Samoa have manganese nodules in substantial quantities in their nearby waters. Some kind of seabed mining framework should be developed within the region.

Satya Nandan: I would like to mention that the deep seabed mining must be of particular interest to Hawaii, because much of the mining is likely to take place in this neighborhood. Here I must say that Hawaii must be very conscious of the environmental impact that could occur.

How Concerned Are the Developing Nations About Seabed Mining?

Oxman: I want to make one other point about the negotiations on seabed mining and the question whether there was an overall package deal.[23] In my opinion, many governments to some extent have two different foreign policies. One foreign policy is being run by the foreign ministries. It concerns their domestic priorities, national claims, and bilateral dealings. Another is being run by an influential ambassador to the United Nations and related supporters at home. It concerns their role in multilateral institutions. In the case of the United States, these policies are usually reasonably well coordinated, although we are all aware of exceptions. In the case of some other countries, they are frequently uncoordinated.

A large number of delegates at this Conference received instructions on many issues, particularly deep seabed mining, that said nothing more of substance than "support the Group of 77." This really means that a political system operates in the United Nations independent of analysis in the capitals.

In the course of the Seabed Committee and the Conference negotiations, we did a great deal of traveling to national capitals. Almost never was the issue of deep seabed mining raised with us by a national government at home. They raised fisheries, they raised security, they raised straits, they raised continental shelf oil and gas. They did not raise deep seabed mining.

In the course of these negotiations, the secretaries of state, particularly Secretary Kissinger, met bilaterally with large numbers of foreign ministers who raised one issue or another regarding the law of the sea negotiations. As far as I recall, the only

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23 See the discussion at pages 58-65, 117-20, and 136-37 supra.

foreign minister to raise the deep seabed mining question with Secretary Kissinger and press him on it was Jorge Castaneda of Mexico.

I had a conversation with someone a few weeks ago who participated in the Peruvian governmental decision on whether to sign the Convention. The issue of deep seabed mining was not even discussed. This is a government whose active delegates helped make it so difficult for the Reagan administration to accept the seabed mining regime in the Convention, and it did not even discuss the gains with respect to seabed mining in its decision not to sign.

It is therefore not credible to tell the United States government that in the eyes of the governments of the world--as opposed to the negotiators at the Conference--there was an inexorable link in the package. That is not clear.

Koh: It is true that some of the delegations from developing countries were operating without very specific instructions on seabed mining, but it is not true of all developing countries. There are many of us who are almost as strictly controlled by our foreign offices as you are by the State Department. So I think you are mistaken when you say that one of the problems you had in negotiating in the First Committee was that your opposite numbers were people who were playing their personal games and who were not accountable to their capitals. I think that point is overblown.

Group of 77 United on Seabed Mining

Djalal: I would like to comment on what Bernie Oxman was saying, that the Group of 77 countries never really cared about the deep seabed mining issues. First, if there is any position that is commonly held by the developing countries, it is on seabed mining. The developing countries may have different views on coastal and land-locked issues, on geographically disadvantaged states. Some of us have a different view on navigation, on transit passage, and so forth. Some of us have a different view, depending on our geographical location, on marine scientific research and many other issues. But on seabed mining, the Group of 77 has a compact and united position.

Because we had a general view that was commonly held by the group, therefore, the dynamic of negotiations did not allow individual nations to make their own commitments. The United States may have its own view on so many other things independently from its allies. But on seabed mining, the developing countries are practically united, except for some minor ramifications here and there. So, I can understand why the developing countries you visited were reluctant to

give their own opinion on what to do with seabed mining, on the Authority, and so on, because of this commonly, generally-held, united or group view.

Second, whenever a united view exists on specific seabed mining issues, the expertise on our side is usually lacking compared to yours. When the United States discusses the seabed mining issue, you line up 15 or so experts facing a politician in our country who does not know anything about seabed mining. As a result, the politician is very reluctant to take a position or to express an opinion to you. Not only are the local ministers reluctant to contradict the point of view of the Group of 77, but also, they are reluctant to contradict the position of their delegation in the Conference, which has developed a certain expertise during the negotiation. So, I would not like to have the impression left here that the developing countries do not have any views on the seabed mining issues; they do.

Can the Convention Be Changed Now?

Van Dyke: Ambassador Djalal, is there a possibility of reopening some of these disputes regarding seabed mining? Or is there rather a feeling that we should live with the Convention as it is for awhile?

Djalal: My personal view is that the only way to reopen the debate is to try to amend the Convention. And the Convention has its own rules on amendments (Articles 312-14).

Van Dyke: Is there the political will to do that?

Djalal: It is hard to say, because we do not know what the United States really wants. The word "misled" may be too strong, but we have been having difficulties trying to understand what the United States really wants. We have made continuous concessions that the United States never thinks of as concessions. Tommy Koh could probably say more about this. We made so many concessions during the last few months of the negotiation, simply hoping that the United States would stay in the Convention, and we were so disappointed when, after making all these concessions, the United States decided they were not sufficient. I think a great many of us at this moment are wary of further negotiations with the United States--both rationally and emotionally. We were, for instance, strongly opposed to the idea of the PIP Resolution.[24] It was

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[24] Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules, (footnote continued)

due to our respect for Tommy Koh, as representative of one or our neighboring countries, that finally we trusted his judgment. We gave in to that and are being asked again to give in to something else. We do not know what more we can give.

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[24](continued)
(commonly called the PIP Resolution - Preparatory Investment Protection); see pages 238 and 252 supra.

CHAPTER 5

THE CURRENT STATUS OF THE FREEDOM OF NAVIGATION

INTRODUCTION

Codifying and clarifying the freedoms of navigation were always the primary goal of the U.S. negotiating team during the Third UN Conference on the Law of the Sea, and the provisions on navigational rights in the Convention conform largely to the views of the United States on these matters. The right of innocent passage in the territorial sea is described in Articles 17-33 in much more detail than in previous treaties, and the right of transit passage in straits used for international navigation is carefully spelled out in Articles 34-45 to deal with the problem created by extending the territorial sea to 12 miles and thus bringing the waters of many important straits under coastal state jurisdiction. Similarly, the rights of innocent passage and archipelagic sea lanes passage through archipelagoes are codified in Articles 52 and 53 to ensure free passage in these waters. The expansion of coastal state jurisdiction over resources in the exclusive economic zone is described in carefully chosen words in Articles 55-75 to ensure that the rights of navigation are not limited by this new zone of resource management.

But will these careful balances between coastal states and maritime interests survive if the Convention is not universally ratified? Professor Bernard Oxman's paper in Chapter 3 outlines all the difficulties that may develop, and he predicts that the rights of the coastal states are much more likely to become part of customary law than are the navigational rights. The inability of the United States to use the dispute resolution mechanisms to enforce the navigational rights of the Convention increases the likelihood that some of these rights may disappear or be modified. If the only way to enforce navigational rights is through the use of force, the United States may be reluctant to

provoke confrontations, particularly with nations with which it seeks continued friendly relations.

This chapter begins with a paper by Abu Bakar Jaafar on the straits of Malacca and Singapore, one of the most crucial waterway for the developed world. Dr. Jaafar, who has been a member of Malaysia's delegation to UNCLOS III, looks at the provisions of the Convention and asks which ones can be said to have become customary norms in the Malacca region.

Brian Hoyle then presents the current U.S. position on navigational rights and describes the reasons why the United States now views the navigational provisions of the Convention as part of customary law, binding on all nations. The other participants raise questions about the logic and practicality of the U.S. position, and Hasjim Djalal repeats the statement he made in his paper in Chapter 2 that Indonesia does not feel it is legally obliged to grant the right of transit passage through the Malacca Straits to nations that do not ratify the Convention (page 301 infra). Both Ambassador Djalal and Ambassador Tommy Koh state that the United States has put its friends in a difficult position because of its decision to stay out of the Convention, and Ambassador Koh cautions the United States to limit its use of force to situations where there is no doubt whatsoever about its legal position.

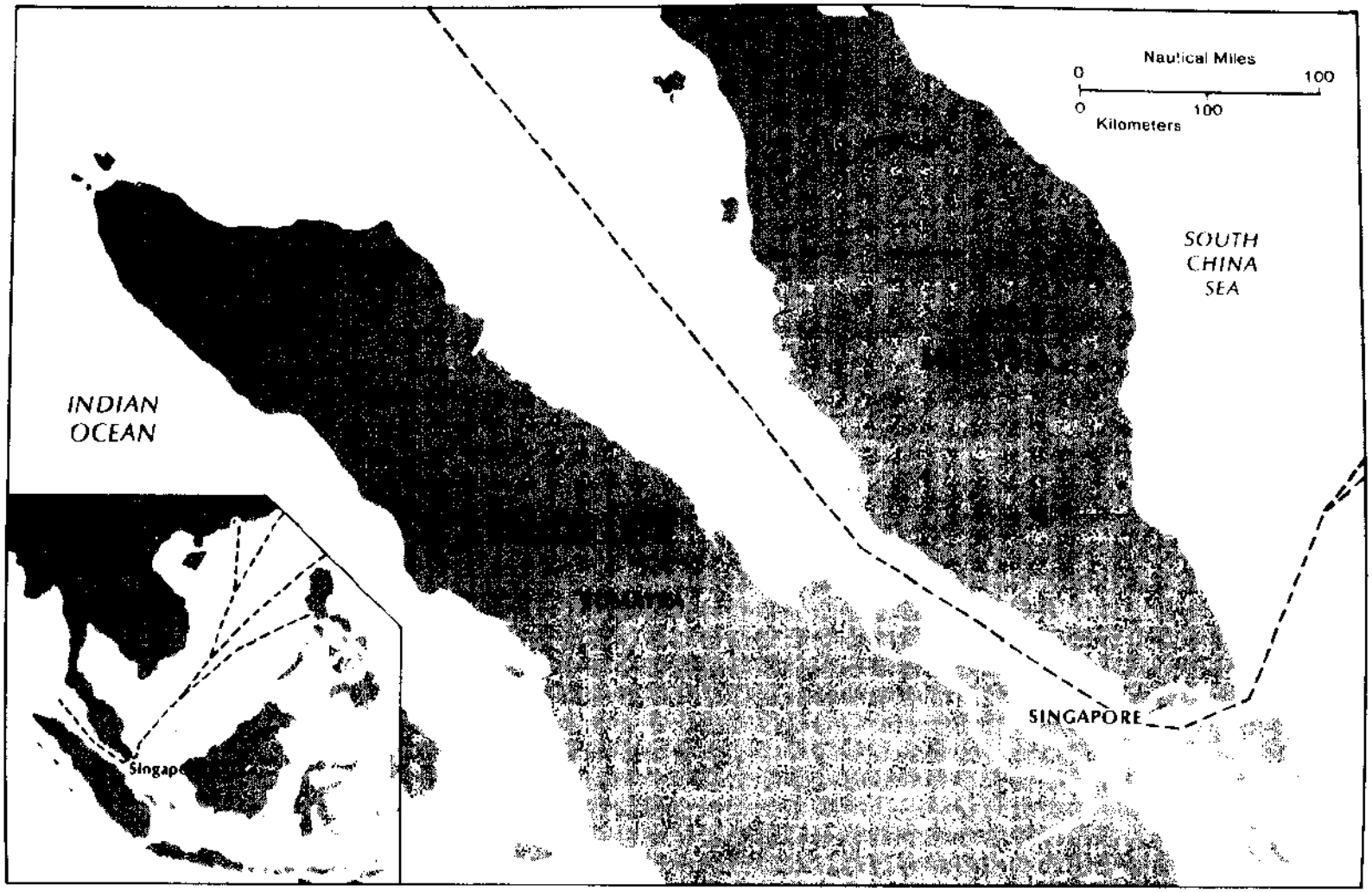
Camillus Narokobi, legal adviser to the Ministry of Foreign Affairs and Trade in Papua New Guinea, then states that his government--along with many others--always felt that warships should be required to seek permission before proceeding through coastal state maritime zones. This position was finally set aside at UNCLOS III in order to achieve consensus on a universal convention, but in light of the U.S. rejection of the Convention many nations may now reassert their position. Perhaps the most dramatic move has been made by Brazil, which stated at the time it signed in December 1982 that it does not view the Convention as authorizing other nations to conduct military maneuvers in its exclusive economic zone, particularly "those that imply the use of weapons or explosives, without the consent of the coastal State" (see pages 304-05 n. 17 infra).

Ambassador Koh recalls the negotiations on this issue at UNCLOS III, and he states that the language of the Convention was clearly designed to permit military activities in the exclusive economic zone without coastal state consent. David Colson then states that the United States is adamant on preserving the rights of warships to operate without restraint in the exclusive economic zones, and that the United States will never be able to reach a reconciliation with the

Convention if there is any erosion of the navigational rights as written (pages 305-06 infra).

Mr. Colson also discusses recent U.S. activities on the high seas that have been undertaken to deal with the problems of drug smuggling. The United States has taken the position that it can question ships on the high seas and--usually with the cooperation of the flag state--make arrests where appropriate. Professor Anatoly Kolodkin asks about this practice and mentions that the United States appears also to have questioned ships bringing materials to Nicaragua.

Some of these questions involving navigational rights are picked up later in this volume (see pages 518-22 and 544-45 infra). They present what Ambassador Koh referred to as the "real policy dilemma" that the United States must face (page 300 infra): Is the fear that the restraints on coastal state jurisdiction may unravel sufficiently real to persuade the United States to accept the less-desirable parts of the Convention?



Map 3. The Straits of Malacca and Singapore

THE CHANGING LEGAL STATUS OF THE MALACCA AND SINGAPORE STRAITS

by

Abu Bakar Jaafar

Introduction

The regime of passage in straits used for international navigation is unclear because of the lack of universal agreement on the UN Convention on the Law of the Sea. The regime is particularly unclear for narrow straits whose waters are in the territorial sea of adjacent states: Bab el Mandeb, Gibraltar, Hormuz, Lombok, Malacca, Ore Sund, San Bernardino, Singapore, Sunda, and Tiran. Before the adoption of this new Convention, only the innocent passage regime contained in Articles 14-23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone governed passage in the waters of the territorial sea. In Articles 17-32 of the 1982 Convention this innocent passage regime was further refined. Had the Convention been universally accepted, the newly introduced transit passage regime in Articles 34-44 would have governed the use of these straits for international navigation. Currently, however, the status of these straits is uncertain and must be studied in light of the application of three separate regimes to each.

This paper highlights the practices of both flag and coastal states in the Malacca and Singapore straits. These state practices are compared to the relevant provisions of the new and old Conventions to assess the extent to which the new provisions of both types of passages have become part of customary international law and to suggest what else would have to

to happen in order to make the relevant provisions customary.

The Malacca Straits and the Law of the Sea

Because the provisions of the Convention are written in general terms, designed to apply to the entire world, they must be adapted to each region in a way that recognizes the unique geographic reality of that region and the existing state practices.

The only clear-cut concurrence between the Convention and current state practice in the Malacca Straits region relates to Article 41 on sea lanes and traffic separation schemes. In 1971, the three straits states (Malaysia, Indonesia, and Singapore) issued a joint statement declaring that the straits were not an international waterway. Later, however, they consulted with the Intergovernmental Maritime Consultative Organization (IMCO), now known as the International Maritime Organization (IMO), and in 1977 adopted and in 1981 implemented a traffic separation scheme.

Environmental and safety concerns have not led to the development of "extensive local regulation of maritime activities in [the] straits [that] would necessarily interfere with important interests of outside users in commercial transportation and naval operations."[1] The procedures followed by the three straits states essentially involve designating and prescribing a proposed scheme conforming to "generally acceptable international regulations" such as the 1960 Convention on the International Regulations for Preventing Collisions at Sea (COLREG),[2] making the proposed action public, holding prior consultations with "competent international organizations" such as IMO, and issuing and publicizing up-to-date navigation charts. It might be concluded that Article 41 has already become part of the customary international law in the Malacca region, except that these steps were taken by the straits states to reflect their earlier assertion that they had full autonomy over the use of the straits, even for navigation. Thus, this recent action may be more in conformity with the newly refined innocent passage regime (Articles 17-26) than with that of the transit passage regime (Articles 34-44).

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1 Finn, The Marine Environment and Maritime Security in Southeast Asia: Controlling Oil Tanker Traffic in the Straits of Malacca, 34 Naval War College Review 49, 57 (1981).

2 16 U.S.T 794, T.I.A.S. 5813.

Article 43 is another provision in which the current practice of states is tending toward but not yet fully consistent with the spirit of the Convention: "User States and States bordering a strait should by agreement co-operate (a) in the establishment and maintenance in a strait of necessary navigational and safety aids..." Japan is thus far the only user state that has come forward to cooperate with the three straits states. The willingness of Japan to cooperate is a reflection of its status as an "indirect user state"--a flag state whose vessels use a strait only for the purpose of transit. Japan is also the second most regular flag state, after Panama, whose vessels call at the various ports in the region (Table 1). The customary practice has always been that flags that call at any port must pay their light dues directly to the coastal state. These fees are collected by a national statutory board, which in turn authorizes the use of this fund for the purposes of providing and maintaining adequate navigation aids. Based on this customary practice, the term "direct-user state" is defined as any flag state whose vessels call at any port on either side or the straits. This dual definition of what constitutes a user state easily translates into an expanded scope for further cooperation between Japan and other direct and indirect user states and the region. No regional agreement has yet been worked out between user states and the three straits states; the management-of-navigation fund accumulated from the collection of light dues is still limited to the national level rather than being region-wide.

Is Malaysia "Land-Locked"?

Article 125 specifically touches on landlocked states' "right of access to and from the sea" and "freedom of transit." On the surface this provision might appear to have no relevance in the region, because no state in the region has ever been considered landlocked in its physical geography. Because of a geographic peculiarity, however, this provision could be extended to the region. Malaysia's port of Johor at Pasir Gudang is secluded in the backwaters of Johor Strait, which has long been obstructed in the west by the Johor causeway. The port's access to and from the South China Sea or the Singapore Strait in the east is possible only through Singapore's port areas, which are being extended to the limits of its territorial sea. In this instance, Malaysia might wish to claim a status related to that of a landlocked state.

Two other provisions on navigation, Articles 100 on piracy and 108 on illicit traffic, which were meant to be applicable not only in the areas of high seas, could be extended to this region. (See Article 58(2).) To suppress both piracy and illicit traffic in the

straits, the straits states will continue individually or jointly to suspend or stop traffic suspected of or engaging in these illegal activities, regardless of whether such traffic has the right of free transit passage under Article 38. The straits states will also continue to suspend or bar any passage that is suspected of or engaged in smuggling and poaching, regardless of whether they jointly "adopt laws and regulations relating to transit passage through [the] straits" according to Article 42.

Despite the laxity in safety measures and the likely threat of major damage to the marine environment, the straits states have yet to exercise their rights of enforcement against deep draft tankers that fail to comply with the minimum-underkeel clearance rule.[3] These enforcement rights have yet to be agreed upon in a Memorandum of Understanding on the interpretation of Article 233. About one-quarter of the tankers larger than 150,000 dead weight tons going east through straits do not respect the rule requiring a minimum clearance of 3.5 meters. This suggests that Article 41(7) has failed to emerge as part of customary international law. The straits states have every reason to make it mandatory. The straits states would appear to have authority to enforce this rule under Article 22(1).

Rights of Straits States

The position of the straits states is further strengthened by Article 39(2)(a) which says that ships in transit passage shall "comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea." Traffic separation schemes are clearly indicated in Notices to Mariners and in Common Datum Charts, but the designated lanes are not demarcated in the straits. No information is available to indicate the extent to which ships in transit passage use the designated lanes. These dangers are increased because local vessels continue to use the same areas for fishing and channel crossing.

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[3] Article 233 states that "if a foreign ship...has committed a violation of the laws and regulations referred to in article 42, paragraph 1 (a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect mutatis mutandis the provisions of this section," which is on "safeguards."

According to Article 233, a similar link between noise pollution and damage to the marine environment may exist. For instance, Malaysia bitterly protested when British Airways made its maiden flight over the straits with its supersonic Concorde from London to Singapore, because of Malaysia's concern over the impact of the sonic boom on spawning fish in the straits.[4] Thus, the absolute right of overflight, according to Article 38(1), is questionable. Aircraft in transit passage are expected to observe only the Rules of the Air (Article 39(3)(a)), but they are also expected to respect environmental rules, such as those for noise control, issued by straits' states.

The right of overflight by a foreign flag in the region has also been questioned with regard to Singapore's acquisition of four Grumman-E2C Hawkeye planes fitted with early warning airborne radar systems.[5] To be effective, the planes have "to monitor air and maritime traffic over the entire waterway and its approaches, the whole of Peninsular Malaysia and virtually 80 percent of Sumatra."[6] Before taking this action, Singapore is expected to seek the prior consent of Indonesian and Malaysian authorities.

Obstructions in the Straits

The new Convention is unclear on one other problem. First, the uncoordinated development of oil and tin in the Malacca Strait could affect the general interests of the region in maintaining sufficient unobstructed area for safe navigation. Although Article 60(7) prohibits interference with "the use of recognized sea lanes essential to international navigation," obstruction by the numerous mining installations or operations may well occur in the straits. The new Convention states clearly that neither transit passage nor innocent passage shall be suspended (Articles 44 and 45) or hampered (Articles 44

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4 MAS Wouldn't Expand: So Enter the Private Airlines, 101:35 Far Eastern Economics Review 62 (Sept. 1, 1978); Valencia, Southeast Asian Seas: National Marine Interests, Transnational Issues, and Marine Regionalism in Southeast Asian Seas: Frontiers for Development 302, 317 (Chia Lin Sien and C. MacAndrews, eds. 1981); see also page 155 supra.

5 Mak, Eye Spy on the Straits, The Sunday Star (Kuala Lumpur), Sept. 4, 1983, at 7; Sabry, ASEAN Need Not Fear Singapore Radar Planes, New Straits Times (Kuala Lumpur), Sept. 5, 1983, at 7.

6 Mak, supra note 5.

and 24) by states bordering straits or coastal states, even in the exercise of their rights to enforce various safety and environmental regulations. Should there be established a hierarchy of a state's sovereignty over its resources, will activities on the continental shelf prevail over other activities in the water column?

Other provisions under the transit passage regime may not require implementation until sometime in the future, and their language may remain ambiguous. Article 38(2) states that "[t]ransit passage means the exercise...of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit...." Recent reports indicate that as high as 87 percent and not less than 61 percent of the vessels in the Singapore Strait have called or will call at the port of Singapore. This strait is therefore used primarily for entry to that state, which is contrary to the general claim that the strait is heavily used for international navigation. It is not clear whether the right of transit passage shall be enjoyed only by vessels that do not call at any ports in the strait and continue their journey without interruption between the Andaman and the South China seas. Vessels that intend to call at the port of Singapore may not have this right of transit passage, especially because they may be suspected of smuggling tin ore.

Vessels continue to pollute in the straits, particularly on the Malaysian side, although they should "comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships" (Article 39(2)(b)). Because it does not have the necessary slop and sludge reception and treatment (SASRAT) facilities, Malaysia finds it difficult to implement its Environmental Quality Act of 1974 and other relevant pieces of legislation. Both Indonesia and Singapore have their own facilities in Dumai and in Pulau Sebarok, respectively, but it is not clear to what extent the regionalization of these facilities would save Malaysia from having to provide similar facilities in order to ratify the 1973 MARPOL Convention.[7]

Article 40, requiring any research or survey vessels to seek "prior authorization of the States bordering straits," suggests that no "high sea corridors" exist in the straits. The recently completed hydrographic surveys initiated by Japan in

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[7] 1973 Convention for the Prevention of Pollution from Ships, done Nov. 2, 1973, T.I.A.S. 10561, 12 Int'l Legal Materials 1319 (1973).

the straits were not only authorized but also jointly conducted by the straits states with Japan.

Article 44 may suggest that the straits states can implace offshore structures for the purpose of exploration and exploitation, even in the middle of the straits, but only as long as sufficient unobstructed area is left for safe navigation.

Conclusions

This paper has attempted to highlight instances in which the Malacca region tends to concur with, diverge from, or break the silence of the new Convention. In the absence of universal adherence to the Convention, it would appear that the straits are neither absolutely territorial nor strictly international and that the passage regime in the straits is neither transitory nor innocent. The present regime is highly dependent upon state practices. At times, the states concerned may consider themselves to be "States bordering straits"; in other instances, they will exercise their rights as "coastal States." Thus, the legal status of the riparian states can be unpredictable.

A geographical solution to this problem of legal uncertainty would be to define from the baselines, exactly where, the rights of coastal states end and those of flag states begin. This solution suggests that existing traffic separation lanes be extended throughout the whole length of the straits, that a transit passage regime apply within the lanes, and that an innocent passage regime continue to apply in areas outside the lanes. In addition, cross-channel traffic separation schemes should be introduced and the rules for navigation in the straits must be enforced by the straits states. Failure to observe any of these rules could lead to major damage to the marine environment. Other maritime activities in the straits must be planned jointly and executed individually in order to avoid open conflict. If these physical and legal arrangements are not instituted to refine and give substance to the regime of transit passage, the newly refined innocent passage regime may prevail over the entire length of the narrow sections of the straits and across their entire breadth.

DISCUSSION

The U.S. Position on Navigational Rights

Brian Hoyle: Some of my discussion will represent U.S. policy, but in the speculative areas, it is merely the thoughts of one participant in the policy process on where I think things might go in the future.

Ambassador Koh asked what the U.S. views were on the status of those articles relating to innocent passage through the territorial sea, transit passage through archipelagic straits waters, and the continental margin. I first would like to return to the general overall position of the United States reflected in the March 10, 1983, statement by the president: "...the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the ocean."[1] The United States will recognize the rights of other states in the waters off their coasts as reflected in the Convention as long as the rights and freedoms of the United States and others under international law are recognized by the coastal states.

The U.S. position is that the nonseabed provisions of the Convention are existing international law. What evidence do we have of that? First, the Convention is not now in force, yet I think very few would claim that a coastal state that qualified was not entitled to claim an exclusive economic zone, was not entitled to claim archipelagic status, was not entitled to a 12-mile territorial sea. Yet the Law of the Sea Convention cannot be the source of those rights. The rights must derive from some other source of international law. The Convention provisions on navigation and on coastal state jurisdiction are

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[1] See Appendix A infra at 552, para 6.

essentially evolutionary, not revolutionary. The revolutionary parts are those that establish the International Sea-Bed Authority and introduce compulsory dispute settlement mechanisms. To a great extent, even the dispute settlement provisions are outgrowths of the existing means of dispute settlement, existing principles, concepts, and organizations.

The nonseabed provisions for the most part represent a consensus among the states at the Conference on what the practice of states is today and what rules of law, what duties and rights states today are accepting. I think they fairly reflect the balance of interests between coastal and maritime states. The provisions for navigation in coastal state jurisdiction are clearly couched in terms of "all States." Ships of all states enjoy rights of transit. The provisions relating to innocent passage in the territorial sea (Articles 17-26), for example, have no revolutionary concepts. They simply give much greater specificity to the provisions of the 1958 Convention on the Territorial Sea and the Contiguous Zone. What we have here really is an attempt to codify existing provisions of international law. These provisions give greater specificity to and more correctly balance the existing needs of coastal states in controlling innocent passage through their territorial sea and the existing needs of maritime traffic in avoiding unfair or unreasonable claims posed by coastal state jurisdiction.

Archipelagoes

The provisions for archipelagic state status and transit through archipelagoes is a body of law that is new in one sense and yet is built on earlier concepts. I doubt that Indonesia or other states that would claim an archipelagic status believe that the Law of the Sea Convention must enter into force before they are entitled to assert their archipelagic status. The provisions for the transit rights through the archipelago apply to ships of all states. The provisions are not couched in terms of ships of states parties, or state contracting parties. The United States is fully prepared to recognize the archipelago of any country that qualifies as an archipelago under the Convention. At the same time, such recognition could only be granted if the rights of transit passage and overflight of the United States and other nations are fairly recognized by the archipelagic state.

Transit Passage Through Straits

In the case of the straits regime, we have heard quite a bit of discussion on the customary law right of a coastal state to claim up to a 12-mile territorial sea. Professor Wesley Hohfeld made the point clearly

that rights and obligations run together.[2] Thus, if a coastal state has a right to establish a 12-mile territorial sea, it has an obligation to permit transit passage through a strait used for international navigation. If a maritime state has the right of transit passage, it has a duty to recognize the 12-mile territorial sea and abide by the rules for transit passage set out in the Convention. Similarly, with archipelagic status, the rights of the coastal state to establish an archipelago also carry with them the obligation and the duty to permit archipelagic sea lanes passage and to conform the archipelago, when it is established, with the rules of international law establishing the archipelago.

Can Transit Passage Be Given Only to Parties?

Hasjim Djalal: I have just a very small question. If the United States can tell us that if we can accept the transit passage then they can accept the 12-mile territorial sea, can we also say that we will accept the transit passage if the United States becomes a party to the Convention?

Another inconsistency in the U.S. position concerning transit passage through straits can be illustrated by considering the Strait of Singapore, which is less than 6 miles in width and only 2.8 miles wide at one point. The United States cannot argue that it has the right of transit passage in the Strait of Singapore outside the context of the Convention because the United States recognizes a territorial sea of at least 3 miles.

Prior U.S. Statements on Transit Passage

William Burke: The major difficulty with the U.S. position on transit passage concerns the statements the U.S. representatives made during the entire negotiation (especially in the early parts of negotiation when this question was still open) that customary international law would not provide proper and secure protection for passage through international straits if the territorial sea were to be extended to 12 miles.[3]

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2 Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30 (1913); see pages 298-99 infra for Ambassador Koh's response.

3 The following statements fall within this description of the position of the United States: Statement of John R. Stevenson, United States representative to the Committee on Peaceful Uses of the Jurisdiction, to Subcommittee II, Aug. 3, 1971;

(Footnote continued)

Because of these earlier appraisals of the situation, it is now very difficult to suddenly discover instantaneously created customary law, and with regard to overflight, it is totally inconceivable. Everybody knows that the prevailing international law on overflight has been consent, and is still, in the absence of any agreement otherwise. So the U.S. position, it seems to me, is very very difficult to support.

Innocent passage for warships is a more difficult question, but it seems to me that a problem exists because the two major naval powers today (the United States and the Soviet Union) historically never believed there was a right of innocent passage for warships. I use the word "historically" to refer to the time prior to World War II when the United States also took the position that warships did not have such a right.[4] The United States subsequently changed its views,[5] and, still later, the Soviet Union also changed its position.[6] We now have the record of the 1958 Geneva Convention,[7] which seems to me to be very clear, and I thought there was an understanding about the provisions in the 1982 Convention as well, but that understanding depended upon the treaty coming into

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[3](continued)
statements by John Norton Moore, chairman of the NSC Interagency Task Force on the Law of the Sea and deputy special representative of the president for the Law of the Sea, in A.W. Rovine, 1974 Digest of United States Practice in International Law 347-51 (1975).

[4] See 4 Whiteman, Digest of International Law 416-17 (1965); see also the United States delegation position at the 1930 Hague Codification Conference, 4 Rosenne (ed.), League of Nations, Conference for the Codification of International Law [1930] 1261 (1975).

[5] 4 Whiteman, id., at 416-17.

[6] See U.S.S.R. draft articles on straits used for international navigation submitted by the U.S.S.R., in Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27 U.N. GAOR Supp. (No. 21) at 162, U.N. Doc. A/8721 (1972).

[7] Article 14 of the Convention on the Territorial Sea and Contiguous Zone, done April 29, 1958, 516 U.N.T.S. 205, 15 U.S.T. 1006.

force. I am quite sure a considerable number of states have had legislation for quite some time requiring permission and believe their legislation was in compliance with the law at the time. The Chinese have had such a requirement for over 25 years, for example, but I understand they will be agreeable to changing their law in the event the treaty comes into force. I disagree with what Mr. Yuan said;[8] I think the Chinese have made statements that their national law would change when the treaty came into force, but possibly only for the benefit of parties to the treaty.

The question therefore remains in doubt, and that is exactly what the United States wanted to avoid. The United States wanted to establish rights of innocent passage for warships so that the U.S. military would have some basis for making operational orders.

Another View on the U.S. Position

Bernard Oxman: Professor Burke referred to a number of statements on transit passage, some of which I may have had a hand in writing. He is quite right to point out the problem, but I think at least most of my colleagues and I tried to be careful to avoid that problem. While the United States complained about the possibility of applying the regime of innocent passage in straits, it did not concede that the regime of innocent passage applied in straits, at least those straits wider than 6 miles. One could take the position under customary law that the extension of the territorial sea from 3 to 12 miles does not carry the regime of innocent passage with it in straits for a variety of reasons with which I am sure you are all familiar, and that have been elaborated by Soviet scholars, among others. To my knowledge, there never was an authorized concession that if the 12-mile limit were valid under customary international law, then the applicable regime in 24-mile straits would be innocent passage. But I suppose it is possible someone said so.

Inconsistencies in the U.S. Position

R.P. Anand: The U.S. position presents certain theoretical problems. President Reagan said in the March 1983 statement that the United States would accept the 12-mile territorial sea as provided in the Convention, provided the other countries accept the United States' rights of passage and overflight.[9] I should think that this emerged previously as part of

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8 See discussion at 207-08 supra.

9 See Appendix A infra at 552, paras. 6 and 7.

customary law, but there are some states that do not accept the right of transit passage as part of customary law. China is one, as Professor Yuan stated.[10] If this has not become part of customary law, and some of the countries do not accept transit passage, the United States says that it would not accept 12 miles of territorial sea if transit passage is not permitted. What happens then? What does the United States do? It goes back to customary law as before the Convention.

Can one say that before the Convention, there was a norm of a 3-mile territorial sea? There was not. There has never been an agreement on the width of the territorial sea. The 1930 Conference failed on the subject, the 1958 Conference failed on the subject, the 1960 Conference failed on the subject. Then, a majority of states started claiming--even before the Third United Nations Conference laid it down--12 miles of territorial sea. Countries were making even broader claims. So can the United States say, "All right, if you do not accept the right of transit passage, we will accept only 3 miles and not more than 3 miles"?

Will Transit Passage Through Straits Be Denied to Nonsignatories?

There is no doubt, as Ambassador Djalal said,[11] that the nonsignatories do not have any legal claims to Convention rights if they do not accept its obligations. But I do not think that most of the parties to the Convention will in fact stop the United States from exercising the transit rights through straits. As the United States uses the transit rights of the Convention, the practice will increase, and this right of passage will move into what we call customary international law.

Jon Van Dyke: Ambassador Koh, what are your views on the status in customary international law of the right of transit passage through straits?

Two Opposing Views of Rights and Duties on Transit/ Innocent Passage

Tommy Koh: I would have to be Solomon to dare to answer this question with any confidence. Not being Solomon, I do not have a confident answer. Let me just recall, if I may, the dialectic we have heard during this workshop.

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[10] See pages 186 and 207 supra.

[11] See pages 54-55 supra and 301 infra.

On the one side of the argument, we heard from Brian Hoyle the invocation of the name of Professor Wesley Hohfeld, who analyzed the concept of rights into four pairs of correlatives.[12] One of those pairs of correlatives is that you cannot have a right without a correlative duty. Brian's analysis is as follows: If a coastal state, such as Indonesia, extends its territorial sea from 3 to 12 miles, then the coastal state must, at the same time, accept the correlative duty of accepting the regime of transit passage through straits used for international navigation. Brian takes a similar view in the case of an archipelagic state--if an archipelagic state claims the right of drawing straight baselines, claiming archipelagic waters, then it has a correlative duty to acknowledge the right of third states to enjoy the regime of archipelagic sea lanes passage.

Duty May Depend on Whether State Is a Party

Now I hope I am correct that the response to Brian's analysis on the part of Hasjim Djalal and others would be that this analysis is faulty. They would point out that even without the benefit of the 1982 UN Convention, international law permitted a coastal state to claim a territorial sea of 12 miles. The right to extend one's territorial sea to 12 miles is not derived from the Convention but has evolved as a result of state practice. And Hasjim would therefore argue that the correlative duty of a state that extends its territorial sea from 3 to 12 miles is simply to accept the regime of innocent passage through its territorial sea and not the regime of transit passage. And I think Hasjim has argued, in the course of our discussions, that in Indonesia's view, for a state to enjoy the regimes of transit passage through straits used for international navigation or archipelagic sea lanes passage then that state must become a party to the Convention.

Who is right and who is wrong? I very frankly do not know. The law in this field is unclear, and it is very difficult to say in advance whether the regimes of transit passage and archipelagic sea lanes passage are already part of general international law. I think there is a legal doubt.

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12 Right/duty, privilege/no-right, power/liability, immunity/disability. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30 (1913). Brian Hoyle discusses these concepts at pages 293-94 supra.

Friendly States May Grant Rights to Nonparties

In practice, the United States may get away with its position in the sense that if the archipelagic state in question, or the strait state in question, is a state with which the United States enjoys friendly bilateral relations, these states are not likely to differentiate the rights of a state party from the rights of a state that is not a party to the Convention. It is very unlikely that Singapore, to take an example, would say, "The United States, not being a party to the Convention, does not have the right to enjoy the regime of transit passage through the Strait of Singapore."

States Should Act with Clear Legal Rights

The problem for the United States will arise in a situation where it is engaged in a conflict with a country with which it does not enjoy good bilateral relations. We might remember the recent incident in the Gulf of Sidra, Libya. When the United States is engaged in a conflict with another country and may have to resort to force in order to assert its international legal rights, my plea to my American friends has always been that the invocation of the use of force should always be done in a circumstance in which its legal rights are clear, as was the case in the Gulf of Sidra. The international community did not protest when the United States shot down the Libyan aircraft because the international community did not accept the Libyan claim that the Gulf of Sidra is internal waters. In a situation where the legal rights are unclear, if a nation resorts to the use of force to assert its purported legal rights, I think its moral position becomes weaker. That is really the point I wanted to make on the regime of transit passage and on archipelagic sea lanes passage.

Customary Law and the Use of Military Force

David Colson: I am a practitioner, I guess, of customary international law. Every day I come to the office I have an in-box full of cables or memoranda of one sort or another. They say we are going to sail a ship this place or that place tomorrow, or the next day or the next week, or that we just had a fishing boat seized at this place or that place. They ask how the State Department is going to react to or plan for this problem or program. These are very real problems. Those who have worked in foreign ministries understand what I am talking about. You have to sit down at that point and really make decisions as to what your country is going to do or not do. In this connection, at least in the advice I would be giving, I would agree with the proposition that Ambassador Koh raised at the very outset: one of the principles one would normally hope

to see coming out of foreign ministries is not to invoke the use of force unless the customary law is very clear--one would hope to have world opinion firmly behind you before you go to great extremes in this area.

Now, as we know, oftentimes, you confront situations where the law is not very clear or where you know there is going to be a great deal of disagreement within the world community as to how a state is projecting its power. You have to develop other guidelines in those situations, and I suppose at that point we begin to leave the legal realm and begin to be a bit more concerned about the political costs and benefits of whatever particular action you are proposing to take. You only run significant risks where you may be called upon to use force when there is not going to be a significant political downside, primarily a bilateral downside. The United States, I assume, would run different risks with Albania than it would with Indonesia. That is just a very practical difference, and that comes out in the policy process.

The other thing that comes out in the policy process is the relationship with allies, because once again, the positions and how specific allies in specific regions are going to react must be considered. Because not all of our allies have entirely the same positions as the United States on these questions over time, their views often cause a moderation of our position.

Danger of Creeping Jurisdiction if Convention Unravels

Koh: The point our American colleagues ought to think about is that by adopting the attitude of staying out of the Convention, they are raising the danger that these very carefully negotiated understandings and delicate compromises may become unravelled. This is a real danger to the United States. If that happens, then the brake that the Conference and the Convention have put on the creeping jurisdiction of the coastal states will be taken off, and there may be a new spurt of extensions and claims and the territorialization of the exclusive economic zone. That is the real policy dilemma that I would like to pose to the United States.

Enforcement of Convention by Denial of Rights

Van Dyke: Ambassador Koh has stated that a danger exists that the Convention may fall apart. Are there other types of dangers that may occur too? Professor D'Amato tells us that customary norms can be enforced or attempted to be enforced in three different ways: (1) through a judicial proceeding, (2) through the use of military or police power in appropriate circumstances, or (3) by a reciprocal denial of rights to the

party that violates the norm.[13] Looking at that third possibility, how likely is it that if the United States, say, were to begin a mining operation outside the Convention, that the states in the Malacca Straits area would decide that the United States should be either denied passage or charged a fee for navigation?

Koh: I think you should put that question to Hasjim Djalal.

Djalal: There is a problem of politics and a problem of law. From the point of law, of course, we in Indonesia believe we could take such actions. A nonsignatory or nonparty to the Convention, in our minds, certainly will not be able to take benefits from the Convention. We would certainly be bound by Article 311, which says that the Convention shall prevail among the parties over the Geneva Conventions of 1958. So, nations not party to the 1982 Convention should not be permitted to benefit from the privileges or rights given in the Convention. This is our legal position. Whether we are going to deny such privileges is a political question, not a legal question.

U.S. Making It Difficult for Friends

I would like to stress what Tommy Koh said--that the United States seems to have the knack of pressuring its friends. It seems to have the habit of putting its friends into difficulties. This practice has gone on and on during the last ten years of negotiation, and it makes it so difficult for its friends to take any particular action or not to take any particular action. Tommy Koh was right, certainly, that for most of the straits, as far as navigation is concerned, most of the states bordering those straits are friends of the United States.

In my mind, the United States is really trying to test our friendship without offering a corresponding degree of friendship and understanding of our problems. I think this posture will raise difficulties in the long run politically. Legally, we have our own opinion--as Tommy said, maybe the International Court of Justice will decide one day.[14] But politically, we will be placed in a difficult position where our friendship is being tested. We do not really mind as long as we also know that the United States is showing some understanding of our difficulties and our problems. But, that, we do not see.

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[13] See pages 493-95 infra.

[14] See pages 232 and 253 supra.

Need to Keep Communication Open

Colson: In this policy process, it is very important to know and understand the other side's positions, their terms, and the way they are thinking about a problem. The only way we can do that is to have our lines of communication open. So I would respond to the statement of Ambassador Djalal by saying that I hope the United States can show some understanding of other people's problems relating to the law of the sea, but the only way we are going to be able to do that is to be able to sit down and talk with them.

Question of Prior Notification for Military Warships

Camillus Narokobi: Professor Yuan mentioned that the Chinese are concerned about the ambiguity in the Convention about the rights of warships to pass through the territorial sea.[15] Mr. Colson also expressed concern about the statements made by certain countries (such as Brazil in December 1982) that warships require prior authorization before they can proceed through coastal state maritime zones.[16] In fact, at the UNCLOS III negotiations, the Chinese delegation and at least 33 other delegations, including the delegation of Papua New Guinea, were quite strongly opposed to the provisions in the Convention in relation to this question. The matters of prior authorization and notification to be given to the coastal states by warships when they move through territorial waters was an issue right up to the last moment. Some of our research has indicated that although this question was raised at the start of the Conference in Caracas, it was never actually addressed squarely and fairly.

Strategic Sacrifices to Assure Convention Acceptance

We finally decided not to pursue this matter in the interest of trying to achieve a universally accepted Convention. This issue was one of our biggest sacrifices. We gave up a position of strategic importance to us, not just an economic position like the United States' opposition to Part XI of the Convention. This was a strategic position that was relinquished by a lot of small island countries and some big powers like China to insure that the Convention would be universally accepted.

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15 See page 186 supra.

16 See page 47 supra for Mr. Colson's statement; the Brazil declaration is reprinted at 304-05 n. 17 infra.

The archipelagic states are concerned about the movement of ships through the archipelagic waters. This is a question that will raise a lot of problems in the future. We all know that, although the concept of an archipelagic regime has long been recognized, it was not until this Convention that it was actually formally agreed upon. Dr. Djalal will also agree with me that the question of movement of warships through the territorial seas into the archipelagic regime of coastal states is still an unresolved question. There are some countries that interpret the provisions of the Convention to say that warships or submarines can navigate in the normal mode of navigation. Other states interpret these provisions to mean that these submarines must navigate on the surface when they come through the territorial seas before they enter the archipelagic waters of coastal states.

Military Activities in the Exclusive Economic Zones of Other Nations

Koh: The question of military activities in the exclusive economic zone is a very difficult one. Bernie Oxman will remember that the status of the exclusive economic zone was one of the last questions to be wrapped up in the negotiations in Committee Two. We finally succeeded in wrapping up this question of the status of the exclusive economic zone thanks to the personal initiative of our friend Jorge Castaneda of Mexico. Before he became foreign minister, he was the leader of the Mexican delegation. In 1977, I believe, Jorge Castaneda invited about 20 of us to dinner one evening. After dinner was over, he asked that the table be cleared and said,

> Ladies and Gentlemen, we have been grappling for the last three years with the question of the status of the exclusive economic zone. I have invited you here because I believe you represent a cross section of the points of view of the Conference and you are the leaders of the Conference. I suggest, if you all agree, that we commence informal consultations on this question.

We agreed and sat down and worked, in fact, all night long. And we began to negotiate every night for two weeks and eventually wrapped up the issue.

Military Activities in the EEZ: Unstated But Understood

The solution in the Convention text is very complicated. Nowhere is it clearly stated whether a third state may or may not conduct military activities in the exclusive economic zone of a coastal state. But, it was the general understanding that the text we

negotiated and agreed upon would permit such activities to be conducted. I therefore would disagree with the statement made in Montego Bay by Brazil, in December 1982, that a third state may not conduct military activities in Brazil's exclusive economic zone.[17]

Interpreting the Convention--Traveaux Preparatoires

Joseph Morgan (Associate Professor of Geography, University of Hawaii): I have concern as a nonlegal scholar about how the Convention should be interpreted. Many of you here actually participated in the deliberations that led to the Convention on the Law of the Sea and your insights are extremely valuable. What worries me is that the interpretation of the courts might have to be based strictly on the words in the document, not on the intentions of those of you who participated in the negotiations. A lot of the discussion here was based on what negotiations were made here, who had dinner with whom, and so on. This is fascinating, but it is not in the finished document. Are not the final words what we will use to base decisions on?

John Craven: Your question is whether a tribunal will interpret just the words of the treaty as they stand, and the answer is no. The traveaux preparatoires can be just as important as the treaty.

Morgan: Then let me say that I wish the negotiators of the treaty a long life.

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[17] Brazil issued a Declaration at the time of its signing of the Convention at Montego Bay, Jamaica, December 10, 1982, which contained the following language:

> .....
>
> (2) The Brazilian Government understands that the regime which is applied in practice in maritime areas adjacent to the coast of Brazil is compatible with the provisions of the Convention.
>
> (3) The Brazilian Government understands that the provisions of article 301, which prohibits "any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of

(Footnote continued)

Provisions Are Slipping Away Through Interpretations

Colson: Many of the things that we have been talking about are political and theoretical. How one really manages a problem that exists between governments or within a region is what the law of the sea really is about. Regardless of what the United States' position may be on the Law of the Sea Treaty, these kinds of issues still have to be dealt with in a rational and reasonable manner between states.

From a United States political perspective, I am sure our politicians would be asking this kind of question: "How can the United States have confidence in the deep seabed mining provisions of this Convention when we see basic and fundamental aspects of the nonseabed provisions that were negotiated slipping away." The Brazilian declaration has already been mentioned. I could mention others. It was frankly outrageous that some states could make those statements in good faith and sign the Convention saying that they intended to ratify the Convention. We have heard statements about prior notification and authorization of warships in the territorial sea. We have heard statements about the meaning or possible interpretation of the phrase "normal mode." We have heard Dr. Yuan's statements about his expectations of China's practice under a Law of the Sea Convention.[18] They want to see it come into force, but yet their statements clearly indicate to us that they are not really very serious about the law that the Convention would seem to create.

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[17](continued)

international law embodied in the Charter of the United Nations", apply, in particular, to the maritime areas under the sovereignty or the jurisdiction of the coastal State.

(4) The Brazilian Government understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone military exercises or manoeuvres, in particular those that imply the use of weapons or explosives, without the consent of the coastal State.

[18] See page 207 *supra*.

U.S. and 1982 Convention--Must Have Navigation and Overflight Rights

I do not know if there ever will be a reconciliation between the United States and the 1982 Convention. But I do believe I can state something with some confidence and that is that if there is ever to be a reconciliation between the United States and this Convention, it is going to have to be a Convention that maintains quite strictly the navigation and overflight provisions as they are negotiated, written, and intended at the Conference. We would not be prepared to enter into a reconciliation if these things have eroded away from us.

Navigational Rights on the High Seas: U.S. Law Enforcement, the Cuban Boat Lift and Drug Smuggling

I would like to come back to the practical issues again and describe for you how the United States has dealt with some very difficult law enforcement problems when we were confronted with new issues in the oceans. In the last few years, the United States has had to deal with two ocean law issues in which our own legal positions about freedom of navigation and the traditional freedoms of the high seas were politically questioned in the United States because it would have been easier for the United States government to deal with the problem had we simply asserted jurisdiction over the activity and not honored the freedom of the seas.

One of those problems was the Cuban boat lift where vast numbers of Cubans came into the United States on non-United-States flag vessels. It would have been much easier for the United States simply to declare a jurisdiction of some nature--such as extending our contiguous zone out to the boundary with Cuba--in order to get a handle on that mass illegal immigration into the United States. It was a very difficult problem for the United States, and it pitted one side of the U.S. bureaucracy against another side. In the end, however, the United States handled this problem entirely consistently with traditional U.S. positions on the law of the sea. We did not board or arrest foreign flag vessels beyond our 12-mile contiguous zone.

The second problem, which has been more interesting from a legal perspective, has been the high seas law enforcement that we have been engaged in with respect to the smuggling of narcotics into the United States. We have a huge problem. The ships carrying illegal drugs come north from South America into the Caribbean Sea. If we let them come too close to the United States coast, the mother ship, carrying vast quantities, will rendezvous with a number of very fast smaller boats, which will then scatter in different

directions toward the coast. As a result, it is difficult to prohibit entry by engaging in law enforcement close to the shore. I have seen some of the writings relating to the law of the sea that say that with modern surveillance equipment a coastal state does not need to extend its jurisdiction seaward. That is not necessarily the case. Even the United States does not have the facilities to regulate or to manage or to ensure that its coastline is thoroughly protected against illegal entry with enforcement officials every step of the way along the coast. It just does not happen.

Therefore, we have been engaged in a program where we have asked for the cooperation of the flag states of these vessels for their boarding by U.S. law enforcement officers on the high seas. This has worked out very well. We have a number of informal agreements and arrangements where we have or seek the concurrence of the flag state to take appropriate action. We also have formal agreements. For instance, the United States and the United Kingdom have entered into an international agreement that gives United States law enforcement officials authority to board and search British vessels on the high seas under a particular standard of proof. If contraband is found, the agreement sets out the ways the United States will deal with the issue, protecting the British concerns about their vessel. We have other agreements and arrangements of a similar nature with other governments.

Elisabeth Mann Borgese: Are they mutual?

Colson: Reciprocal? Yes. But that is fairly hollow, because there are not too many drug runners going the other way. But we have not had any difficulty in accepting the principle of reciprocity.

Arrest Procedure

The way we deal with these issues is that when a U.S. Coast Guard vessel comes across a non-U.S. flag vessel that is suspected of intending to smuggle narcotics into the United States, the Coast Guard vessel radios the Coast Guard commandant's office in Washington, and a conference call is put together between the State Department, the Department of Justice, and the Coast Guard to determine how to proceed. The Coast Guard vessel asks the suspected smuggler for the vessel's identification and where it is home-ported, under the right of approach set forth in the 1958 High Seas Convention.[19] The vessel

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[19] Article 22 of the Convention on the High Seas, done April 29, 1958, 450 U.N.T.S. 82, 13 U.S.T. 2312, (Footnote continued)

normally responds with that information. For example, let us say the vessel says, "I am British and I am registered in the Grand Caymans." Absent an agreement, we would then immediately notify our embassy in the claimed flag country and request that the embassy contact the local shipping authorities to determine whether that claim was valid. If the claim was valid, we would then institute a discussion with the flag state government to ask it to do one of two things:

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19 (continued)
reads as follows:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
>
> (a) That the ship is engaged in piracy; or
>
> (b) That the ship is engaged in a slave trade; or
>
> (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
>
> 2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
>
> 3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

The United States relies primarily on Article 22(1) for its practice of exercising the "right of approach" or "visit" described in the text.

One is to allow the United States to board the vessel as its agent and to take action under the laws of that particular country; the alternative is to board the vessel under the authority of the flag state but, if violations of U.S. law are found, to act in accordance with U.S. law at that point.

Depending on the country concerned, we receive different responses. Some countries wish us to board simply as their agent and to hold the vessel and to turn the vessel and the crew over to that government. Others are more inclined simply to wash their hands of the issue and to authorize the boarding but also to allow the United States, once on board, to take whatever action it wishes under U.S. law. Of course, under the law of the sea, if the vessel is legitimately registered in the state, and the state does not wish to cooperate with us, we have to break off the matter.

We sometimes find that the vessel has claimed a registry that is clearly invalid and has not given us the true story. Therefore, under the law of the sea, that vessel is not entitled to the protection of any flag under international law, and the United States can proceed against the vessel as a stateless vessel.

We have had a number of interesting cases over the years. We are now able to deal with these kinds of situations rather routinely with about a dozen different governments. Occasionally we run into a situation with a maritime state with which we have not had this problem before. We have gone so far as to take the flag state consular officer out to the suspected vessel by helicopter so that he can board the vessel in the name of the flag state in order to ensure that the flag state jurisdiction over vessels on the high seas has not been questioned. It has cost the U.S. government money and effort to deal with the issue in this way, but it is an example of how one can deal with a new problem in the law of the sea within the bounds of traditional legal concepts, without requiring or claiming that the only way that a new problem can be dealt with is by defining a new zone of jurisdiction.

Can Warships Make Inquiries Outside of Article 110

Anatoly Kolodkin: Mr. Colson, tell me please from a legal point of view, do you think a warship has a right to verify a trade vessel, commercial vessel, or foreign vessel outside of the provisions of Article 110 of the Law of the Sea Convention? Could a warship in the high seas ask a foreign vessel where it is going and what kind of cargo it has on board?

Colson: It has certainly been our practice and I am sure it would be our interpretation that one does have the right to determine the cargo of the vessel as well as its last port of call and its intended port of

call. These are essential questions that are necessary for the warship to know in the exercise of its rights of approach.

Kolodkin: Beyond the territorial waters of the United States?

Colson: Yes.

Right of Visit and Future Peace on Oceans

Kolodkin: We have had some discussion about customary international law, and we agree that the right of visit in the high seas is a customary rule and allowable in certain carefully established situations. International law and international relations have developed the details of this important principle over many years. The right of visit on the high seas is allowed when a nation is engaging in hot pursuit curtailing the slave trade, stopping unauthorized broadcasting, or pursuing a ship that is without nationality, flying a foreign flag, refusing to show its flag, or is in reality of the same nationality as the warship (see Articles 110 and 111). We can read Articles 110 and 111 of the Convention to say that in encounters on the high seas, a foreign ship (other than a ship entitled to complete immunity) is not justified in boarding unless one of the enumerated exceptions to flag state jurisdiction applies. The book by Professors McDougal and Burke, The Public Order of the Oceans (1962), which is very widely read in the Soviet Union, states that without doubt, on both sides of the Atlantic, all authors recognize this principle of the jurisdiction of flag state, with minimal exceptions.

That is why I was very surprised when I heard that the United States was indiscriminately using the right of visit on the high seas. There was one case when your vessel was close to Nicaragua, but out in the high seas. Our vessel was stopped, and the U.S. ship asked, "Where are you going, what kind of cargo do you carry?" Our captain answered. When he returned, he reported that the commander of the American carrier was very polite, and he was also very polite. I was asked about this by some of my people, and I said that such a stop is unlawful and there was no need for any politeness at all. The practice is unlawful because outside of territorial waters the warship can exercise the right of visit only subject to the restrictions in Article 22 of the 1958 Convention on the High Seas and in Article 110 of the 1982 Convention.

It seems to me that it is very important for the future of the world and international law of the sea to maintain peaceful co-existence, especially peaceful co-existence on the oceans. That is why it is very important to remind you of the proposal of the Soviet gov-

ernment not to conduct military task forces near the generally accepted international routes for shipping. I would also remind you of the Soviet proposal to pull U.S. and Soviet warships with nuclear weapons out of several areas, particularly the Mediterranean Sea.

These two and other proposals are evidence of the Soviet striving and dreaming for peace. It seems to me that peace on the earth depends a great deal on the peace of the oceans and the seas.

Right to Visit on the High Seas

Colson: Could I respond by saying a word about our position on warships? I think it is by far the better legal view. We believe the right of approach in international law is clearly inferred from the right to board, which is embodied in Article 110. It only makes sense that there is a right to ask questions before you have a right to board. To determine whether you have a right to board, in our view, the warship has the right to approach the merchant ship and ask some questions.

CHAPTER 6

FISHING ISSUES

INTRODUCTION

The expansion of coastal state jurisdiction over the living resources of the 200-mile exclusive economic zone is one part of the Law of the Sea Convention that has achieved near-universal acceptance and approval. Problems remain, however, in sorting out the rights of neighboring and distant-water fishing states that have historically fished in waters now under coastal state jurisdiction and in resolving the dispute between the United States and the rest of the world over the status of tuna.

The first paper in this session is presented by Professor William Burke, professor of law at the University of Washington and a specialist on fisheries and ocean law issues. His paper analyzes the fishing provisions of the Convention in detail and strongly criticizes the unrestrained powers given to coastal states.

The next presentation is made by Craig S. Harrison, who worked for the U.S. Fish and Wildlife Service from 1975 to 1983 on problems facing aquatic birds and fish in Alaska and Hawaii and who recently earned his law degree at the University of Hawaii. His paper surveys the costs to the United States of staying out of the Convention--the problems created by our tuna policy, our possible inability to share in the "surplus" stocks, our weak legal position with regard to the salmon that spawn in our rivers, and our inability to take advantage of the dispute resolution procedures of the Convention.

This paper is followed by Camillus Narokobi, the legal adviser to the Ministry for Foreign Affairs and Trade in Papua New Guinea. Mr. Narokobi looks at the tuna issue in more detail from the perspective of the Pacific nations and raises a number of questions about the impact of the U.S. policy of refusing to recognize coastal state jurisdiction over tuna within the 200-mile zone. One question that is raised by Article 64 is whether a fishery organization should be

created in the Pacific that would include the distant-water fishing nations as well as the Pacific island nations. Mr. Narokobi feels that to allow distant-water fishing nations to participate in the regional organization of the Pacific islands would be to undermine the sovereignty of the island nations in the region.

Rabbie Namaliu, foreign minister of Papua New Guinea, gives the next presentation, discussing the dynamics of the relationship between the United States and the Pacific island nations on the tuna issue. Satya Nandan and Iosefa Maiava comment on this presentation, adding additional insights on the importance of this issue to Pacific islanders and the difficulties created by the U.S. position.

The final formal paper is delivered by Satya Nandan, who describes the process by which the fishing provisions were agreed upon during the Conference negotiations and provides useful insights into the meaning of the ambiguous provisions.

David Colson participates actively in the discussion periods and provides examples from U.S. practice to illustrate the problems that exist. He acknowledges the problems that U.S. tuna policy has created and states that he finds it easier to defend U.S. policy on deep seabed mining than U.S. policy on tuna (page 374 infra). Nonetheless, he asks for understanding and expresses hope that the differences can be worked out. Satya Nandan, who represented Fiji throughout the negotiations, asks in turn for U.S. understanding of the position of the Pacific islanders, who look at tuna as their main ocean resource of commercial importance.

The participants discuss in detail the reasons why coastal states gained such a resource bounty through the acceptance of the 200-mile zone. Elisabeth Mann Borgese suggests that this solution was adopted in order to promote effective management of the species and that giving ownership to the coastal state was likely to promote sound conservation practices. Other participants questioned whether this was the best solution to reach that goal and argued that cooperation on a species-specific approach would produce more effective management practices. The Convention's provisions reserve little or nothing to the land-locked and geographically disadvantaged nations and thus seem inequitable from their point of view.

The participants also discuss what the language in Article 62(3) requires of coastal nations in allocating their "surplus" stocks. Must coastal nations have a scientific basis for their determination on "optimum utilization" and their "capacity to harvest" each species? Can these requirements be viewed now as part of customary law?

THE LAW OF THE SEA CONVENTION AND FISHING PRACTICES OF NONSIGNATORIES, WITH SPECIAL REFERENCE TO THE UNITED STATES

by

William T. Burke

Introduction

The purpose of this paper is to consider briefly the relationship between the Convention on the Law of the Sea and the behavior of nations that have not signed the Convention, are not now intending to be parties to it, or do not become parties. Presently the most prominent member of this group is the United States, and special reference will be made to its position on some issues concerning fisheries. I do not propose to discuss the views of the United States regarding the Convention as a whole or to speculate about when there will be a reassessment of U.S. interests related to the Convention. It is conceivable that this reappraisal will only occur in the context of a fourth conference on the law of the sea, but one would hope it is not necessary to wait for that event before U.S. interests are again evaluated and a change occurs.

The paper addresses three main subjects: (1) the provisions of the Convention on fisheries; (2) the customary international law of fisheries, to the extent these norms can usefully be identified; and (3) some specific questions about the effect of the Convention on the position of the United States on fisheries matters, including the Presidential Proclamation of March 10, 1983.1

1 See Appendix A *infra*.

Specific questions about the U.S. position include: (1) Does the United States, as a nonsignatory, have the right to share in the surplus of other nations in their exclusive economic zones (EEZ)? (2) Must the United States share surplus in its own zone with other states? (3) Is the U.S. EEZ governed by the Convention's provisions on the EEZ? (4) What is the state of the law at present on the issue of highly migratory species?

In my opinion the details of the treaty are not now part of customary law. The major provisions conferring sovereign rights on coastal states are commonly found in state practice and therefore reflect customary law, but the accompanying details are not yet customary law.

The Provisions of the Convention Concerning Fisheries

I think the fishery provisions of the Convention generally confirm Bernie Oxman's observations that the rights established by the Convention will be incorporated into international customary law but the restrictions on those rights may not be.[2] Most states have by now claimed sovereign rights over fisheries in their coastal waters; however, the specific details of the obligations spelled out in the treaty are not often found in state legislation or in state practice.

The following comments briefly address the provisions concerning allowable catch, overexploitation, permissible yields, effects on associated or dependent species, the obligation to promote optimum utilization, harvesting capacity and surplus, terms and conditions of access, landlocked and geographically disadvantaged states, shared stocks, highly migratory species, and anadromous species.

Articles 55-57 are the key provisions on the regime of the EEZ and establish the specific limit for that zone. Article 55 provides that the EEZ is not part of the territorial sea and is defined solely in the terms of the Convention. Article 56 identifies the general rights of the coastal state in the zone, and Article 57 declares that the zone may extend to 200 nautical miles beyond the baseline.

The overriding provision on fisheries in the Convention is Article 56, which declares that the coastal state has sovereign rights for the purpose of exploring, exploiting, conserving, and managing the living resources in its EEZ. This article applies to all living resources found in the EEZ with the lone exception of sedentary species, which are governed by

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[2] See pages 138-61 and 164 supra.

another part.[3] Article 56(2) states that any specific limitations or modifications of coastal authority must be found within the Convention.[4] In the absence of a specific limitation, the coastal state is in full control as long as it does not otherwise offend international law. What limitations on coastal state authority to exercise its discretion in managing fisheries can be derived from other provisions of this treaty? As a general proposition, it is safe to say that such limitations are few. This treaty delegates virtually complete authority for managing fisheries, including conservation, utilization, and allocation, to the coastal states of the world.

This paper is not the place to assess the wisdom of this delegation, but it is a dubious choice when assessed on grounds other than political necessity. Not many states around the globe have the skill and resources for the highly complicated job of fishery management, and it would not be difficult to devise a better system on paper than one relying on coastal states alone. Apparently, however, a "better" system simply was not within the realm of political feasibility because it would have required a different definition of coastal state rights than was generally acceptable. The major formal alternatives at the Conference were either (a) coastal state authority or (b) a continuance of the previous regime, which required the express consent of the exploiting states for effective implementation. In my view the main responsibility for the unfortunate delegation of complete authority to coastal states rests with those large distant-water fishing states whose disregard for coastal interests discredited the preceding international regime.

A better way would have been to agree on cooperation from the start rather than to adopt the decentralized method of more than a hundred coastal states having complete authority to manage resources within their 200-mile zones. It would not have been difficult to devise a better system if one had the luxury of not having to pay attention to political feasibility.

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3 See Articles 68, 77(4), and 76-85.

4 Article 56(2): "In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."

Articles 61 and 62 delineate the major refinements of coastal state authority to conserve, utilize, allocate, and regulate fish stocks found wholly within their EEZs. Articles 63 and 64 provide for stocks that move beyond a single EEZ to other EEZs and to the high seas, and Article 66 concerns the distinctive and valuable anadromous species that move from fresh water to ocean and back again, presenting complicated questions of conservation and management.

Allowable catch. Article 61 provides that the coastal state shall determine the allowable catch of living resources in its EEZ. Although not expressly stated in Article 61, the determination of the allowable catch is a discretionary power of the coastal state. Article 297 expressly declares that the discretionary power to establish the allowable catch or the exercise of that power cannot be made subject to compulsory dispute settlement.[5] The allowable catch may therefore be established at any level that will satisfy the coastal state's interests as it perceives those interests, as long as this level does not entail overexploitation to the point of endangering the maintenance of the resource.

Measures to protect against overexploitation. Article 61 also provides that the coastal state is obliged to adopt conservation and management measures to ensure "that the maintenance of the living resources of the EEZ is not endangered by overexploitation." As far as is known to me, the terms "maintenance of living resources" and "endangered by overexploitation" have no commonly accepted meaning, nor does the combination of them. Perhaps the intent was to refer to overexploitation, which along with natural fluctuations threatens an irreversible decline in a stock, although this is not a likely occurrence except in limited circumstances. Another possible interpretation is that a stock is in danger of commercial extinction, but this also seems unlikely in the absence of easily available indices identifying this state of affairs.[6]

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5 Article 297(3)(b)(ii) does say that the nonbinding conciliation procedures can be used if "a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest...".

6 For ocean finfish, the prospects of extinction are so remote it is hardly worth talking about. As far as I am aware, there has never been a single (footnote continued)

Permissible yield. The same coastal measures taken to ensure that living resources are not endangered by overexploitation "shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors..." (Article 61(3)). This provision indicates that the coastal state is not required to manage the fishery actually to produce a scientifically determined maximum sustainable yield (MSY) but is instead authorized to consider its environmental and economic interests as well. This formulation means the coastal state is not obliged to fix the allowable catch solely in accordance with biological considerations.

I think the provision on allowable catch, or permissible yield, is sound policy from the coastal state's perspective, which is the way this treaty is written, because it permits the coastal state to manage fisheries for their largest net advantage. This is sound because the goal of maximum sustainable yield, which would require permitting input irrespective of the cost of the input, is in many respects from a management point of view discredited. This is partly because the theory has been applied to single-species fisheries when in most instances fisheries are conducted on a multispecies basis. It is impossible to manage for MSY on a single species when you are taking several of them simultaneously. In any event, it is up to the coastal state to determine on its own the level of abundance of fish stocks it wishes to maintain.

The allowable catch or permissible yield the coastal state is to determine can be a calculation that

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6(continued)
instance of a marine finfish being made extinct by exploitation in the entire history of the world. However, that does not mean there are stocks that could not be. Stocks that have a very localized habitat, for example, reef fish, could be heavily pressured, and certainly marine mammals can be harvested to extinction. I do not include anadromous or catadromous species either because you can catch all of those if you wish to do so and simply destroy them. That has happened as a result not so much of exploitation but of habitat destruction in some parts of the world. But for other fish, the ones that are the bulk of the world catch, the conservation obligation is not in my opinion that significant. The commercial gain from fishing will disappear long before there is any realistic concern about endangering a stock of marine finfish.

reflects the range of factors affecting the coastal state's interests. The Law of the Sea Convention does not mandate a narrow conception of the coastal state's authority or its interests in fishery exploitation.

The obligation to consider the effects of exploitation on associated or dependent species. Not much attention is given in most discussions of the Convention's fishery provisions to Article 61(4), which states that "the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened." It is true that the obligation to "take into consideration" is not particularly demanding, but it does appear to envisage at least that the coastal state has taken action to acquire the information it needs to consider the matter. Even this step may entail involved and costly investigation of species interactions that are difficult to understand and to evaluate. If this obligation is taken seriously, it will impose onerous burdens on coastal states.

The substance of this obligation is also demanding because it appears to call for multispecies or ecosystem management. The former of these is a complex undertaking and the latter is beyond the capacity of scientists at the present time. Although progress in these directions is a worthwhile objective, it is probably a mistake to impose these obligations on fishery management at the present time.

The obligation to promote optimum utilization. Article 62(1) requires the coastal state to "promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61." The use of the terms "optimum utilization," instead of "full" or "maximum" as suggested by some states, signifies that the coastal state is not obliged to allocate all safely available fish to noncoastal state users when its own nationals cannot take them. The addition of the phrase "without prejudice to article 61" supplies further evidence that the coastal state's obligation to set the allowable catch is not affected by any requirement for full utilization. Thus, the coastal state is authorized to decide that "optimum utilization" means fishing at whatever level is compatible with the "allowable catch;" it is not the responsibility of the coastal state to fix the allowable catch so that a particular level of fishery harvest is secured.

It is significant that the Convention declares in Article 62 that "the coastal State" shall promote

optimum utilization (emphasis added). This assumes that it is the coastal state that solely determines what is "optimum". Such a conclusion is reinforced by the provisions on dispute settlement in Part XV. Article 297 excepts from compulsory and binding dispute settlement procedures under Section 2 of Part XV any dispute arising from those coastal state sovereign rights and discretionary powers that together determine how much of the coastal state's EEZ fish can be taken, by whom, when, and on what conditions. It is apparent that under the Convention the specific meaning of the term "optimum utilization" is a matter exclusively for the coastal state to decide, although in the case of specified highly migratory species, coastal states are required to cooperate with fishing states to provide for optimum utilization and conservation in the region, including in the EEZ (Article 64).

Harvesting capacity and surplus. In addition to fixing the allowable catch, the coastal state is expressly authorized by Article 62 to determine its own harvesting capacity in relation to the living resources of its EEZ. The surplus available for allocation to foreigners is determined by these decisions. Article 62(2) states that "Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall...give other States access to the surplus of the allowable catch...". It is evident, therefore, that it is not enough simply to state, as is common, that the coastal state is obliged to give access to a surplus. Such a statement by itself does not disclose that the determination of whether there is a surplus is entirely discretionary for the coastal state.

It is more accurate to say that under the treaty the coastal state is obliged to share a surplus if it is in its interest to do so. If the coastal state determines that its interests are not served by the declaration of a surplus and an allocation to foreign fishermen, the treaty provides no obstacle to action based on that determination. Such a decision is permitted by the treaty and is not subject to challenge through compulsory dispute settlement under treaty provisions.

Although it may seem strange that a coastal state would not be interested in declaring a surplus that can be sold to foreign fishermen, the grounds for reaching that conclusion under some circumstances are sound. On other occasions, it will be in the coastal state's interest to permit foreign fishing for such a surplus. The coastal state has discretion under the treaty to decide this balance of interests.

The terms and conditions of access. If a coastal state has a surplus to allocate among foreign fishermen, Article 62(2) directs that it act through "agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4" of Article 62. This paragraph states that nationals of other fishing states "shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State." The nature of the terms and conditions is solely the decision of the coastal state, the only specific restraint being that coastal state laws and regulations containing the conditions "shall be consistent with the Convention...." The choice of terms and conditions is not restricted by the treaty. The list contained in Article 62 is illustrative only and not exhaustive.

Although the coastal state's decision on the terms and conditions of access is discretionary, the choice must be consistent with the treaty. Article 300 requires states parties to fulfill their treaty obligations in good faith and exercise their rights "in a manner which would not constitute an abuse of right." Accordingly a coastal state cannot simply promulgate regulations for foreign fishing that are arbitrary and capricious by requiring unrealistic fishing practices and decisions. For example, it would be arbitrary to impose closed fishing areas so that fishing gear is put at hazard from natural conditions or to establish fishing times that impose unnecessary costs on foreign fishing.[7]

In providing for an extended list of fishing regulations, the great detail implicit in Article 62 should not obscure the special importance of its particular terms. Article 62(4)(a) specifically mentions licensing and payment of fees, making it clear that a requirement for payment to secure access to the surplus is within the terms of the treaty. No restrictions or limitations on fee level are specifically provided, although reasonableness is required; thus the treaty offers plenty of room for the coastal state to secure monetary benefits from EEZ fisheries. A fee level that

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[7] I think the United States has failed to act in "good faith" on at least two occasions. One was when the United States deliberately set permissible fishing areas for crab in the Bering Sea so close to the ice pack that no prudent foreign fishing boat would go in and fish. A second example concerns logistic measures (regulations on time of fishing) in the Atlantic Ocean that have effectively discouraged some European states from seeking access to stocks.

reflects the actual value to the foreign nation involved of the right to fish in the EEZ would seem reasonable. Nor does the treaty restrict the coastal state in the choice of specific methods of payment. Article 62(4)(a) refers to the "licensing of fishermen, fishing vessels and equipment, including the payment of fees and other forms of remuneration," but does not require the coastal state to calculate the total value charged on a per-vessel or per-fisherman basis. A charge based on the overall value of the right to fish could be collected on a per-vessel basis or in any other way the coastal state prefers.

Constraints affecting the choice of who obtains access. Article 62 mentions three categories of noncoastal states in connection with giving access to coastal fisheries. These are (1) the landlocked and geographically disadvantaged states (hereinafter referred to as LL/GDS), (2) developing states in the region or subregion, and (3) states that have habitually fished in the zone or have made substantial efforts in research and identification of stocks. Of these categories only the first has any substantial claim to access, and even the LL/GDS must negotiate with the coastal state and is required to match any other offers that might be made. The following discussion examines the treaty provisions for each of the categories of states.[8]

Landlocked and geographically disadvantaged states (LL/GDS). Articles 69 and 70 deserve careful analysis because they were particularly controversial--they were the product of special negotiations aimed at satisfying landlocked, geographically disadvantaged, and coastal states. Among the several important points requiring attention are the distinctions made between developing and developed states, the concept of a surplus, and the authority of the coastal state to establish to its own satisfaction the terms and conditions of access.

Articles 69 and 70 distinguish between developing and developed LL/GDSs in two respects. First, any participation under these articles by developed LL/GDSs applies only to the EEZs of other developed states in the same region or subregion. A developed state has no claim to participate in the EEZ fishery of a developing state. A developing LL/GDS, on the other hand, may

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8 This discussion borrows heavily from Burke, The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction, 63 Ore. L. Rev. 73, 95-103 (1984).

have such a claim against another developing state of its region or subregion.

The second distinction is more subtle. Under Articles 69(1) and 70(1), the right of LL/GDSs to participate in fishing the EEZs of coastal states of the same region or subregion applies only to an "appropriate part of the surplus." If the coastal state does not declare a surplus or finds that the allowable catch is equal to or less than its harvesting capacity, then the LL/GDSs have no claim to access. Both of these coastal state decisions are discretionary, as noted earlier.

Articles 69(3) and 70(4) qualify the requirement of a surplus in a modest way that might permit a developing LL/GDS access despite its absence. As will be noted below, however, this transaction is surrounded by conditions so heavily favorable to the coastal state that the apparent right of participation by a developing LL/GDS is almost entirely vitiated. Full realization of the right is dependent upon the capacity of the LL/GDS to accept terms and conditions equal to those of the best offer by any other state. We will examine this and other points more fully below.

In the final outcome, the provisions of Articles 69 and 70 do not significantly condition or modify the coastal state's complete control over its EEZ fisheries. According to Ambassador Satya Nandan of Fiji, head of Negotiating Group 4, which dealt with this "core issue," the LL/GDSs stated their belief that "their participation in the neighboring exclusive economic zones should be on a preferential or priority basis" and that Articles 69 and 70 should "expressly include a reference to priority or preference in order to make those articles more meaningful."[9]

This position was unacceptable to the coastal states and no such reference was included in the Convention. Ambassador Nandan nonetheless said he was "convinced there is a need for some clarification of the relationship between the provisions of Articles 69 and 70 and those of Article 62."[10] His compromise was to amend Article 62, adding at the end of paragraph 2 the words "having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein."

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9 Nandan (Chairman of Negotiating Group 4), Explanatory Memorandum of the Proposals (NG4/9/Rev. 2) in 10 Official Records of the Third United Nations Conference on the Law of the Sea 88-92 (1978).

10 Id.

Neither this amendment, nor the addition of paragraphs 3 and 4 to Articles 69 and 70, respectively, places any significant constraint on a coastal state's decision to give or not to give access to foreign states in general, including LL/GDSs. The declaration that LL/GDSs have a "right to participate" in Articles 69 and 70 refers only to the "surplus" and an "appropriate part of the surplus." Whether there is a surplus in the first place remains within the full control of the coastal state, a fact that is specifically confirmed by the qualification that the "right to participate" is also "in conformity" with Articles 61 and 62 (Articles 69(1) and 70(1)). This express qualification establishes that the "right" of Articles 69 and 70 is subject to the discretionary powers of the coastal state as set out in Articles 61 and 62.

In addition, as will be noted further below in discussing Articles 69(3) and 70(4), the one instance in which developing LL/GDSs seem to have a right of access despite the absence of a surplus is hedged with so many conditions that the coastal state effectively retains full authority to exclude LL/GDS participation unless it cannot strike a better deal with another state.

Although Articles 69 and 70 do not substantially modify the substance of Article 62, they do declare the "right" of the LL/GDS to have access to a part of the surplus if one is established. But despite the multiple references in Article 62 to Articles 69 and 70, even the right to fish part of the surplus is tenuous. Article 62(2) provides that the coastal state is to give access through "agreements or other arrangements and pursuant to the terms, conditions, laws and regulations" it may establish. Although in giving access the coastal state is to have "particular regard" for LL/GDSs (paragraph 2), paragraph 3--which is the major provision concerning access of other states--expressly provides that the relevant factors to be taken into account by the coastal state in giving access are not exhaustively listed in the article. The reference to Articles 69 and 70 is only one of the factors the coastal state must take into account from an open-ended list it might also consider in choosing its course. The additional reference to LL/GDSs in paragraph 2 certainly emphasizes their importance for choosing which states are given access, but it does not succeed in completely removing a coastal state's right to give access to others. That right is only slightly qualified by Article 62 in combination with Articles 69 and 70.

Arguably, the one modest constraint placed on the coastal state's right to give access to its surplus entirely as it pleases derives from paragraph 3 of

Article 69 and paragraph 4 of Article 70. These are identical in substance and hereinafter both are covered by references to 69(3). Article 69(3) assumes that the coastal state has declared a surplus and that foreign fishing is being allowed, that the coastal state is building up its capacity to take the allowable catch, and that it is approaching the point at which it can take all of it. In other words, the surplus is about to disappear, and with it the right to participate. According to the compromise formulation in Article 69(3), as explained by its author, Ambassador Nandan,[11] if this buildup is of wholly indigenous capacity, then the LL/GDSs have no strong basis for arguing for their own participation and Article 69 is inapplicable. This result presumably follows because there is no "surplus" over the coastal state's own indigenous harvesting effort and all foreign participation can justifiably be foreclosed. On the other hand, if the buildup of domestic capacity is occurring through joint ventures, Article 69(3) makes provision for conditional continued access by a developing LL/GDS, apparently through participation in a joint venture.

The term "conditional continued access" should be emphasized. According to Ambassador Nandan's report, in Article 69(3) "emphasis is put on the developing landlocked and geographically disadvantaged States which have actually been fishing in the particular exclusive economic zone at the time when the situation arises."[12] If this statement is given appropriate weight in interpretation, Article 69(3) excludes any new claims to entry by developing LL/GDSs to fisheries in adjoining EEZs when the coastal state's capacity is increasing to the point that through joint ventures it is capable of taking the entire allowable catch. (It must be remembered that the latter can be adjusted to suit the coastal state's socioeconomic interests and is not dictated by biological considerations.)

Despite the mandatory tone of the language in Article 69(3), the provision for continuing developing LL/GDS participation in this situation leaves a good deal to be desired in terms of certainty and of assured access. The coastal and other concerned states "shall co-operate" to establish "equitable arrangements" to allow for developing LL/GDS participation "as may be appropriate in the circumstances and on terms and conditions satisfactory to all parties." This language offers only the most modest assurance to the developing LL/GDS that has an investment in, at least, vessels and

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11 Id.

12 Id.

gear and also perhaps in processing, storage. distribution, and marketing facilities that it seeks to protect by having access to a secure supply of a particular resource. Provision for continued participation "as may be appropriate in the circumstances" gives a very wide range within which to make arrangements. The larger the number of fishing entities in the face of a declining surplus, the smaller the share for each; thus it might be expected that the "appropriate" share would be relatively small and subject to further reduction, especially if the LL/GDS is one of several other fishing states. The problem could be made much more difficult if the LL/GDS has need for fish of a particular species, size, or condition or for fishing at a particular place or time.

It is fair to say that Articles 69 and 70 provide legal support for all LL/GDSs to seek access when the coastal state is willing to establish a surplus or, for developing LL/GDSs, when harvesting capacity is built up through joint ventures to take the entire surplus. It is also fair to say that the conditions for achieving that access could in fact impose insuperable obstacles. Whether the LL/GDS seeks access as a developing or a developed state, and whether its right is dependent on the existence of a surplus or not, the right to participate must be in conformity with Articles 61 and 62, the latter providing that the coastal state may establish the terms, conditions, laws, and regulations governing access. Accordingly it appears that actual access depends upon LL/GDS capacity to meet the coastal state's terms and conditions. These terms may be difficult or impossible to satisfy, especially if the coastal state establishes fees on a market basis.

Further, Article 69(2) provides that the states concerned are to establish the "terms and modalities of participation" through agreements. In seeking this agreement, Article 69(2) sets out an open-ended list of factors to be taken into account, the first being "the need to avoid effects detrimental to fishing communities or fishing industries of the coastal state." The same factors are to be taken into account in implementing Article 69(3), where through joint ventures the coastal state is about to achieve the capacity to take the surplus itself. Accordingly, whether a particular LL/GDS can secure access depends on whether it can negotiate appropriate arrangements with the coastal state and others, bearing in mind the condition of coastal fishing communities and industries, the extent of fishing elsewhere by the particular LL/GDSs, the extent to which other LL/GDSs fish in the coastal state's EEZ, and the nutritional needs of the states concerned.

As noted above in discussing Articles 69(3) and 70(4), the developing LL/GDS must work out terms satisfactory to those concerned. If this cannot be achieved, it would have no participation. Its remedy in this case would be compulsory conciliation under Article 297(3)(a). Although the LL/GDS is not completely without recourse, this remedy is not likely to be very helpful.

In summary, Articles 69 and 70 do not provide for an effective right of access to an adjoining state's EEZ fishery, but if a surplus is available and cannot be taken by a coastal states's indigenous capacity, Articles 69 and 70 give the LL/GDS (in the latter case only if it is a developing one) a claim to secure access to it. States making such a claim face the pitfalls and difficulties of negotiations to reach bilateral, subregional, and regional agreement on terms and conditions satisfactory to the coastal state and others.

Developing states in the region or subregion. The reference in Article 62 to developing states in the subregion or region is the third item on this nonexhaustive list of relevant factors for the coastal state to take into account in giving access to other states to its EEZ. If, as previously noted, the LL/GDS effectively possesses only a right to negotiate for access on terms satisfactory to the coastal state, then other developing states in the region have even less legal claim to consideration. It must be said, however, that these and other developing states might still be able to negotiate access, in preference to the states stipulated in Articles 69 and 70, if they are able to agree to better terms than the minimum the coastal state will accept. It must be emphasized that the coastal state has complete discretion to set the terms and conditions for access to its EEZ. Thus, it is solely up to the coastal state under Articles 62,69, and 70 to choose which state or states are given access.

This interpretation of the relevant articles is not shared by all observers. The view has been expressed[13] that developing LL/GDSs are given a preference or priority under Articles 69 and 70. meaning apparently that the coastal state must give them access even though other states might offer better terms. This position cannot be squared with the discretion afforded coastal states under Article 62, which is expressly reaffirmed under Articles 69 and 70. Where contenders for participation in EEZ fishing are

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13 Id.

subject to identical terms and conditions, there is a basis for arguing the superior claim of the LL/GDS. When the coastal state can make better arrangements with a non-LL/GDS, the treaty leaves this choice to the coastal state. This seems to be the message of Articles 62, 69(3), and 70(4).

Economic dislocation. The final "relevant factor" mentioned in Article 62(3) is "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks." This factor could embrace two different categories of states: fishing states and those that have "made substantial efforts in research and identification of stocks." In either case, however, the legal consideration is the same. These states are the last mentioned in a nonexhaustive listing of states to consider in giving access. This order of arrangement contrasts sharply, and probably intentionally, with the proposal made by the United States that specifically provided for access to be given on the basis of certain priorities, the first of which was which states have traditionally fished a resource. Thus, if the order of enumeration in Article 62 is given legal weight, the factor of economic dislocation in habitual fishing states and researching states should have the lowest priority among those mentioned. As previously mentioned, however, the coastal state's choice of states to be given access is ultimately dependent on the terms and conditions it finds acceptable, and it may prefer a state in this fourth category. If any "order of priority" is suggested by the listing in Article 62(3), it appears to be vitiated by the discretionary authority of the coastal state to set the terms and conditions satisfactory to it.[14]

In this connection a good deal has been made by some U.S. government officials, in both the executive and legislative branches, of the alleged requirement of Article 62(3) that would obligate the coastal state to allocate portions of a surplus to states who show economic dislocation. Such an argument has no merit whatsoever, even if the activities of certain fishermen meet the criteria of habitual fishing in an EEZ. Even if no developing, landlocked, or geographically disadvantaged states sought access to the EEZ to compete with developed states seeking access, Article 62 imposes no obligation to give preference to any particular state or category of states.

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14 Compare the language in the Convention to the greater weight given to economic dislocation in the Fisheries Case (U.K. v. Ice.), 1974 I.C.J. 2.

Under the treaty, the coastal state alone determines the conditions of access (subject to Article 64 for Annex I species, as discussed below). No state can demand to be given access as a matter of right. Suppose a coastal state decides to allocate all of its surplus resources by auction to the highest bidder. If all the states who bid have habitually fished in the zone and one of them submits the highest bid, all but one will be denied access. This result is perfectly lawful under a treaty that gives the coastal state discretion to determine acceptable terms and conditions of access. Certainly a decision to maximize revenue from a surplus resource is a reasonable one and could not successfully be attacked as an abuse of right or as an objectionable abuse of discretion.

Indeed, it may be difficult to imagine practical choices regarding access that, if unrelated to politics, could be considered unreasonable. Article 62(3) expressly recognizes that in giving access the coastal state can take into account the significance of the EEZ's living resources to its "economy" and also to its "other national interests." These interests include political, military, educational, ecological, cultural, religious, or ideological concerns. States already employ controls over their fisheries to secure such objectives. In the face of the treaty's broad terminology, it would be difficult to demonstrate that the coastal state's authority over access can no longer be exercised to promote those interests.

Shared stocks. Article 63(1) concerns the situation in which stocks or "associated" stocks occur within the EEZs of two or more states, and provides that the states concerned "shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks...." It is made clear that both states retain sovereign rights over their respective zones by adding the phrase "without prejudice to the other provisions of this Part."

The problem dealt with in Article 63 is one that is not solved by the extension of national jurisdiction. In a sense, these management situations are left over after most fishery problems are transferred by the treaty to coastal state jurisdiction. The coastal state and the other states concerned are enjoined to seek to agree on conservation measures. To the extent that significant fishing on the same stock occurs within more than one state's waters, none is able to institute an effective management regime, and it will be necessary for them to coordinate conservation measures among themselves in order to achieve management objectives. The treaty imposes the obligation to

seek to agree on this coordination. Presumably a state can discharge that obligation by identifying problems that may require coordination with another state and by attempting to reach agreement on such coordination. States can thus comply with the treaty without succeeding in establishing an effective management regime.

Highly migratory species. The Convention deals with several instances in which marine fish or mammals are found both within national jurisdiction and in areas beyond any state's jurisdiction. Relevant treaty provisions include Articles 63(2), 64 (highly migratory species), 65 (marine mammals), 66 (anadromous species), 67 (catadromous species), the various articles that deal with high seas fishing, and the provisions on compulsory dispute settlement. The relationship between the right to fish on the high seas and coastal states rights and duties is especially interesting in this connection, because the treaty appears to introduce a radical change in high seas rights. I will not examine this question here except as it bears on highly migratory species. The latter issue is selected for discussion because it involves the United States particularly and raises the question of the relationship between high seas fishing rights and coastal states rights. It also involves the compulsory dispute settlement provisions.

What is the state of the law at present concerning the highly migratory species? This question bears particularly on tuna fishing and on the views of the United States on jurisdiction over such fishing. So far as the Convention is concerned, I believe it is quite clear in providing that the coastal state has sovereign rights within its exclusive economic zone over all living resources, and that this includes tuna as well as all other highly migratory species listed in Annex I. Coastal authority additionally includes such species as might also be considered highly migratory but are not listed in Annex I.[15] Annex I is in some respects a disaster because it is inaccurate from a technical perspective, omits species that are "highly migratory," and includes one category of animals (cetaceans) that cannot possibly be subject to Article 64, which is the only article that refers to Annex I. (Cetaceans are the subject of Article 65, whose substantive provisions are wholly inconsistent with Article 64 as I understand these provisions.)

At any rate, Article 56 provides that tuna are within coastal state authority but that the coastal

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15 E.g., wahoos, bonitos, pilchards, butterfly kingfish, Dall's porpoise, and jack mackerel.

state must exercise its authority in accordance with Article 64(1), which declares that the coastal state and distant-water fishing nations "shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone." Article 64(2) provides that this paragraph applies "in addition to the other provisions of this Part." I have heard no explanation of these words that reveals a hidden meaning in what seems plainly to be said: Articles 56. 61, and 62 apply to highly migratory species, along with other general provisions of Part V, and the duty to cooperate is in addition to the authority of the coastal state under these articles.

The requirement of cooperation does significantly alter the coastal state's management authority under the treaty. As I understand it, the coastal state cannot simply promulgate the allowable catch. domestic harvesting capacity, terms and conditions of access, and specific allocations to fishing states, as it is permitted to do for other species of fish in the EEZ. If "cooperation" is to have meaning in this context, the coastal state and the fishing states must discuss the information on which these decisions are made. not only for the portion of the stock found within the EEZ but for the entire stock subject to exploitation within and beyond the EEZ. Similarly, the distant-water fishing nation that harvests fish on the high seas beyond the EEZ cannot simply proceed to take fish without having previously cooperated with the coastal state regarding conservation and utilization. Such cooperation would seem to require concerted efforts to identify the best available information on the status of the stocks, the measures needed to maintain these stocks at appropriate levels, and the shares of the proceeds of fishing (however measured and in whatever form exchanged) the various participants receive. If these interactions lead to agreed results, there would appear to be no controversy under Article 64.

The real problem of Article 64 arises if cooperation does not produce agreed results before those concerned must begin harvesting. In that event, it seems to me that Article 64 and the other relevant provisions permit the coastal state to take action to achieve conservation and utilization within its EEZ, taking into account the entire stock subjected to exploitation. This is a minimal interpretation of coastal state authority under Article 64--it is also subject to a wider meaning in conjunction with Article 116, which provides that the right to fish on the high seas is subject to the rights, duties, and interests of the coastal state under Article 64. This combination

of provisions might be interpreted in various ways, but any interpretation would seem to extend coastal state authority to affect high seas fishing.

Article 64 has another entirely different dimension that deals with the means by which coastal and fishing states cooperate regarding conservation and utilization. The article identifies a number of possibilities, including the direct interaction of the states concerned, use of one or more international organizations, or a combination of the two.[16] Private associations representing direct participants in the fishery may also play a significant role in the interactions, but this option is not specifically contemplated in Article 64. The most significant point to be made about the means of cooperation is that the states concerned are not bound to any one system or method but can establish such means as they are able to agree upon. In view of the several approaches that have characterized past tuna management, it might be expected that different methods will be selected by different groups of states.

Customary International Law of Fisheries

The questions posed about the United States in the introduction to this paper also require consideration of the customary law of the sea. The critical issues are the scope and extent of coastal authority over fisheries and the coastal state's obligations regarding foreign access to its fisheries.

If the detailed provisions of the Convention discussed here were also considered to be customary law, there would be no need for further examination of these questions. I do not, however, believe this is the case. State practice, as documented by national legislation, indicates that except for the fundamental point that coastal states are entitled to claim and exercise sovereign rights over living resources within 200 miles, the major provisions of the treaty have not found their way into customary law by this route. In particular, state practice provides no basis for inferring general acceptance of any customary law concerning the following: allowable catch, determination of harvesting capacity, access to a surplus, endangering a target species, safeguarding associated or dependent species, identification of such species, prohibiting the initiation of a high seas fishery on anadromous species, a requirement that high seas fishing states recognize or defer to coastal states rights, duties, and interests concerning highly migratory species or straddling stocks, or a require-

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16 See pages 351-61 infra.

ment that coastal states cooperate with high seas fishing states in utilization and conservation of highly migratory species within a coastal state's EEZ. Nor can one find national legislation that recognizes obligations regarding LL/GDSs.

Some may consider that the Convention expresses customary law because it has been widely signed and includes principles that enjoyed a consensus in the negotiations. Perhaps the treaty principles will come to be widely observed, but evidently the treaty is not now taken by states to mandate their behavior at the levels involved in the provisions I have summarized above. It is not daring to predict that it will be some time before state practice reflects many of these provisions. So far as I am aware, fishing states are not protesting coastal state actions regarding fisheries, and I would not expect such protests. Coastal state control is almost universally accepted and is mostly thought to be nearly absolute.

Only one comprehensive survey of national fishing legislation appears to have been made in recent years, by the United Nations Food and Agriculture Organization, recently updated (April, 1983).[17] The survey does not deal with all the matters listed in the previous paragraph, but it does unequivocally show that national legislation provides no evidence that states generally believe they are obliged to determine an allowable catch or provide foreign states with access to a surplus. A few states provide for foreign access to a surplus, but even these do not expressly require granting such access. In practice foreigners still fish within EEZs around the globe, but there is no evidence that this is sought or permitted in recognition of a right of access to a surplus. Even in the major states that allow foreign access, such as the United States, there are strong movements afoot to eliminate legislative provisions requiring allocation of a surplus to foreign fishermen.

The two questions regarding access by the United States to foreign surpluses and the U.S. obligation to permit access to its own surplus fish can be answered briefly. Even if the United States were a treaty party, it would have no specific claim to access to a surplus in another state's EEZ, nor would it have an obligation to give that access to any particular state except as its own law requires. The treaty does not confer such a right on any particular state-party to

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17 G. Moore, Coastal State Requirements for Foreign Fishing (Paper for FAO Expert Consultation on the Conditions of Access to the Fish Resources of the EEZ, April 1983).

the treaty, except for the mostly ineffective rights of the landlocked and geographically disadvantaged states. This question is somewhat academic for the United States because, except for tuna fishing, it has little distant-water fishing capability. The U.S. tuna fleet largely operates in waters subject to other states' jurisdiction, and under customary law, as I understand it. it does not have a right of access to those waters even if there is a surplus. Under the treaty, access to a surplus depends primarily upon the policies of the coastal state concerned, as expressed in its laws and regulations and reflected in the terms and conditions it is willing to adopt regarding such access. Not least among the determinative conditions will be the amount the aspiring fishing state is willing to pay for the right of access.

It does not seem to me that the law outside the treaty confers any right of access by a particular state to a surplus either. Nothing in state practice supports a right of access by U.S. vessels to the surplus declared by other nations to exist in their EEZs. Customary law, as previously noted, does not recognize any more than does the treaty, that any particular state has a right of access to a surplus. It would be difficult to document that <u>any</u> state has a right of access to a surplus under customary law. Certainly there is no evidence in state practice that states feel compelled to determine whether there is a surplus; this is no different from the Convention's provisions on that point.

U.S. law provides that if the allowable catch in its EEZ exceeds domestic harvesting capacity, access shall be given to foreign fishing vessels, although not necessarily immediately. No particular state is considered to have a right of access, and actual allocations to foreign fishing fleets must be preceded by an expressed international agreement with the states concerned and are available only if several specific conditions relating to U.S. fishery interests are met. Continued access to a fishery is not guaranteed, even if an allocation is awarded. Under U.S. law access may be denied at any time and for reasons unrelated to fishing.

The Convention provides that other states are to be given access to a declared surplus of fish in a coastal state's EEZ; however, as noted in the preceding general discussion, there is no obligation under the Convention to declare such a surplus, whatever the biological condition of a fishery might be. If a surplus is declared, the coastal state determines the terms and conditions of access at its own discretion. United States policy is in compliance with these provisions.

Regarding current law on highly migratory species, it is my opinion that there is total agreement among states that highly migratory species are subject to coastal states jurisdiction as a matter of state practice. The exceptions are the United States and the Bahamas, which take the position that coastal state sovereign rights are inapplicable to tuna. So far as is known, these two states alone seek to distinguish tuna from other highly migratory species and contend that only tuna are not subject to coastal state jurisdiction. Thus it is apparent that state practice is uniform on most species that are considered to be highly migratory under Annex I of the Convention. To me it is amazing that the United States has taken this same position in official communications to the United Nations regarding the interpretation of Article 64 of the treaty, apparently without regard for the fact that the treaty contains no such distinction. If the United States is correct, and the treaty makes no provision for coastal state jurisdiction over tuna, surely it must be interpreted similarly for all other highly migratory species mentioned in Annex I. In that case the U.S. legislation is inconsistent with the treaty provision and with what the United States itself asserts, with good reason, is sound policy.

On the other hand, if the uniform practice of all nations on highly migratory species other than tuna is the correct interpretation of the treaty provision, i.e., that coastal states have sovereign rights over highly migratory species, then the U.S. position on tuna is anomalous and its use of economic sanctions against coastal states is inconsistent both with the treaty and with state practices. Either way the United States has placed itself in violation of international law.

It might be possible to escape this dilemma if the United States adhered to the views expressed in Prof. Anand's paper[18] that a single state whose interests are significantly affected by an alleged rule of customary law can by its opposition prevent the application of the custom to itself. So far as I know this is not the position of the United States--rather, its position is that there is no customary law establishing coastal state jurisdiction. So far as I am aware, the United States does not concede that such customary law exists. Furthermore, if it were conceded that the Convention reflected or embodied customary law, it is the U.S. position that Article 64 of the Convention cannot be interpreted to provide for sovereign rights over tuna. I do not know what, if any, view the United States

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[18] See pages 104-14 supra.

takes on the question of a single state's opposition to an alleged rule of customary law.

Whatever the view on this matter, it is arguable whether the U.S. position is that, because of its opposition, it would not be bound to coastal jurisdiction over tuna. As I understand the principle. the objecting nation must have consistently opposed the customary rule and its interests must be significantly affected, and there may be other conditions as well. The United States may not qualify on any count. First, it has definitely not consistently objected to coastal state jurisdiction over living resources in the EEZ. Instead, the United States has consistently supported such a principle, including its application to all highly migratory species of fish and mammals, with only one exception. That exception is tuna, and the objection purports to be based on the notion that an international approach is the only way to achieve effective management. This is a principled position, but its force is vitiated in this instance because the United States does not adopt that position for any other species for which it is also unquestionably relevant. What is at stake for the United States is not effective management, but bargaining leverage on behalf of its only distant-water fishing industry.

Second, there is reason to doubt that U.S interests are significantly affected by the recognition of coastal state jurisdiction over tuna. The assumption underlying this contention is that somehow coastal state jurisdiction is inconsistent with cooperation between coastal and fishing states through an international institution. There is simply no evidence to indicate this is true, and the proposition is inconsistent with most of what we know about international law today. Virtually all international cooperation rests on the assumption that the nation-states involved are "sovereign" with respect to the subject matter involved.

It also appears to me that the United States is in a poor position to continue to insist that coastal state jurisdiction is inconsistent with international cooperation in management. The recent agreement in the eastern tropical Pacific effectively recognizes coastal state jurisdiction within 200 miles while also establishing an international licensing mechanism. The United States' own behavior indicates that there is not necessarily incompatibility between coastal jurisdiction and effective international mechanisms for implementing agreed management measures.

Conclusion

The foregoing comments on the current state of the law on fisheries do not cast much light on the actual fishery management system that can be expected under

either the 1982 Convention on the Law of the Sea or under customary law. That is because coastal states have considerable discretion in management under either source of law and can be expected, at least initially, to adopt different approaches. This is one of the advantages of the decentralized system we now have. Coastal states are only now beginning to realize that fishery resources within their jurisdiction represent wealth that can be tapped for local benefit. The ways of doing this and the resources and skills required are also just now becoming known to coastal states. It can be expected that it will take some years for many coastal states to create a system of management that adequately serves genuine coastal interests. Distant-water fishing states also have real interests at stake, but they are not well protected under the new system and it is not unlikely that these interests may suffer until coastal states arrive at an appropriate management system.

DISCUSSION

Customary Fisheries Law

David Colson: I disagree with Professor Burke when he says there is no customary international law of fisheries right now.[1] In fact, fisheries is one of the few places in state practice where we have a fairly consistent practice concerning coastal resource jurisdiction. Although the details are different, most countries have established a general framework providing for the full utilization of the fisheries.

It is within the discretion of the coastal state to determine just exactly what that full utilization is, but most coastal states have devoted themselves to trying to fully utilize the resource. If they cannot utilize it themselves, they can make it available to others under terms and conditions that they set. That is basically what the Law of the Sea Convention says about coastal fisheries resources (Article 62). Many international agreements have been entered into by major states, along this line. The United States has about 16 of these agreements which relate to fisheries off our coast where other states have agreed to fish in accordance with our law, and we have several where we fish off the coast of other states consistent with their laws. The European community has acted similarly.

Enforceable Rights for Foreign Fishers in U.S. Courts

One of the interesting things that has happened as a result of the United States' 200-mile law is that the full weight of the U.S. legal system has borne down upon the management of the U.S. 200-mile zone. That

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[1] Professor Burke's analysis is at 332-36 supra.

means that there are lots of government rules and regulations concerning fishermen. This system has created enforceable rights for foreign fishermen in U.S. courts against the U.S. government. This opportunity may be unique in the world at this point. We have made our surplus fisheries available under strict terms and conditions at our discretion as a sovereign government, and once we have granted rights to foreign fishermen they are enforceable in U.S. courts.

I would also note that the National Marine Fisheries Service has begun to prosecute U.S. fishermen that fish unlawfully in foreign waters, particularly Mexican waters. When those fishermen come home, their catch is seized and they are subject to criminal penalties under the Lacey Act.[2] So we have been doing quite a bit to make this new legal regime governing fisheries meaningful within our system.

The Vague Terms in the Fisheries Articles

Jon Van Dyke: Professor Burke has discussed the provisions on fishing and conservation of living resources arguing that the terms used in the Convention are so vague and general that they do not serve to limit in any meaningful way the actions of coastal states. Some other observers, including Professor Louis Sohn of Harvard, now of the Georgia Law School, have argued that those terms are no more vague than many terms used in other fields of the law and that they may gradually attain meaning and become substantial restraints on actions.[3] The terms "optimum utilization" and "capacity to harvest" in Article 62 seem vague to us now, but they are not any more vague than "due process of law" or "equal protection" which now play very important roles in restraining governmental actions.

The phrases "optimum utilization" and "capacity to harvest" could become terms with a specific scientific meaning. In some of the discussions we have had in Honolulu recently with fisheries officials from Southeast Asia we have found an interest in working toward the development of a regional scientific body that could help nations make scientific determinations and thus provided an objective standard to deal with these potentially controversial matters.

These provisions may thus become meaningful both to help us conserve overfished species and to promote

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2 18 U.S.C. sec. 42 (1982).

3 Professor Sohn discussed these problems at the Environment and Policy Institute of the East-West Center in Honolulu in August 1983.

greater fish production where appropriate. If so, the question would then be raised whether nations not party to the Convention can have access to the surplus stocks in the waters of parties to the Convention.

Optimum Utilization

William Burke: The provisions of the Convention are ambiguous with respect to fisheries, but I believe this was quite deliberate. This ambiguity underscores that the coastal state has full authority. Coastal state decisions cannot be challenged through compulsory procedures (see Article 297(3)(a)). Jon Van Dyke has compared them in terms of generality to the notion of due process, but unlike other general concepts, we have no mechanism to work out what those terms might mean through a compulsory procedure. This is the big loss from the exclusion of compulsory procedures with respect to fisheries. The interpretations of these provisions cannot evolve over time or gain more specific scientific meaning.

The term "optimum utilization," for example, is general and properly so, because it is impossible to define in advance on a worldwide basis. The management of tens of thousands of extremely complex, very different fisheries that are to be managed for the benefit of either the world community as a whole or for coastal states requires very flexible standards. The United States has the equivalent of optimum utilization in its national legislation.[4] It is an extremely difficult job to reach any generalizations about what is the optimum yield on fisheries on coastlines that reach from Mexico to the Soviet Union on the Pacific coast of the United States. In the State of Washington, after 50-75 years we are still unable to work out allocations within that small part of the United States. Gunfire is still sometimes used to resolve disputes, which persist despite the constant use of the U.S. judicial system to try to resolve them.

The life of these fisheries is so close to the communities involved that it is extraordinarily difficult to resolve them by the very general principles that we have in our own national legislation. So I think it defies belief to imagine we could have come up with a system on the international level dealing with such terms as optimum utilization that would have provided any clear guidance for resolving disputes on a worldwide basis. I am not very discouraged about that. The Convention does present opportunities for coastal

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[4] See the definition of "optimum yield" in the Magnuson Fisheries Conservation and Management Act, as amended through Jan. 1983, 16 U.S.C. sec. 1802(18).

states to benefit, for experimentation to take place, for methods to be worked out by which these benefits can be realized to aid the poorer countries, and for conflicts to be resolved adequately when they arise.

Satya Nandan: Professor Burke has commented on the impreciseness of terms used in the fisheries articles. We heard from a number of technical advisers and fisheries experts during the negotiations, and I do not recollect anyone submitting a more precise definition of terms then those ultimately included in the Convention.

COSTS TO THE UNITED STATES IN FISHERIES BY NOT JOINING THE LAW OF THE SEA CONVENTION

by

Craig S. Harrison

INTRODUCTION

President Reagan's decision in July 1982 not to sign the Law of the Sea Convention does not appear to have been made on the basis of the net balance of gains and losses for the interests of the United States.[1] Rather, this decision seems to have been made largely because of objections to the deep sea mining regime,[2] which contained what was viewed as a dangerous precedent for future economic negotiations between developed and developing nations.[3]

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1 The White House officially announced that President Reagan had decided not to sign the treaty on July 9, 1982.

2 Metals markets are currently poor and mines throughout the world have closed or reduced production. The development of deep sea minerals may be several decades away. Wertenbaker, The Law of the Sea I, The New Yorker, August 1, 1983, at 38, 59. However, several signatory nations seem interested in registering claims under the regime established by the Convention.

3 Ratiner, The Law of the Sea: A Crossroads for American Foreign Policy, 60 Foreign Aff. 1006, 1008 (1982).

The Reagan administration argues that many of the rights the United States wants from the Convention have already become binding under the regime of customary international law.[4] Although most concerned about navigation and national security issues, the United States also wishes to claim other rights, such as a 200-mile exclusive economic zone (EEZ), on this basis. One prominent commentator has stated that the assumption that treaty provisions regarding the mobility of air and sea forces would become customary international law was never seriously questioned--it was taken for granted.[5]

Those who object to the Convention often assume that by signing it the United States would forego rights it already possesses in return for a package of compromises that limits its interests.[6] The fundamental problem with such an approach is that many of the rights the United States claims are not clearly possessed by it. A primary motivation for participating in the negotiating Conference was precisely that many of the rights the United States claimed were becoming increasingly ambiguous.[7]

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4 Id. at 1012. The Reagan Proclamation, claiming a 200-mile EEZ around the United States and its territories, is a tangible example of a claim of right emanating from the Convention. See Appendix A infra.

5 Ratiner, supra note 3, at 1011-12; but see discussion at 54-55 and 294-306 supra.

6 For example, a spokesperson for the U.S. fishing industry stated that U.S. domestic law is far more favorable to U.S. fishermen than the Convention. This view ignores the basic question of whether the United States asserts rights that are not recognized by international law. Hearings on the Status of the Law of the Sea Treaty Negotiations Before the Subcommittee on Oceanography and the House Committee on Merchant Marine and Fisheries [hereinafter cited as 1982 House Hearings], 97th Cong., 1st Sess. 268 (1982) (statement of Lucy Sloan, Executive Director, National Federation of Fishermen).

7 For example, issues such as free passage through straits and the waters of archipelagoes and the demarcation between the high seas and national waters were hotly contested. See generally
(footnote continued)

This paper discusses certain costs related to fisheries that will be incurred by the United States by not joining this widely recognized treaty on the law of the sea. The United States may sacrifice many important advantages in these areas by remaining outside the Convention.

International legal scholars have pointed out that during the next twenty years legal issues concerning the oceans are likely to be confusing.[8] Overlapping and intersecting strata of treaty and customary law and of old and new legal norms will exist. Both the applicability of these treaties and norms and the question of which states will be bound by them will be controversial matters.

The International Court of Justice (ICJ) has rendered several lengthy opinions concerning the rights of states to fishery resources.[9] The 1958 Convention on Fishing and Conservation of Living Resources of the High Seas,[10] to which the United States is a party, will have some authority even after the Convention

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Stevenson & Oxman, The Preparations for the Law of the Sea Conference, 68 Am. J. Int'l L. 1 (1974); The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session, 69 Am. J. Int'l L. 1 (1975); The 1975 Geneva Session, 69 Am. J. Int'l L. 763 (1975); and Oxman, The Third United Nations Conference on the Law of the Sea: The 1976 New York Session, 71 Am. J. Int'l L. 247 (1977); The 1977 New York Sessions, 72 Am. J. Int'l L. 57 (1978); The Seventh Session (1978), 73 Am. J. Int'l L. 1 (1979); The Eighth Session (1979), 74 Am. J. Int'l L. 1 (1980); The Ninth Session (1980), 75 Am. J. Int'l L. 211 (1981); The Tenth Session (1982), 76 Am. J. Int'l L. 1 (1982).

8 See generally Vitzthum, The Baltic Straits in C. Park (ed.), The Law of the Sea in the 1980s, 14 L. Sea Inst. Proc. 537 (1980); Gamble, Where Trends the Law of the Sea? in id. at 3; Rosenne, The Reconciliation of the Old and the New Law of the Sea in id. at 63.

9 For example, Fisheries (U.K. v. Nor.), 1951 I.C.J. 2, 132, Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 2, and Fisheries Jurisdiction (W. Ger. v. Ice.), 1974 I.C.J. 173.

10 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

enters into force.[11] The 1982 Convention contains no provision creating a general suppression of the 1958 Convention, so the latter remains a valid treaty for parties to it that do not become parties to the Law of the Sea Convention.[12] The United States is a party to several bilateral and multilateral fisheries treaties with various nations in the Pacific. Even if the United States were a party to the 1982 Convention, many of its rights and duties concerning fisheries under these treaties would be ambiguous, but because it has not joined the Convention, its rights are especially vague. It is unclear to what extent the process of negotiating the Convention, the claims of numerous nations for 200-mile EEZs,[13] and the dicta in a recent ICJ opinion[14] have given birth to customary rights in the EEZs.[15] The resolution of questions concerning fishery law will be different for species confined to

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11 Allott, Power Sharing in the Law of the Sea, 77 Am. J. Int'l L. 1, 13 (1983).

12 Article 311(1) states that the 1958 Conventions are superceded for parties to the 1982 Convention.

13 For example, see Kruegar & Nordquist, The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin, 19 Va. J. Int'l L. 321 (1979). The authors cite 40 instances of 200-mile claims in this region. The UN Law of the Sea Secretariat lists 81 states with 200-mile EEZs, fishery zones, or territorial seas as of January 1984.

14 Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 1, 115.

15 The ICJ has pronounced four requirements that must be met before a new customary norm or customary rule of international law may be proclaimed:

(1) The practice must have been general or universal. Fisheries (U.K. v. Nor.), 1951 I.C.J. 2, 132.

(2) Such practice must have been "virtually uniform in the sense of the provision invoked." North Sea Continental Shelf (W. Ger. v. Den; W. Ger. v. Neth.), 1969 I.C.J. 3, 43.

(Footnote continued)

an EEZ, highly migratory species,[16] and anadromous species.[17]

Species Confined to an EEZ

The United States has over two million square nautical miles within its EEZ.[18] This area is fished by many nations and provides as much as 20 percent of the world's harvested marine resources.[19] Fisheries

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[15](continued)

(3) A sufficient period of time must have passed to permit widespread practice by states whose interests are specially affected. North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth), 1969 I.C.J. 3, 42.

(4) A psychological element must be present such that the practice is "carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation". North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 44.

[16] Highly migratory species are defined in Annex I of the Law of the Sea Convention. Included are 8 species of tunas, 9 species of marlins, 7 families of whales, and many others. The United States has adopted a different definition in its domestic legislation, defining highly migratory species as including only tunas. 16 U.S.C. sec. 1802(14) (1982).

[17] Anadromous fishes are those that spawn in fresh water on land and migrate to the ocean for part of their life cycle. The most important of these are the many species of salmon.

[18] See President Reagan's March 1983 proclamation, Appendix A infra; see also U.S. Dep't of Com., Calendar Year 1981 Report on the Implementation of the Magnuson Fishery Conservation and Management Act of 1976 at 1 (1982).

[19] U.S. Dep't of Com., id., at 1.

imports, however, account for about 10 percent of the U.S. balance of trade deficit.[20] The U.S. government is aggressively promoting fisheries development,[21] which would eventually limit the large amount of foreign fishing activity within the U.S. EEZ.[22] Representatives of the U.S. fishing industry view the Convention from a limited perspective, and seem to be primarily concerned with achieving the "best deal" for established U.S. fisheries.[23] They appear to ignore the opportunities presented by the Convention to establish new fisheries.

Part V of the Convention provides extensive rights, jurisdiction, and duties for a coastal state in its EEZ including provisions concerning fishery management, allocation to users, and conservation. The coastal state has virtually exclusive authority to make decisions on such issues (Articles 56, 61, and 62), and is obliged to

- o determine allowable catch (Article 61(1)) and optimum utilization (Article 62(1));
- o determine its capacity to harvest the living resources of the EEZ (Article 62(2)); and
- o give other states access to any surplus (Article 62(2)).

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20 Hearings on U.S. Foreign Policy and the Convention on the Law of the Sea Before the House of Representatives Comm. on Foreign Affairs, 97th Cong., 2nd Sess. 33 (1982) (statement of Congressman Don Young).

21 U.S. Dep't of Com., supra note 18, at 59.

22 For example, in 1979 Canada, Japan, Mexico, Poland, Korea, Taiwan, and the Soviet Union harvested fishery resources in the U.S. EEZ in Alaska. Over 1.5 million metric tons were taken, of which Japan accounted for about 1.1 million metric tons. Jones, Freedom of Fishing in Decline: the Fishery Conservation and Management Act of 1976 and the Implications for Japan, 11 Cal. W. Int'l L. Rev. 52, 107-10 (1981). The largest and most valuable foreign fisheries are pollock and flounders. U.S. Dep't of Com., supra note 18, at 82.

23 1982 House Hearings, supra note 6, at 323 (statement of Lucy Sloan).

Primary management objectives are to prevent overexploitation of living resources, ensure protection of associated marine species, and provide for the harvest of the total allowable catch.

The Convention requires that "all relevant factors" be taken into account in the allocation of surplus stocks to foreign nations (Article 62(3)). These factors include the significance of the resource to the economy of the coastal state, the needs of landlocked or geographically disadvantaged states, the requirements of developing states in the region, and the need to minimize economic dislocation of distant-water fishing nations (Article 62(3)). Because this formula is the result of a compromise and is vague,[24] a coastal state has the flexibility to justify virtually any decision to allocate its surplus to any nation it prefers.[25] It is unlikely that developing nations would be able to compete with distant-water fishing nations in the "auctions" for fishing licenses held by coastal states.[26]

A coastal state might jeopardize an otherwise profitable domestic fishery if it allows foreign nations to harvest resources within its EEZ. A fishery for a relatively unexploited stock has a high catch per unit of effort, which declines when the number of fishermen increases.[27] Fishing industries of coastal states might incur increased costs and diminished profits when they share surplus stocks.[28] The Convention gives coastal states sole discretion to set surplus levels, but they cannot act arbitrarily. Dispute settlement provisions can be invoked only when a nation arbitrarily refuses to allocate a surplus it has declared to exist.[29] Although such disputes are subject only to nonbinding conciliation, the process of fact finding and the promulgation of a report are likely to encourage states to act responsibly.

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24 See text accompanying notes 37-77 infra.

25 Balasubramanian, Fishery Provisions of the ICNT, Part 2, 6 Marine Pol'y 27, 40 (1982).

26 Id.

27 Id. at 30.

28 Id.

29 See Article 297(3)(b) of the Convention.

The Magnuson Fisheries Conservation and Management Act (MFCMA)[30] established in U.S. law many of the rights that emanate from the Convention. It established a 200-mile fishery conservation zone, which President Reagan has more recently transformed into an EEZ.[31] Like the Convention, the MFCMA allows foreign nations access to surplus fish stocks and charges fees for this right.[32] Foreign nations are allowed access to the EEZ only pursuant to a governing international fishery agreement (GIFA),[33] and recent GIFAs have eliminated consideration of economic dislocation of historic fisheries as a criterion in the allocation process.[34] This aspect of U.S. law may be somewhat at variance with Article 62(3) of the Convention.

The primary cost to the United States of remaining outside the Convention is in the dispute settlement area.[35] The U.S. fishing industry has expressed concern that foreign states may be able to use the dispute settlement provisions of the Convention to secure advantages in the U.S. EEZ.[36] U.S. fishermen

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30 16 U.S.C. secs. 1801 et seq (1982).

31 Appendix A infra.

32 Almost $18 million were collected in license fees in 1981. U.S. Dep't of Com., supra note 18, at 87.

33 16 U.S.C. sec. 1821(c) (1982).

34 Statement of Theodore G. Kronmiller, deputy assistant secretary for oceans and fisheries affairs, U.S. State Dep't, at the Fishery Law Symposium, Seattle, Wash., Oct. 15, 1982.

35 A second cost might be the uncertainty concerning the existence of an EEZ for a state that does not join the Convention. The Convention envisages the EEZ as a source of complex and interrelated rights and duties. It could be argued that EEZs exist only as contractual rights and that to have the benefit of a 200-mile zone a state must accept the burdens of the Convention. However, many commentators argue that the EEZ has already emerged as a customary norm in international law. Macrae, Customary International Law and the United Nations' Law of the Sea Treaty, 13 Cal. W. Int'l L. Rev. 181 (1983); Comment, Fishery and Economic Zones as Customary International Law, 17 San Diego L. Rev. 661 (1980).

36 See, for example, 1982 House Hearings, supra note 6, at 447-59.

oppose interference in their EEZ by distant-water fishermen, but they are subject to far more "outside" interference as a nonparty to the treaty than as a party. The Convention allows the most important fishery decisions to be left to a coastal state's discretion.[37] As a party to the Convention, even if the United States manifestly failed to comply with its obligations to conserve stocks or arbitrarily refused to determine allowable catch or to allocate a surplus, it would be subject only to nonbinding conciliation.[38] The U.S. fishing industry would fare better with definite procedures that settled fishery disputes strictly on a fisheries basis. Without such procedures, disputes concerning allocations of surplus stocks become embroiled in general foreign policy concerns, and fishery objectives could be traded for other foreign policy issues. For example, fishing allocations to Japan were traded for Japan's promise to boycott the 1980 Olympic Games in Moscow to protest the Soviet invasion of Afghanistan.[39] Fishermen would be unrealistic not to expect that similar bargains will occur in the future. If the United States were a party

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37 Article 297(3)(a) states in part:

> the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

38 The United States would still be subject to the binding decision of a special commission under the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, arts. 9-11, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285. Such disputes might include allocation of catches in the EEZ. The United States might denounce this Convention if it were faced with this possibility.

39 1982 House Hearings, supra note 6, at 314 (statement of Lucy Sloan). The United States may reduce fishery allocations to Japan if Japan continues commercial whaling after the IWC Moratorium begins at the end of 1985. Walsh, Can Fish Quota Save the Whales?, 224 Science 850 (1984).

to the Convention, it is likely that allocations would be based increasingly on technical criteria.

Highly Migratory Species

Migratory species of fish present special problems in management and conservation.[40] Such species typically spend parts of their life cycles in the EEZs of many different states, and consequently cannot be managed effectively through unilateral coastal state action.[41] Both the Convention (Article 64) and U.S. domestic law[42] include special provisions for highly migratory species. Opportunities for fishery expansion with these species, especially skipjack tunas, exist in the western, central, and south Pacific, and the U.S. fleet is rapidly expanding into these areas.[43] This is the most important long-distance fleet in the United States; 99 percent of its current catch comes from waters beyond the U.S. EEZ.[44]

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40 Joseph, The Management of Highly Migratory Species, 3 Marine Pol'y 275 (1977); see generally J. Joseph & J. Greenough, International Management of Tuna, Porpoise, and Billfish (1979).

41 Id.

42 Tunas are specifically excluded from the U.S. Fishery Conservation Zone because the United States argues that tunas cannot be effectively managed by coastal states alone. 16 U.S.C. secs. 1813 (1982).

43 U.S. fishermen began exploratory fishing in the area in the late 1960s. Orbach, Fishing in Troubled Waters, 22 Env't 33, 34 (1980). By 1982, as many as 23 vessels, representing 20 percent of the total capacity of the U.S. tuna fleet, operated exclusively in this area. 1982 House Hearings, supra note 6, at 462 (statement of August Felando, president, American Tunaboat Association). The number is now doubling each year, and 50-60 were fishing there in 1983. Statement by Dr. George Coulter, deputy director, South Pacific Forum Fisheries Agency, at the East-West Center, Honolulu, Hawaii, Sept. 14, 1983.

44 Over 90 percent of the tuna caught is consumed in the United States, Japan, and Western Europe. It is unlikely that developing states can afford to compete at the market level with higher-income states for significant quantities of tuna. 1982 House Hearings, supra note 6, at 462-63 (statement of August Felando).

U.S. policy concerning highly migratory species is widely recognized to be out of step with state practice throughout the world.[45] The United States defines highly migratory species in a manner that defies both science and the Convention. The U.S. definition is limited to tunas,[46] whereas the Convention lists seventeen categories, including marlins, sailfishes, swordfishes, porpoises, and whales, in addition to tunas (Annex 1). Developing nations in the tropical Pacific resent a fishery policy in which U.S. officials argue that tunas should not be managed by coastal states but then assert management over other species of highly migratory fish in order to appease domestic interest groups.[47]

U.S. policy on tunas is causing increasing problems with many coastal states.[48] The Pacific island nations view U.S. tuna policy as a confused, inconsistent effort to protect a single U.S. industry

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45 David G. Burney, U.S. Tuna Foundation, agrees that U.S. law is out of step with other coastal nations, but argues that the U.S. position is not necessarily wrong nor antagonistic to the Convention. He claims that both are based on the principle that tunas can only be effectively managed through international cooperation. 1982 House Hearings, supra note 6, at 473 (statement of David G. Burney).

46 16 U.S.C. sec. 1802(14) (1982).

47 The Foreign Minister of Papua New Guinea noted that the United States "claims management rights over marlin, another migratory species, in order to safeguard the interests of its sports fishermen." Pac. Islands Monthly, July, 1979, at 83.

48 The U.S. government actively protects its flag vessels when they are arrested in the EEZs of other nations. The Fisherman Protective Act, codified at 22 U.S.C. secs. 1971-79 (1982), was passed in 1954 and requires the Secretary of State to take immediate steps to aid crews of vessels seized by foreign countries on the basis of rights and claims not recognized by the U.S. government. The act requires the Secretary of the Treasury to reimburse vessel owners for any fines paid. This provision seems particularly anachronistic in view of a stated national policy that disfavors government subsidies to private industry. The tuna industry can readily insure itself for fines that are incurred when vessels are caught fishing in the EEZs of other nations.

at the expense of their sovereignty as nations under the Convention.[49] One commentator believes that a new tuna war is brewing in the western tropical Pacific.[50] The South Pacific Forum Fisheries Agency (FFA), established in 1979 to coordinate regional fishing concerns, excludes the United States from participation.[51] The Inter-American Tropical Tuna Commission (IATTC) has managed tuna fisheries in the eastern tropical Pacific since 1950. Mexico, Equador, and Costa Rica have recently withdrawn from this commission, largely because of disputes concerning U.S. tuna policy.[52]

Many U.S. fishermen, fishery managers, and fishery biologists believe it is time to bring U.S. tuna policy into conformity with that of the other nations of the world. For decades, U.S. policy has been dominated by the wealthy Southern California distant-water tuna fleet. Recently, constituencies have begun to emerge that view U.S. interests from the perspective of a coastal state rather than a distant-water fishing state. Concern for the viability of the giant bluefin tuna fishery from the Gulf of Mexico to New England is causing some fishermen and fishery managers to question the wisdom of excluding tunas from U.S. jurisdiction in its EEZ.[53] The Commonwealth of the Northern Marianas,

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49 Larson, The United States Without The Law of the Sea Treaty: Opportunities and Costs, presented at Center for Ocean Management Studies, Univ. Rhode Island, June 12-15, 1983.

50 Id. at 1.

51 Van Dyke & Heftel, Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency, 3 U. Hawaii 1. Rev. 1. 4-5 (1981). Japan and other distant-water fishing nations are also excluded by art. 2 of the South Pacific Forum Fisheries Agency Convention.

52 Mexico and Ecuador withdrew in 1978, followed by Costa Rica in 1979. Id. at 21.

53 See generally Hoover, A Case Against International Management of Highly Migratory Fish Resources: The Atlantic Bluefin Tuna, 11 B.C. Envt'l Aff. L. Rev. 11 (1983). At one time bluefin tunas may have numbered in the millions, but some estimates put the stock as low as 100,000 today. Comment, Fisheries Management in the Gulf of Mexico: Impact of the Tuna Exception to the Fishery Conservation and Management Act of 1976, 42 La. L. Rev. 705, 714 (1982).

the territories of Guam and American Samoa, and the State of Hawaii desire control over the tunas in their EEZs. Tunas in those areas represent an underutilized and valuable resource. Guam and American Samoa have protested to Washington about the lack of control and protection of tunas,[54] and the Western Pacific Regional Fishery Management Council has requested that Congress include tunas within the management purview of the fishery councils. In particular, the council noted that international arrangements to manage tunas are impossible in the Pacific as long as the United States continues to pursue a maverick tuna policy.[55]

The waters in the region of the South Pacific Commission may be the location of one of the world's largest fisheries.[56] Tunas are clearly the most valuable proven marine resource in the area, and the small, developing island nations are understandably concerned about the development of this resource. The Convention is vague concerning the roles of coastal states and international organizations in the management and harvest of stocks of highly migratory fishes. Article 56(1)(a) gives coastal states "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living..." within the EEZ.

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54 Larson, supra note 49, at 14.

55 Chairman Wadsworth Yee of the Western Pacific Regional Fisheries Management Council wrote the following to the U.S. Senate's Subcommittee on Commerce, Science, and Technology:

> The exclusion of tunas from the management authority of the Council works a hardship against the Western Pacific region, where tuna resources offer the greatest opportunity for full domestic utilization of underutilized species....As long as the U.S. policy on tuna remains so divergent from that of the Pacific island nations, the Western Pacific Council will have difficulty in promoting international arrangements within the Western Pacific to accomplish the purpose of the Magnuson Act.

Letter from Wadsworth Yee to Senator Bob Packwood, (March 16, 1983).

56 Between 2 and 4 million metric tons are estimated to be available annually. Larson, supra note 49, at 9.

However, coastal states must give "due regard to the rights and duties of other States...." (Article 56(2)). Article 64 directs coastal states and states whose nationals fish for highly migratory species in a region to "co-operate directly or through appropriate international organizations" to ensure conservation and to promote optimum utilization both within and beyond the EEZ. Where no international organization exists, coastal and distant-water states must establish one.[57]

The uncertain treatment of highly migratory species in the Convention is no accident--the issue represents a major disagreement by the participants that was never fully resolved.[58] The predominant view was that tunas should be treated exactly the same as other living resources governed by the coastal state when within its EEZ.[59] Article 64 preserves coastal state authority but requires cooperation through a regional agency to ensure conservation and optimum utilization in addition to other provisions (Article 64(2)). In the event that regional cooperation reached an impasse, coastal states are authorized to engage in unilateral action with regard to conservation, exploitation, or management.[60]

The United States is subject to four costs related to tuna because of its nonparticipation in the Convention. The most important problem is the impasse over

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57 The FFA interprets Article 64 to allow coastal states and distant-water fishing nations to cooperate in one of two ways: either directly or through an international organization. Their position is that cooperation with distant-water fishing nations can best be effected by direct consultation between states concerned, and does not require an expanded version of the FFA or the creation of a new organization. Letter from Tony Slatyer, Legal Officer, FFA. to Craig Harrison (February 17, 1984).

It seems more likely that "direct cooperation" is intended for management of those highly migratory species where only a few nations have an interest and where the creation of an international organization would be cumbersome. An example might be the North Pacific fishery for sauries, in which the primary fishing nations are Japan and the Soviet Union.

58 Van Dyke & Heftel, supra note 51, at 52.

59 Burke, U.S. Fishery Management and the New Law of the Sea, 76 Am. J. Int'l L. 24, 41 (1982).

60 Id. at 63.

the establishment of an effective international organization that can manage tunas on a regional basis. U.S. officials and the U.S. tuna industry recognize the need for international management of this resource. Congressman John Breaux has expressed concern that management of tunas by international agreement is being seriously eroded,[61] and the President of the American Tunaboat Association has stated that claims by coastal nations of exclusive rights to tunas in their EEZs might undermine conservation of fishery resources.[62]

The largest barrier to international cooperation in tuna management is U.S. tuna policy. It is primarily this position that has created the recent problems in the IATTC and has denied the United States admission to the FFA.[63] It is unlikely that broad-based international management will occur in the Pacific basin until the United States becomes a party to the Convention or accepts its regime regarding migratory fishes.[64] Although the Convention does not prohibit nonparty states from participating in international management and conservation regimes,[65] the recent problems with developing nations in the South Pacific indicate an unwillingness by many states to cooperate with the United States. The situation would be improved if the United States recognized the tuna regime that has been established by the Convention, even as a nonparticipant. However, some states might retain hostility toward the United States because of its policies on the Convention. Such states may refuse to cooperate in regional fishing organizations with the United States as a means of punishment.

The United States has already begun to change its tuna policy on a piecemeal basis. Recent licensing plans that permit U.S. vessels to fish for tunas in the

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61 Hearings on the Law of the Sea Negotiations Before the Subcomm. on Arms Control, Oceans, International Operations, and Environment of the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 146 (1981) [hereinafter cited as 1981 Senate Hearings].

62 1982 House Hearings, supra note 6, at 461-62 (statement of August Pelando).

63 See text accompanying notes 49 to 53 supra.

64 See statement by Satya Nandan at 385-86 infra.

65 1982 House Hearings, supra note 6, at 473 (statement of David G. Burney, U.S. Tuna Foundation).

EEZs of Costa Rica,[66] Panama,[67] the Trust Territory of the Pacific,[68] and, potentially, Mexico[69] tacitly recognize the rights of coastal nations to exercise some control over tunas. Widespread cooperation is critical to the interests of the United States,[70] and accepting the Convention is the best means by which the United States can play an effective role in tuna management. Article 64 requires coastal states to cooperate with competent international organizations. Continuing a maverick policy not only denies reality, it undermines the long-term interests of the U.S. tuna industry.

A second cost to the United States by remaining outside the Convention concerns the dispute settlement provisions. Unlike many fishery disputes, a dispute concerning an alleged lack of cooperation through an appropriate regional organization is subject to binding arbitration (Article 287(3)).[71] Although Article 56 gives coastal states sovereign rights to exploit and manage fisheries, this right is subject to other duties provided for in the Convention (Article 56(1)(c)). The requirement in Article 64 to cooperate through appropriate international organizations to conserve stocks of highly migratory species throughout the region is precisely such a duty. The discretion of a

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66 Larson, supra note 49, at 7.

67 Id.

68 1982 House Hearings, supra note 6, at 466 (statement of August Felando, American Tunaboat Association). The agreement with the Trust Territory (Palau, the Marshall Islands, and the Federated States of Micronesia) was made by the American Tunaboat Association, which represents 90 percent of the U.S. purse seine fleet.

69 The United States has been holding meetings with Mexico, Costa Rica, and Panama to discuss a regional licensing scheme. Statement of Theodore G. Kronmiller, deputy assistant secretary for oceans and fisheries affairs, U.S. State Department, at the Fishery Law Symposium, Seattle, Wash., October 15, 1982.

70 1982 House Hearings, supra note 6, at 473 (statement of David G. Burney, U.S. Tuna Foundation).

71 Article 287(1) states that if both parties to the dispute have chosen another means of dispute settlement, that means shall apply.

coastal state to determine its total allowable catch and the allocation of surpluses in its EEZ is normally subject only to nonbinding conciliation dispute settlement procedures (Article 297(3)). However, a refusal by a coastal state to cooperate, or its insistence upon setting unreasonably high catch levels in its EEZ, might undermine the rights of other nations in the region. For this reason, binding dispute settlement procedures are necessary and have been provided in the Convention.[72]

The President of the American Tunaboat Association has cited Mexico's refusal to cooperate with the IATTC to limit its tuna catch as an important problem in tuna management.[73] This situation demonstrates the need to have leverage over other states in order to equitably and rationally allocate the amounts of tuna that may be caught each year. The Convention provides for conciliation if a coastal state has manifestly failed to ensure proper conservation and management measures or has arbitrarily refused to determine allowable catch or to allocate its surplus stocks to other states (Article 297(3)(b)). Although conciliation is nonbinding,[74] it can function to produce negotiated settlements. A party that did not negotiate in good faith (Article 300) could be subject to binding dispute settlement procedures.[75] Most important, a state that did not cooperate with distant-water fishing nations would be in violation of the "shall co-operate" provisions in Article 64. Because a lack of cooperation could undermine not just the proper management of living resources in the EEZ (Article

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72 Id. at Part XV, section 2, generally provides for compulsory procedures entailing binding decisions. However, Part XV, section 3, provides limitations on binding procedures for disputes that concern fisheries in the EEZ under art. 297(3). Overfishing a regional fishery resource in a state's own EEZ arguably does not fall within the exceptions under Part XV, section 3.

73 1982 House Hearings, supra note 6, at 464 (statement of August Felando).

74 1982 House Hearings, supra note 6, at 474 (statement of David G. Burney, U.S. Tuna Foundation).

75 Under Article 287, a state party to the Convention may choose one of four dispute settlement procedures. If all states in a dispute have not chosen the identical procedure, binding arbitration under Annex VII is used.

297(3)(b)(i)) but also of resources that are regional, the binding dispute settlement procedures of Part XV could be invoked.[76] As a party to the Convention, the United States would be in a favorable position to ensure that Mexico or any nation would not take more than its fair share of the regional tuna resources.

A third potential loss to the United States as a nonparticipant in the Convention is access to the surplus tuna stocks of coastal nations in the Pacific. Each coastal state is required to give access to other states to catch the surplus stocks the coastal nation does not have the capacity to harvest itself (Article 62(2)). In giving access, the coastal state is required to "take into account all relevant factors" (Article 62(3)), but its discretion regarding allocation is essentially unreviewable (Article 297(3)(a)) unless it arbitrarily refuses to make such an allocation (Article 297(3)(b)(iii)). By remaining outside the Convention, the United States may be disfavored in the allocation of surplus stocks. As a party, the United States could assert under Article 62(3) several factors in favor of access: (1) substantial effort expended in research and stock identification, (2) historical tuna fisheries, and (3) potential economic dislocation of its tuna fleet.[77] These arguments are weakened considerably when asserted by a nation that refuses to join the Convention. The FFA gives priority access for surplus stocks to the members of the region.[78] To the extent that Japan, Korea, Taiwan, and the United States compete for access, the FFA could view Japan, Korea, and Taiwan as more reliable nations with which to do business because they are signatories to the Convention. Other factors

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76 If only resources in the EEZ were involved, this article would merely invoke conciliation.

77 Although this article specifies nationals who have "habitually fished in the zone...." (emphasis added), it would be in keeping with the special regime for migratory species that historical fishing for such species in the region would qualify for historical fishing rights. Highly migratory species are a regional resource and transcend the EEZ in many important management aspects.

78 Statement by Dr. George Coulter, deputy director, Forum Fisheries Agency, at East-West Center, Honolulu, Hawaii, September 14, 1983.

would probably also be considered in such a decision,[79] and most developing nations would probably choose to allocate surpluses to nations that made the most favorable economic arrangements. The effect of the U.S. position on U.S. fishermen ultimately may be to increase the price for leases to fish surplus stocks. The Convention does not prevent any nation from granting a license to fish for tunas in its EEZ to the United States if it so desires.[80]

A fourth cost to the United States lies in its disclaimer of direct jurisdiction over tunas in its vast Pacific EEZ.[81] The U.S. position under the MFCMA is to claim coastal state jurisdiction over tunas only as far seaward as three nautical miles. Under the Convention, the United States could control tuna fishing within a 200-mile radius around American Samoa, Baker Island, Howland Island, Jarvis Island, Guam, Johnston Island, Kingman Reef, Midway Island, Wake Island, and the Northern Marianas.[82] The islands near the equator are located in a rich tuna fishing area

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79 For example, recent reports indicate that some nations have fishing fleets in which the fishermen live under subhuman conditions. Some coastal states may prefer not to do business with such nations. See generally, Doss, Hell Ships of the Pacific, 16:5 Oceans 30 (1983).

80 Article 297(3)(a). It is possible that some nations may have surplus stocks that are uneconomic to exploit. One prominent biologist believes that economic, not biological, constraints will prevent fisheries for skipjack tunas in the Western Pacific from ever reaching maximum sustainable yield. Yellowfin tuna are probably already being exploited to the maximum capacity of that species. Dr. R. Kearney, quoted in W. Bayliff, Synopses of Biological Data on Eight Species of Scombrids, IATTC Special Rep. No. 2 at 336 (1980).

81 The Reagan Proclamation claimed an EEZ around all U.S. "overseas territories and possessions...." The same proclamation "does not change existing United States policies concerning. . . highly migratory species of tuna...." See Appendix A infra at 551, para. g. Enforcement would be a problem at present, but expanded domestic capacity in these areas would increase surveillance and encourage foreign fishermen to purchase licenses.

82 U.S. Dep't of the Interior, Territorial Areas Administered by the United States 5-21 (no date).

near Kiribati. In addition, the United States could control tuna fishing in the waters of the Hawaiian Archipelago, which stretches from the Island of Hawaii northwest some 1,600 miles to Kure Atoll. These areas contain vast tuna resources, now virtually unexploited, that could generate license fees.[83]

Anadromous Species (Salmon)

The Pacific salmon stocks are considered to be the most valuable finfish resource in the U.S. EEZ.[84] Salmon reproduce in freshwater rivers on the continents and islands of the North Pacific.[85] They spend most of their lives far out to sea, well beyond EEZs,[86] where Asian and North American stocks frequently intermingle.[87] Japan has developed an important high seas gillnet fishery for salmon.[88] This fishery is regulated primarily by the treaty which created the International North Pacific Fisheries Commission (INPFC).[89] The congressman from Alaska has complained

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83 Because of the regional nature of the tuna resource, it is difficult to assess the amount in the U.S. EEZ. One estimate for the tuna potential in Hawaii is 71 million pounds per year. Hawaii Dep't of Land and Natural Resources, Hawaii Fisheries Development Plan xix (1979).

84 1982 House Hearings, supra note 6, at 474. With an annual catch of about 400,000 metric tons, Pacific salmon are one of the world's most important fisheries (statement of Lee J. Weddig, executive vice president, National Fisheries Institute).

85 Copes, The Law of the Sea and Management of Anadromous Fish Stocks, 4 Ocean Dev. & Int'l L. 233, 236 (1977).

86 For example, coho salmon range offshore 1,000 miles. J.L. Hart, Pacific Fishes of Canada 116 (1973).

87 Id. at 110-21.

88 The Japanese began a high seas salmon fishery in 1952. Diplomatically weak after the Second World War, Japan agreed to abstain from high seas fishing east of 175°W. Korea also engages in high seas salmon fishing. Copes, supra note 85, at 237.

89 Canada, Japan, and the United States ratified the International Convention for the High Seas Fisheries of the North Pacific Ocean in 1953. 4 U.S.T. 380, T.I.A.S. No. 2786, 205 U.N.T.S. 65. A protocol amending that convention entered into force in 1979. 30 U.S.T. 1095, T.I.A.S. No. 9242.

that the Japanese fishing fleet has harvested millions of dollars worth of fish that originated in the United States.[90]

Nations with salmon spawning streams have a proprietary interest in salmon from their area. A state of origin must forego other uses of its rivers to protect salmon, which adds to the economic cost of salmon fishing.[91] The Convention creates a new rule of law by granting special rights to states of origin. Article 66(1) grants primary interest in and responsibility for salmon stocks to states in whose rivers the fish spawn. The state of origin can regulate fishing in waters landward of the EEZ, and high seas fishing by other nations can continue only if cessation would result in economic dislocation (Articles 116, 66(3)(a)).

Some U.S. fishing interests complain that the Convention will allow high seas fishing to continue in perpetuity,[92] and that its grant of preferential rights to the state of origin is too weak.[93] This argument ignores the provision that limits such fisheries to nations that have previously committed resources to high seas salmon fisheries.[94] Without the Convention, any nation would be permitted to fish for salmon under the doctrine of freedom of the high seas.[95] Article 66(3)(a) also requires high seas fishing nations to "maintain consultations with a view to achieving agreement on terms and conditions of such fishing...."

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90 Hearings on U.S. Foreign Policy and the Law of the Sea Before the House of Representatives Comm. on Foreign Affairs, 97th Cong., 2nd Sess. 32 (1982) (statement of Don Young, Congressman from Alaska).

91 Balasubramanian, supra note 25, at 34. In addition, streams are developed, hatcheries established, and escapement monitored to ensure adequate reproduction. Such activities can be expensive. Copes, supra note 85, at 243-44.

92 1982 House Hearings, supra note 6, at 188 (statement of Congressman Donald Young).

93 Copes, supra note 85, at 245.

94 Because the Law of the Sea Convention in Article 66(3)(a) permits fishing beyond the EEZ only where economic dislocation would otherwise result, a prior commitment of resources is necessary to be able to engage in this fishery.

95 1982 House Hearings, supra note 6, at 303 (statement of Professor William Burke).

Such agreements may include requirements for a high seas fishing nation to make expenditures to renew anadromous stocks (Article 66(3)(c)).

The Convention establishes mechanisms to settle disputes that concern high seas salmon fisheries. Any fisheries dispute relating to maritime areas seaward of an EEZ comes within the compulsory dispute settlement provisions of Article 286;[96] the more informal and nonbinding dispute mechanisms of Article 297 apply to disputes within the EEZs.[97] Either the state of origin or the distant-water fishing nations may use compulsory dispute settlement procedures; however, the Convention requires a prior agreement between states in order to enforce regulations concerning, for example, boarding for inspection on the high seas (Article 66(3)(d)).

U.S. domestic law asserts rights that do not exist under international law. The MFCMA claims exclusive management authority over anadromous species beyond the EEZ to include the entire worldwide range of salmon except when they are in the EEZ of another nation.[98] Although some U.S. fishing industry analysts complain that the Convention "weakens the right" of the United States to control salmon stocks over the extent of their range,[99] no state of origin rights whatsoever exist under customary international law.[100] The MFCMA apparently provides for enforcement of violations of U.S. domestic law related to salmon fisheries, including the boarding of vessels on the high seas and the arrest of crew members.[101] It is clear that U.S.

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96 Rosenne, Settlement of Fisheries Disputes in the Exclusive Economic Zone, 73 Am. J. Int'l L. 89, 98 (1979).

97 According to Article 297(3)(a) "the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone...." (emphasis added). A fishing dispute beyond 200 miles does not occur in an EEZ.

98 16 U.S.C. sec. 1812(2) (1982).

99 1982 House Hearings, supra note 6, at 476 (statement of Lee J. Weddig, National Fisheries Institute).

100 1982 House Hearings, supra note 6, at 303 (statement of Professor William Burke).

101 U.S.C. secs. 1861 (1982). The United States has a treaty with Japan that allows enforcement. Interna-
(footnote continued)

law attempts to create rights beyond any found under international law.

The United States suffers two major losses in this area if it does not join the Convention. First, the United States may forego the treaty provisions that grant important management rights to the state of origin. Such provisions are favorable to the United States[102] and are not available under customary international law. As a state party, the United States could limit the number of nations with historic rights to high seas salmon fishing to those that had already invested resources in the fishery. As distant-water fishing fleets become displaced from the EEZs of coastal states, the high seas salmon fishery in the North Pacific will be an increasingly attractive one.[103] As long as the United States remains outside the Convention, applicable international law would not appear to bar entry into the high seas salmon fishery. If more nations entered the fishery, allocation, conservation, and management would become enormously complicated.[104] Some nations might rush to enter the fishery in order to establish a historical commitment to salmon fishing and thereby vest rights to salmon stocks that would remain even if the United States subsequently became a party to the Convention. Japan, which entered into treaty arrangements with the United States and Canada during postwar reconstruction, could withdraw from the INPFC on one year's notice and greatly expand its high seas salmon fishery.[105]

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101 (continued)
tional Convention for the High Seas Fisheries of the North Pacific Ocean, art. IX, 30 U.S.T. 1095, T.I.A.S. No. 9242.

102 1981 U.S. Senate Hearings, supra note 61, at 287 (statement of Lee Kimball, United Methodist Law of the Sea Project); Curtis, In Everyone's Interest There Must Be a Law for the Sea, 15:1 Oceans 2, 3 (1982).

103 The most probable nations would be Japan, Korea, and Taiwan. Copes, supra note 85, at 247, 250.

104 Id. at 236.

105 Id. at 247. Robert Iverson, former fisheries attache to the U.S. Embassy in Tokyo points out that Japan might lose fishery allocations in the U.S. EEZ if it renounced the INPFC. This leverage will exist only as long as the goal of the MFCMA, the elimination of foreign fishing in the U.S. EEZ, is not attained.

Increased landings now by Japan might vest rights to higher catches in the future.

If the United States became a party to the Convention, it could exert considerable influence on high seas salmon fisheries, including requiring fees for fishery enhancement.[106] No comparable leverage exists over nations that do not join the Convention--the United States can merely negotiate bilateral and multilateral agreements with them. Although this approach had some success prior to the Law of the Sea Convention, it may be less productive once the Convention enters into force. Other nations may prefer to eschew bilateral treaties and look to the Convention to define rights between states.

High seas fishing nations that are not constrained by bilateral or multilateral salmon fishing agreements with the United States could argue that they have a right to fish for salmon stocks on the high seas based on the historical concept of freedom of the high seas. This right was explicitly stated in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas,[107] to which the United States is still a party. High seas fishing nations might also assert that the Icelandic Fisheries Jurisdiction Case[108] allows nations that have historically fished in an area to possess rights to continue to fish there.

The United States might argue that customary international law has changed since Icelandic Fisheries, and that the freedom to fish on the high seas is now limited by the state-of-origin provisions embodied in the Convention, which have become a customary norm because a large number of states have accepted such provisions as a part of the Convention. As customary international law, this concept would apply to both parties and nonparties. This assertion would be another example of the United States claiming rights granted by the Convention without accepting its obligations. In this instance, the argument is weak for a variety of reasons.

Unlike the concept of the EEZ, in which virtually all coastal states have asserted rights over marine resources seaward to 200 miles, very few nations have asserted state-of-origin rights over anadromous fish. The state-of-origin concept did not exist in

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[106] See text accompanying note 95 supra.

[107] Art. 1, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

[108] Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 2, 35.

international law prior to the Convention. The idea of granting rights to the state of origin of salmon is neither general nor universal [109]--most nations do not possess such resources and their lack of challenge to an asserted U.S. position cannot be interpreted as confirming a universal practice.[110] Rather, the state practice of states that engage in high seas fishing for salmon must be examined. The ICJ has emphasized that states whose rights are specially affected are those whose practice is most relevant.[111] There are very few states that fish for salmon, and most occur in the North Pacific.[112] The actions of a single high seas fishing nation such as Japan or Taiwan could defeat the U.S. argument that state practice in this area rises to the level of being "virtually uniform."[113] If two or more states did not adopt the U.S. position, state practice would clearly lack uniformity. Furthermore, insufficient time has elapsed for this concept to have risen to the status of a customary norm.[114] Unlike the concept of an EEZ, which has evolved for at least two decades, the right of a state to control salmon fisheries on the high seas because such fish have spawned in its rivers first came to life with the Convention. Although it is true that a state of origin has an equitable claim to some rights to the salmon, it is also true that salmon subsist on food resources of the high seas, a part of the global commons. The

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[109] This is one of the four requirements that must be met before a new customary norm can be proclaimed. See ICJ requirements, supra note 15.

[110] Special provisions for anadromous species was not an item of great importance to most Law of the Sea delegations. Only six nations made proposals in this area: Canada, Denmark, Ireland, Japan, the Soviet Union (through a Soviet Bloc proposal), and the United States. Copes, supra note 85, at 241.

[111] The ICJ has stated that states whose interests are specially affected are those whose actions are most important in determining customary international law. North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 43.

[112] Interview with Dr. John D. Hall, Alaska salmon fisherman and fishery consultant, December 2, 1983.

[113] See ICJ requirements, supra note 15.

[114] Id. Compare the statements by Ambassador Djalal and Professor D'Amato at 181-82 supra.

rights of a state to control salmon in the high seas emanate from the Convention, not from a customary norm.

The U.S. position concerning the Convention may result in new nations entering the high seas salmon fishery. For example, Mexico has already conducted exploratory fishing in Alaska.[115] Because of disputes about tuna policy, Mexico does not have a GIFA with the United States and cannot export fishery products to the United States. The United States has no additional economic leverage in the fisheries sector that it can assert over Mexico. Mexico could view such a fishery as an important resource if it were able to develop markets for the product in Japan or Europe--it might even see some justice in fishing for salmon of U.S. origin on the high seas, given its history of problems with U.S. tuna fishermen fishing for tuna in the Mexican EEZ.

Japan also might change its salmon policies. If the United States is successful in developing domestic fisheries that displace Japanese fishing vessels from the U.S. EEZ,[116] Japan might choose to marshall its capital resources in the high seas salmon fishery. Korea and Taiwan already have extensive high seas squid fisheries, and could easily modify their gear to fish for salmon.[117] It is ironic that the United States advocates expanded national fisheries, yet seriously jeopardizes one of its most profitable and historic fisheries by choosing to stay out of the Convention.

A second cost to the United States from nonparticipation in the Convention is an inability to use the compulsory dispute settlement provisions (Article 286). If the United States were a party to the Convention, it would be in a position to obtain binding settlements concerning catch allocation and management and payments for fishery enhancement. In the absence of such provisions, the United States may face substantial overfishing of high seas salmon stocks that originate

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[115] Jones, supra note 22, at 107.

[116] The most recent expression of this policy is the American Fisheries Promotion Act, Title II of P.L. 96-561 (96th Cong., 2d Sess.) which amends section 201(d) of the MFCMA.

[117] Taiwan took significant quantities of pink salmon (Oncorhynchus gorbuscha) in 1983 during their high seas "squid" fishery, which it unsuccessfully tried to sell to Japan. Central Alaska had a poor catch for pink salmon and has blamed the Taiwanese. Interview with Dr. John D. Hall, Alaska salmon fisherman, January 24, 1984.

in the United States. Rights claimed by the United States are essentially unenforceable in a court without the consent of the high seas fishing state. The United States would lack recourse except to involve fishery disputes with other totally unrelated aspects of U.S. foreign policy.

Conclusion

The United States incurs many costs by remaining outside the Convention. The barriers to cooperation in regional and international tuna management will continue. If the U.S. tuna industry wants to influence conservation and regional allocation of migratory fish stocks, it must accept the framework established by the Convention. In addition, U.S. tuna fishing vessels may face increased barriers with regard to access to surplus tuna stocks of Pacific island nations. The United States also jeopardizes its profitable salmon fishery. State-of-origin rights for anadromous fishes granted by the Convention are unique and very favorable to U.S. interests.

Many of the disadvantages to the United States are counterbalanced by its strong economic and technical position, and some costs in fisheries can be mitigated through bilateral and multilateral diplomatic action. It seems clear, however, that by remaining outside the Convention the United States will have diminished influence in the international organizations that manage and regulate marine fisheries. Fishery disputes will probably become increasingly politicized, rather than being solved by experts using technical criteria.

DISCUSSION

Salmon

David Colson: I do not agree with Mr. Harrison[1] that the United States has created a problem for itself in terms of salmon by not ratifying or signing the Law of the Sea Convention. The only state that has had a high seas fishery for salmon in recent years is Japan. Japan fishes both outside and inside the U.S. 200-mile zone under the International North Pacific Fisheries Convention (INPFC),[2] and that agreement is working well. We have also recently negotiated an agreement with the states of the North Atlantic concerning the conservation of Atlantic salmon[3] and we are hoping that this resource can be built back up. Although, as Professor Burke has noted,[4] the international community may not have harvested any species to extinction, commercial fisheries have been destroyed over the last 50 years by overfishing, and the Atlantic salmon is certainly one of them. The Atlantic halibut is another fishery that has been fished virtually to extinction, certainly commercial extinction.

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1 See pages 361-68 *supra*.

2 International Convention for the High Seas Fisheries of the North Pacific Ocean, entered into force June 12, 1953, 4 U.S.T. 380, T.I.A.S. No. 2786, 205 U.N.T.S. 65 (1953); 30 U.S.T. 1095, T.I.A.S. No. 9242 (1979).

3 Convention for the Conservation of Salmon in the North Atlantic, entered into force Oct. 1, 1983, T.I.A.S. No. 10789.

4 See pages 317-18 n. 6 *supra*.

THE TUNA ISSUE, THE SOUTH PACIFIC, AND THE UNITED STATES

by

Camillus Narokobi

My topic is the South Pacific countries' relations with the United States on tuna. I also wish to touch on a few other related matters because our fisheries relations are not limited to those with the United States. We also have arrangements on fisheries with Japan, South Korea, and other distant-water fishing nations. I wish to address myself to the following topics: first, to the perceived legal positions of the South Pacific islands countries in relation to the new Law of the Sea Convention on exploitation of living marine resources in our exclusive economic zones; second, to regional cooperation, which we have going quite vigorously at the moment in the South Pacific region; and finally, to our associations and dealings with the United States government and the United States fishing industry, the American Tunaboat Association (ATA).

It is appropriate that this workshop is held in the Pacific, an area that will have a very significant role to play as a result of the Law of the Sea Convention. The South Pacific Ocean has the greatest potential for the increase of resources to be harvested from the ocean. It is also in this region that the richest deposits of manganese nodules are found, near the Hawaiian Islands as well as the Samoan Islands. Some estimate that up to 90 trillion metric tons of manganese nodules are found in this region.

Fisheries: Major Economic Interest of South Pacific Nations

The Pacific Ocean has at least 12 independent sovereign countries. Many of them are very small and are often obscured in the global scenery when there are confrontations among superpowers on important questions. However, their economies are important to them. The question of resources in their exclusive economic zones is very important. Fisheries is one particular area many of them depend upon heavily in order to sustain their economies. Some of the most important articles in the Law of the Sea Convention, as far as South Pacific countries are concerned, in the areas of fisheries are Articles 56, 61, 62, 63, and 64. Article 56 deals with rights, jurisdictions, and duties of the coastal states. Nearly all the Pacific islands countries have declared exclusive economic zones, and some have declared fishery zones of 200 miles. Some of these 200-mile zones, in fact, are extensions of 200 miles from the baselines used to delimit their archipelagoes. The coastal states in the Pacific have very strong views on Article 56. They have the right to exercise sovereign control of all the natural resources, including tuna and other highly migratory species, up to the 200-mile limit. Articles 63 and 64 allow coastal states, in our view, to take measures to conserve the stocks of fish found within and also outside the 200-mile zone in order to ensure their conservation.

In some of our waters we have pockets of high seas between 200-mile exclusive economic zones. Under the Convention, we have the right to ensure conservation of fish that are harvested from those high seas areas so that they do not adversely affect the size of stocks within our 200-mile zones.

Highly Migratory Species: The Forum Fisheries Agency

Article 64 deals with highly migratory species, specifically tuna. Skipjack and yellowfin are the most important species in the South Pacific. Under Article 64, we have the Forum Fisheries Agency.[1] The Forum Fisheries Agency, through the South Pacific Commission, is heavily involved in conservation and studies relating to the size of tuna in our waters. We see Article 64 as giving us the right to require information and cooperation from distant-water fishing nations to assist the Forum Fisheries Agency and the

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[1] See generally Van Dyke and Heftel, Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency, 3 U. Hawaii L. Rev. 1 (1981).

separate island countries in their management of tuna within their 200-mile exclusive economic zones. Unlike other regions where distant-water fishing nations are members of the international fishing organizations, they have not been included in the South Pacific Forum Fisheries Agency. The primary reason why the metropolitan countries have not been allowed to take part in the Forum Fisheries Agency is to ensure that the coastal states are able to exercise full sovereign rights over the highly migratory species in their 200-mile exclusive economic zones.[2]

Article 63: Straddling Stocks

Article 63, dealing with straddling stocks, gives us the right to require information from distant-water fishing nations harvesting fish beyond the 200-mile limit to provide needed data in order to assist in programs of conservation of those stocks.

The South Pacific Forum Fisheries Agency is a creation of the Forum countries of the South Pacific. It does not permit membership for the metropolitan countries. The agency is based in Honiara, Solomon Islands. There is cooperation in the works between the South Pacific Forum and the South Pacific Commission. A large tuna tagging project is now being conducted by the South Pacific Commission based in Noumea, New Caledonia. A major objective of this regional cooperation is to develop common strategies among the South Pacific island countries to deal with distant-water fishing nations. Last year, we established a regional register. The South Pacific countries now require any foreign country with vessels fishing in the region to be listed on a single register when conducting fishing activities in the region. If a vessel violates the laws of one member state, that state would then request the vessel to be deregistered. Once the vessel is deregistered, it would be blacklisted and will not be allowed to fish in any waters of members belonging to the Forum Fisheries Agency. This program has been very effective. In fact, the Japanese and South Korean governments have accepted quite clearly the conditions laid down in the program.

Within the Forum Fisheries Agency, there is a small group composed of the western South Pacific countries. Their common objective also is to cooperate in working out strategies towards dealing with distant-water fishing nations. They have agreed in the Nauru Agreement to minimum terms and conditions to be imposed by the members of this group on any foreign fishing vessel. There is further agreement among these coun-

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2 See page 355 n. 57 supra and pages 385-86 infra.

tries to enact the minimum terms and conditions in their legislation to give further enforcement powers to them.

New Fishing Agreement between South Pacific Countries and the United States

The South Pacific island countries will soon enter into a fishing agreement with the United States government. It is our impression that the U.S. government prefers a multilateral agreement with more than one Pacific island state. The problem thus has been for the Pacific island countries to agree on certain procedures and stands before we can negotiate with the U.S. government. In time, an agreement may be reached depending on the kinds of terms and conditions that can be negotiated.

Current Customary Law Re Highly Migratory Species

What is the current customary law regarding highly migratory species? There is no doubt that in the South Pacific before the Convention was agreed to, nearly all South Pacific countries had declared 200-mile exclusive economic zones. Nearly all the nations conform to the requirements of Part V of the Convention, and their legislation in fact is consistent with the provisions of the Convention. Article 64 of the Convention requires that an organization be created with powers to manage tuna in the Pacific that includes distant-water fishing nations. We do not think that is necessary since we already have the Forum Fisheries Agency.

I believe strongly that the distant-water fishing nations do have a duty to provide data needed for the successful management of tuna. In fact, under the Convention, nations that do not provide this needed information cannot expect allocation of surplus fish as readily as they could if they provided information. South Pacific island countries have an enormous difficulty in obtaining the scientific information that is needed to properly manage and conserve the tuna fishery. At the moment, the Japanese fishing industry is cooperating quite well with Pacific island countries in providing that data, and we are hopeful that any final agreement we reach with the United States will also conform to the requirements we have laid out, which are already accepted by Japan and South Korea.

DISCUSSION

Tuna

David Colson: I think that someday I will write a book about all the problems that tuna fish create for the United States government. I am not going to try to defend the United States tuna position here. I personally feel that it is a much more difficult position to defend than the deep seabed mining position. I might only say that in 1977 the United States tried to make clear to the political leadership in the South Pacific that we did not wish to have the same kind of problem in the Central and South Pacific as we have had for the preceding 20 years in the Eastern Pacific. We carried that message around the region, we had the industry's support, and we told the region's leaders that we were prepared to strike a deal before the industry came into the region.

We had several meetings in Fiji in 1978 and made an effort to negotiate an agreement. In those negotiations, we told the South Pacific officials that the United States was prepared to agree to coastal state enforcement over tuna in this region, that we could accept joint licensing arrangements, and that we would be prepared to pay fees to the coastal state for the tuna in their zones. Unfortunately although we were able to reach agreement at a working level, the South Pacific Forum rejected that agreement because it was ambiguous with respect to the actual jurisdictional issues.[1] But it did, as a practical matter, give the coastal states everything they needed, and the United

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[1] See Van Dyke and Heftel, Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency, 3 Univ. Hawaii L. Rev. 1, 12-17 (1981).

States government did indicate that we were prepared to control our industry in this area. As Mr. Welling has noted, once the United States has agreed to something like this, we do control the industry. The only way that we are going to control the tuna industry is if we have a regional agreement whereby the U.S. government has the ability to impose laws and regulations on the industry.

Impact of U.S. Position on South Pacific

Jon Van Dyke: Ambassador Djalal has commented that the United States is making it hard on its friends by putting them in awkward positions. I wonder if our colleagues from the South Pacific, Minister Namaliu and Professor Maiava might care to say a word on that. How are you seeing the U.S. position and the impact it imposes upon you in this situation?

John Craven: I would also like to ask our next speaker, Foreign Minister Rabbie Namaliu of Papua New Guinea, the following question: If the United States were to substantially modify its position with respect to tuna and only tuna, how far would that go in your view toward ending its isolation?

THE U.S. POSITION ON TUNA AND THE PACIFIC ISLAND NATIONS

by

Rabbie Namaliu

The question of fisheries, particularly tuna, has become a thorn in the back of our diplomatic relations with the United States.

None of the South Pacific nations has presented any threat to the interests of the United States, but we have proceeded to develop our own interests. We have accommodated the concerns that the United States, France, and Britain have raised in relation to questions of security and related issues. But the question of fisheries is likely to dominate discussions in relation to the law of the sea in the years ahead.

Tuna Affects the Fabric of Economic Life

Even though we have reached acceptable arrangements with some distant fishing nations, we continue to encounter particular problems with the United States. These difficulties relate to the U.S. position on tuna as a migratory species, because the United States does not accept coastal state jurisdiction over these species. We find this position frustrating, sometimes exasperating.

The U.S. "isolation" is not the same in the Pacific as it is elsewhere. By and large the United States remains a close friend of the Pacific. The issues raised by this Convention have not significantly changed that position.

Nonetheless, when it comes to questions about tuna, which affects the very fabric of economic life of most of these small countries, we become tremendously disappointed with the attitude of the United States. If these questions could be resolved, that would go a long way to encourage closer working relationships with the United States.

First, we would cooperate with the United States in developing a framework to harvest the tuna resources. Second, we would work closely with U.S. industry to develop the appropriate technology and skills required to exploit the tuna resources of the Pacific Ocean for our mutual benefit. These developments would benefit the countries of the region as well as the U.S. fishermen. Third, I think it would ensure that proper scientific research is done to preserve the tuna resource, particularly where it spawns. The jurisdictional questions that relate to tuna should be sorted out in a way that develops the long term potential of tuna to benefit all concerned.

The transfer of technology is of importance to us because we are developing countries. Most of us do not have the expertise, the capital, or the technology to develop the tuna resource. It has been in our interest to invite distant fishing nations to come and fish if it can be arranged in a way that produces mutual benefit.

What factors should we consider in our negotiations? Quantity of course is one factor, but price is probably the most important one. Price is an issue of great contention because different prices are charged in different parts of the Pacific for the same tuna, which migrate from one end of the Pacific to the other.

Small Nations at Disadvantage in Negotiations

These attitudes vary depending where you go in the South Pacific. My country (Papua New Guinea) happens to be the biggest of the South Pacific nations when it comes to tuna resources. We can afford to spend a bit more time negotiating over tuna, because we have other resources to develop to build up our economy. Most of the smaller countries, like Tuvalu, Kiribati, the Solomons, Samoa, do not have other sources of revenue, and they look upon tuna as a major source of revenue. Some distant fishing nations take advantage of this lack of economic capacity to negotiate an agreement. This attitude may not necessarily be in our interest or in the interest of the region.

When I said that I thought the word "isolation" was being misused in the context of the Pacific, it is because we in the Pacific believe that the issues that exist between us and the United States are resolvable. It is really a question of getting together, as Mr.

Colson said earlier, establishing mutual understanding, identifying the problems, and then cooperating in developing a common strategy for the future development of the tuna resource.

Future Development of Tuna Resources in Pacific Island Nations

One of the things that will be of continuing interest to Pacific countries is why the United States has chosen to exempt tuna from the other migrating species.[1] Why does the United States refuse to accept other countries' jurisdiction over tuna? One encouraging sign has been the American Tunaboat Association's entering into arrangements with some of the subregions and countries of the South Pacific. This action indicates that the United States is prepared to accept these country's EEZs. The President's declaration points out quite clearly that this is the type of arrangement the United States would prefer in the long-term as far as tuna is concerned.[2]

I think that I am speaking for the majority of us in the Pacific when I say that we would like to see the development of our relations in ocean affairs on the basis of cooperation. This approach insures stability and peace in the region. We have a number of regional organizations, and the United States is a member of several of these regional organizations already. They can help build the mutual understanding that Mr. Colson referred to earlier.

The question of how the fishing industry should be set up in the region is another issue that must be discussed. Is licensing the only way to develop the tuna resource or are there other ways of developing it either on the basis of joint ventures or on the basis of onshore operations? Should the operations be carried out entirely by the individual government with the distant fishing nations cooperating by having their operations onshore?

What should we do with the fish once it is caught? Now, it is largely taken out of the region by distant fishing countries. This practice reduces the employment opportunities that could be made available to people from the region. If a processing operation is established, jobs can be created and technology can be transferred. To develop the understanding that is required for optimum development of tuna, we must have a regional framework and sit down with the distant fishing nations to discuss our mutual problems.

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1 See 16 U.S.C. sec. 1802(14)(1982).

2 See Appendix A infra, at 551-53, paras. g and 9.

DISCUSSION

United States, Pacific Islands, and Tuna

Satya Nandan: I would like to underscore what Minister Namaliu said regarding fisheries in the Pacific. So far as fisheries are concerned, there is no doubt within the Western Pacific region about what the customary international law is. State practice has already indicated how the countries of the region view this issue. The critical question is with respect to tuna.

As the Minister said, that is the single urgent issue in our relationship with the United States. If that issue were removed, I think we would find very little else that would divide the Western Pacific region and the United States, which is our close neighbor. Other participants here have talked about showing some compassion and understanding towards the U.S. position on the law of the sea, but I hope on this particular issue that the United States will show some compassion and understanding to the problems of the Pacific countries. One of the single most important aspects of the Convention for the Pacific countries is their control over the fisheries adjacent to their shores. Because they are mostly peaks sticking out of the ocean, they do not have large continental shelves. Therefore, the major commercial fishing that is to be found in this area is tuna.

If the Pacific islands' control over the resource is going to be limited by the position that the United States has taken, then it will be a very sad thing for the region. Indeed it would frustrate the aspirations of the island nations of developing their economies to a viable point.

U.S. Tuna Position in Pacific

David Colson: I would like to make one more comment on tuna. It is my job to defend the United

States' tuna position. It is a job that creates many problems for me. I hereby defend it. Accepting the fact that there is clearly a strong coastal state interest in the tuna resource, it also should be accepted that fishermen have to chase these resources all over the place and this chase lends a very special characteristic to the tuna fishery. Once those two basic assumptions are accepted, reasonable people ought to be able to sit down and develop the rules, regulations, procedures, and fees that go into the management of this resource. The United States has been willing and interested in doing that in the Pacific for some time. We are hoping that in the coming months there will be some progress made in negotiations in the Pacific region. I would hope that these negotiations do not get wrapped up in the other Law of the Sea Convention issues.

Pacific Island Nations Favorable to Convention

Josefa Maiava: I would like to follow on what Minister Namaliu said and express some of the emerging views in the South Pacific region on the adoption of the Convention and the decision by the U.S. government not to sign that Convention. As we all know, the participation by the Pacific island nations has been limited by real constraints in their resources and personnel. But where possible, they have always expressed a very positive attitude towards the Convention. If my memory serves me right, in 1976 all the South Pacific Forum leaders at their summit meeting declared that the 200-mile exclusive economic zone was entirely in accordance with what was emerging as a general practice.

On the decision of the U.S. government not to sign the Convention, I agree with Minister Namaliu that there was widespread regret on the part of the Pacific island governments. The U.S. government is probably the biggest maritime power in this region. We desperately hope that Professor Vargas is correct that the maritime powers will tend to act in accordance with the provisions of the Convention. We are especially concerned about military activities in the 200-mile exclusive economic zones. The Pacific island nations for some time now have been trying to put together a South Pacific Nuclear Free Zone, but have been unsuccessful because of uncertainties surrounding the rights of maritime powers within the 200-mile zone.

Access Agreements With the Tunaboat Association

On the issue of fisheries, Papua New Guinea and other bigger Pacific island nations may be able to afford a wait-and-see game, and wait until the U.S. government finally does adopt or sign the treaty. But most of the Pacific island nations have no resources

other than the fish in the sea, and cannot afford to wait. Most of them have, therefore, concluded access agreements with bodies like the American Tunaboat Association.

I want to pose a question to our distinguished legal scholars. I suspect that this practice of small nation-states concluding access agreements with nonstate bodies like the Tunaboat Association is going to become a general practice in this part of the world. How will this practice affect the official position of the United States? These agreements appear to recognize the rights of the coastal states as defined by the Convention. How will they affect emerging customary law?

Emerging Skepticism Regarding EEZ Benefits

In the beginning, Pacific islanders were optimistic about the resources of the 200-mile zone. But now they are skeptical about the real benefits. Most of the Pacific island governments expected that the distant fishing nations would rush into the region and conclude access agreements. But it soon became clear that it was a buyer's market, not a seller's market. This problem is another reason why the Pacific island governments have reached agreements as soon as possible with nonstate actors like the American Tunaboat Association.

I talked with a senior official from the Western Samoan government just before I left to attend this workshop and he said to me that the governments of Western Samoa, Niue, and Tokelau, have recently concluded and signed an agreement with the Tunaboat Association. He said one of the reasons why the Samoan government decided to enter into this agreement as soon as possible was because Western Samoa has the smallest exclusive economic zone and the only way it could get the fishing interests to come to the negotiating table was to go together with the others.[1] Unfortunately, it has not been possible for the Samoan government to negotiate together with all the other Pacific islands. What we see emerging therefore are subregional access agreements between eastern Polynesian countries on one hand and the American Tunaboat Association on the other. We also see the emerging of other subregional agreements such as the Nauru Agreement, in the western Pacific, and the West Central Pacific Agreement. How are the subregional agreements going to affect the official position of the United States government?

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1 See Broder and Van Dyke, Ocean Boundaries in the South Pacific, 4 U. Hawaii L. Rev. 1, 50-52 (1982).

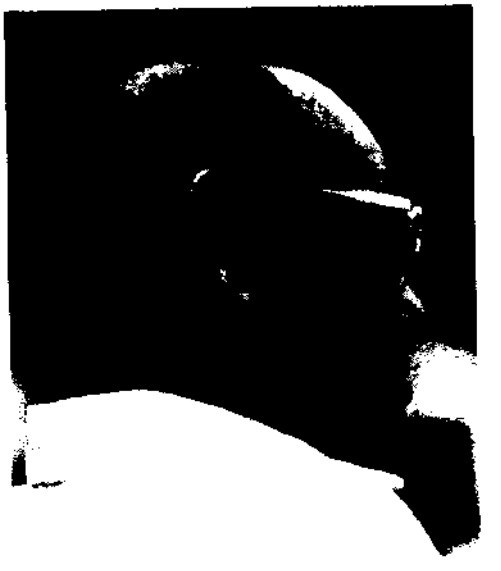
Trust and Understanding Needed on Tuna Issue

Colson: I only hope that the practice that is developing regarding tuna fishing in the region is a positive practice, one that will positively affect the U.S. position and the regional position. I hope a certain degree of trust and understanding will develop between these positions so that we can begin to address these issues rationally and fairly.

IMPLEMENTING THE FISHERIES PROVISIONS OF THE CONVENTION

by

Satya Nandan



Our office at the United Nations has prepared a chart listing the countries that have extended their fisheries jurisdiction or exclusive economic zone jurisdiction to a limit of 200 miles. About 51 countries have declared 200-mile exclusive economic zones, and another 23 countries have declared 200-mile fisheries zones. These declarations were made while the negotiations were still being conducted. I know of no new declaration except the change declared by the United States only recently.[1] In terms of the acceptance of the concept of such zones and their broad implementation, you will see that there is a considerable amount of practice already established.

Many of the declarations are decrees simply asserting a right over a 200-mile zone for fisheries, for minerals, or for resources as a whole. In very few cases do you actually have detailed national legislation that would indicate the character or the content of the zones. So it is rather early to say whether all these declarations conform exactly to the Convention provisions.

If one looks at the implementing national legislation, one finds that the common element in all of them

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1 See Appendix A *infra*.

is very strong coastal jurisdiction. There are rarely references to conservation or other measures except to justify the claims. No standards are established, nor are there references to access to these resources for foreign fishing vessels of landlocked and geographically disadvantaged states. Not even the United States' legislation has a provision making the surplus available to foreign fishing vessels. The state practice in favor of the establishment of a 200-mile zone must therefore be updated to bring the assertion of rights into conformity with the Convention.

A number of nations asked our office in the United Nations for examples of national legislation enacted in accordance with the Convention. These requests indicate that many countries are now either beginning to enact detailed legislation or are beginning to update the claims that they had made initially.

History of 200-Mile Claims

There was a certain point in time when the concept of a 200-mile economic zone began to gel. It had a domino effect in the claims that were made. Many claims were made for 200-mile zones simply to protect against the shift of distant-water fishing vessels from one region to another. After Iceland's claim, for instance, the European community was forced to make similar claims in the North Atlantic. That forced, to some extent, Canada and the United States into making their own declarations, because of the movement of fishing vessels ousted from other states' fishing grounds. It is not therefore unusual to see that the claims are not very detailed and are very strongly coastal-oriented.

All the claims are over all the species in the 200 miles with the exception of the United States'. It appears from all the information available that in most regions, the 200-mile exclusive economic zone, including the jurisdiction over tuna, is respected except in the Pacific region, and that again is because of the United States' position. In West Africa, for instance, there is extensive licensing on the west coast, and most states involved, particularly from the European community, respect the 200-mile zone. Japanese and Koreans who fish also do not challenge the juridical aspect or it, although they may be fishing illegally nevertheless.

Problems with Pacific Implementation

In the Pacific, we have a totally different experience. In the southeastern Pacific, the Latin American area, it is well known that the problem there has been largely because of the United States' position. In the southwest Pacific, the problem is the same, where most fishing nations accept the juridical

claims as they are except for the United States. But that is not to say that those others accepting the juridical positions do not violate those rights. In fact, this is one of the major problems in the implementation of the Convention in most areas. We still have distant-water fishing fleets that poach in 200-mile zones, and there is no enforcement mechanism to prevent fishing without proper licenses in the vast oceans, particularly in the Pacific area. I think it would be of interest to note that about 70 percent of the world's tuna is caught in the Pacific Ocean and out of that, about 50 percent in the western Pacific itself. The Atlantic Ocean contributes about 19 percent and the Indian Ocean about 11 percent. So the problem of implementing the Convention is more acute in the Pacific area than in other oceans.

In different oceans, different species of fish are important. In the Indian Ocean region, particularly around the coast of India, Malaysia, and right down to Singapore, the emphasis is largely on coastal fishing, or at least coastal species, as compared to the Pacific, where there are no large continental shelves and the important commercial fish is tuna.

The Convention envisages cooperation through regional organizations. It also envisages that where no regional organizations exist there would be cooperation in the establishment of them. I think the one example of a regional organization that has been established since the concept of the 200-mile economic zone actually concretized is the Forum Fisheries Agency.[2]

It is very difficult to establish an organization unless there is at least agreement to the juridical content of the concept. Originally, the South Pacific countries initiated a movement to establish a wider regional organization than the current organization. It failed because the United States--which has territories in the region and which has an important fishing interest in the region--could not agree to the exclusive jurisdiction of the coastal nations over tuna in their 200-mile zones.[3]

The result was that the other two metropolitan powers, France and the United Kingdom, were also excluded, although they both accepted the exclusive zone in the terms prescribed in the Convention. Because of the differences with the United States on juridical

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2 See pages 353, 355, and 371-72 supra.

3 See Van Dyke and Heftel, Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency, 3 U. Hawaii L. Rev. 1, 12-19 (1981).

aspects, it has been indeed very difficult to implement the Convention as it is envisaged by creating the appropriate regional organization.

Much has been said about the cost to the United States with respect to its own position, but I think that there is a tremendous cost also to those states whose assertion of a 200-mile exclusive zone is not being respected. Just to give you an example, it is believed that in the western Pacific region, about 400 to 500 million dollars worth of fish are exploited each year. Out of that, less than 3 percent or so goes back to these countries. This is a tremendous cost to those countries whose resources are being exploited.

I have a few comments concerning Professor Burke's paper. I was very impressed by the paper, and I think it reflects generally the spirit of the provisions of the Convention. He has observed that the exclusive economic zone provisions favor the interests of the coastal states. He also observed that these provisions are very general. I agree with both those observations, and I thought that one way I could assist in better understanding those provisions is to give the broad perspective from which they were put together.

The Negotiating Process

First of all, the text of the Second Committee, which is the committee that dealt with the national jurisdiction areas, was put together as a package within itself, though not outside the overall package of the Conference. I do not want to create the impression that this was not part of the overall package, but there was a package approach in the drafting of this text, which was drafted separately from the other text of the other committees.

The Committee first identified all the interest groups and their major interests and then tried to create a balance in the negotiating text. This approach was taken so that no interest group would find the text so objectionable as to reject it altogether.

Some quick examples can be offered. Because the 12-mile territorial sea was adopted in the text, a fairly liberal passage right through straits and through the territorial sea generally also had to be included. There also had to be included the elements for coastal states' security and safety of navigation. This is one indication of the kind of small packages that were forged.

A number of interests had to be reconciled in the construction of the exclusive economic zone. Coastal states had a strong desire to control the resources adjacent to their coasts. The states that claimed a 200-mile territorial sea had to receive enough satisfaction from the zone to persuade them to move away from their 200-mile territorial sea demands. The

coastal states received a strong resource jurisdiction, which benefitted both developed and developing coastal states, and the major maritime powers received their transit rights, providing some element of balance. The territorialists who wanted a territorial sea of 200 miles won a zone that was as close as possible to the 200-mile territorial sea but granted sovereignty only over resources. This was further emphasized by the retention of the concept of the contiguous zone (Article 33) to show that the 200-mile economic zone lacked certain things that a territorial sea would have had.

Then the Committee had to consider the demand of the landlocked states for equal rights to the living and nonliving resources in the exclusive economic zone. The most important interest of the landlocked states was identified as being their access rights, or lifeline if you like, to and from the sea. It is here they got their satisfaction, a very strong access right which was much stronger than in previous conventions in which access rights were prescribed.

Continental shelf jurisdiction was also a product of balancing competing interests. The continental shelf jurisdiction was extended beyond that which was prescribed in the 1958 Convention (Article 1). The balancing element was the revenue-sharing provision. So there was an overall package established in order to satisfy the various interest groups.

In the early stages of these negotiations, the maritime powers totally opposed the idea of a 200-mile zone. When it began to appear that there had to be a zone of that kind, the proposals that came--not so much from major maritime powers as from distant-water fishing nations--were for a preferential zone in favor of the coastal states. Opposed to this approach was the territorialists' demand for a 200-mile territorial sea. Therefore, it was not unnatural that, in the end, a strong coastal-oriented exclusive economic zone would be forged.

The Language of the Fisheries Articles

Although various imprecise terms such as "optimum utilization" and "use of scientific data" have been included in Article 62, the fact of the matter is that throughout the text nothing deviates from strong coastal states' rights vesting all the discretion within the coastal states. The language in Articles 62 and 63 was included to provide a guideline as to matters that should be taken into consideration in the exercise of this discretion.

One could read these articles and conclude that the coastal state might deny absolutely any participation in the fishing of resources within the exclusive economic zone. Nonetheless, in practice, those who

have resources will want to benefit from them. If they cannot themselves utilize the resources, they will make them available to those who are prepared to pay for them and benefit from them in that way.

With respect to Article 64, Professor Burke says he does not know why paragraph (2), which says that the provisions of this Article are in addition to other provisions, was included. I think this was done very clearly to indicate that coastal state rights are tempered by the rights of other states.

DISCUSSION

Why Were Coastal States Given So Much?

David Colson: A brief personal note. I have been very lucky in my career in the government. I was able to start working under a person you all know well, Bernie Oxman, and that was a great education and he was a great teacher. During this period, Bernie was thoroughly involved in the Law of the Sea Conference, and he left me alone to work out the implementation of the U.S. 200-mile fisheries law. It was a real education both in international law and in our domestic politics and domestic legal system. From the perspective of what has happened over the last few years in the international law of fisheries, I probably know as much about it as anyone.

I find it strange that no one tries to justify coastal state jurisdiction over fisheries on any sort of legal basis. It is explained simply as something coastal states got at the Conference. I find that somewhat strange when compared to the very strong statements that are made about the legal meaning of the common heritage of mankind. In giving up the coastal resources, the world community gave away at the Law of the Sea Conference a much more valuable resource than they are ever going to get out of manganese nodules. There must be a little bit more to all of this, at least from a lawyer's perspective, than a simple give-away to coastal states. I think lawyers should try to come to grips with exactly what has happened in international law with respect to coastal state jurisdiction over fisheries.

The 1976 U.S. 200-Mile Fisheries Zone

Also, no one has said that the United States acted unlawfully in 1976 when we declared our 200-mile fisheries jurisdiction. No one said then that we were picking and choosing from parts of the Convention. Why

is the United States entitled to a fishery zone in international law but we are not entitled to an economic zone? Certainly the major benefit of the 200-mile resource zone in international law is the jurisdiction that the coastal state exercises over fisheries.

Tommy Koh: I must not make it a habit to respond to David every time he speaks, but let me take up his point that when, in 1976, the United States enacted national legislation declaring a 200-mile fisheries zone the world either applauded or acquiesced. I want to tell David that this was not the case.

I would like to remind David that until 1976, the United States and I believe also the Soviet Union protested, by diplomatic means, every claim by coastal states extending their territorial sea or asserting a fishery zone beyond 12 miles. But because of the expediencies of an election year, under the pressure of coastal fishing interests of the New England states, the United States Congress completely reversed its position and enacted such a law.

Effect on Conference Dynamics

I want to tell you what it meant in the dynamics of the negotiations at the Conference. At that time, Ambassador Nandan was chairing a negotiation between coastal states and those of us who represented land-locked and geographically disadvantaged states. Up until 1976, when you betrayed your own principles, the landlocked and geographically disadvantaged were still opposed to the concept of a 200-mile exclusive economic zone because we felt that the universal declaration by coastal states of such a concept would not lead to a very fair or equitable allocation of the ocean's living resources, which is, after all, a resource that belongs to the whole of mankind. But when the country that led the fight in opposition to the unilateral establishment of such a concept not only gave in, but embraced the concept itself, you pulled the carpet from under our feet, and we had to capitulate to the coastal states.

Rights of Landlocked and Geographically Disadvantaged States

We had to capitulate and negotiate the best deal we could. Now what is the deal we negotiated? Of course, the author of the deal, Ambassador Nandan, wants me to believe that he has given me a good deal.

Nandan: I tell the other side the same thing.

Koh: Of course, Ambassador Djalal, who was on the other side of the negotiating table, thinks Ambassador Nandan gave us too much.

Hasjim Djalal: He did, but it was OK!

Koh: What did we get? Essentially nothing. I think William Burke is absolutely right.[1] What the landlocked and geographically disadvantaged states got can be completely vitiated, because even though we have a preferential right to the surplus, that preferential right is not a free right. It is to be exercised in accordance with the terms and conditions prescribed by the coastal state. If a coastal state prescribes specific terms and conditions for access to its surplus, it could include, in accordance with the text of the Convention, the transfer of technology, financing, etc. The developing landlocked and geographically disadvantaged states will be unable to compete with other third states because they cannot meet those same conditions and terms. The fact that they may be at the head of the queue is completely meaningless because we will not be able to take advantage of our priority over other third states. As Professor Burke says, the preferential rights for the LL/GDS look good on paper but can be and will probably be vitiated in practice.

I do not blame the coastal states. After all, if I were Indonesia and I wanted to raise as much revenue as I could from the surplus catch and I wanted to develop my indigenous fishing industry, I would allocate the surplus to the countries that can pay the highest license fees. I would allocate my surplus to countries that can help me modernize my fishing industry. This is a perfectly legitimate aspiration on the part of Indonesia, but it means that Japan, rather than Singapore, will obtain a share of the surplus.

The basic question is this: The chapter on the exclusive economic zone in the Convention is designed to redress the multifarious problems of the preexisting law, in which fish, other than fish to be found in the territorial sea, are regarded as a commons. This approach led to the overexploitation of certain species, and the coastal states were able to convince the international community that the way to cure this problem was to give to coastal states the right to manage these species within a very broad belt of waters extending to 200 miles. Whether the Convention will actually succeed in doing a better job than the preexisting law in conserving and managing the living resources of the sea is, in my view, still an open question.

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1 See pages 322-29 supra.

Scientific Data Essential

The law under the Convention will do a better job than the preexisting law provided that the coastal states, especially developing coastal states, are able to acquire the necessary scientific data to know just what living resources they have in their economic zones. This information is not now available to many developing countries. Second, coastal states must make rational rules for the conservation of the different species in the economic zone. Third, they must make the right judgments each year about what is the permissible catch of each species. Fourth, they must have the infrastructure to enforce their laws and regulations in the economic zone. This requires planning as well as the training of personnel. I do not think one should assume that just because the law in the Convention is better that it will necessarily produce benefits.

In many cases, fish do not respect the boundaries that we draw. A fish may spawn in one economic zone, it may spend part of its life in a second economic zone, and it may grow up in a third economic zone. Unless the three countries are able to cooperate, the new law could still lead to the overexploitation of the species. We face this problem especially with respect to tuna and with respect to salmon.

The Convention does not solve all these problems. It imposes an obligation to cooperate upon states that find themselves in these situations, but it is a weak obligation. Unless these groups of states are guided by their enlightened self-interests to enter into cooperative arrangements to conserve the species, we could still end up with an overexploitation of certain species.

The Long-Term Significance of the Exclusive Economic Zones

Elisabeth Mann Borgese: I want to make a long-term assessment of this whole issue. The significance of the establishment of the economic zone seems to me not to be national aggrandizement, which I see as a transition stage, but that we made a fundamental change from a system of laissez-faire in fisheries to a system of management. During the negotiations, we had no choice but to go through the nation-state to give management responsibility to the coastal states. Everyone who works in fisheries knows that there is not one single economic zone that is actually a sound basis for the management of fisheries. The acquisition of economic zones makes regional cooperation and the activities of international organizations much more important than it was before.

We will have an outburst of regional cooperation through the Regional Seas Programmes, the programs of

FAO, the new programs of IOC, and others. These initiatives would not have happened had we not had an economic zone and had we continued with a free-for-all and a laissez-faire system. The next and quite inevitable step in this long-term development is moving toward a merger of economic zones in regional management systems. Although nothing will ever be perfect, this will come closer to realizing the hopes that we have for a rational exploitation of the seas for the benefit not only of coastal states, but for all states, including the landlocked and geographically disadvantaged. What we have now is a framework, a first step that will lead us to a transition stage over the next 20 to 25 years. I am not at all pessimistic.

How Do We Promote Regional Cooperation?

Luke Lee: Ambassador Koh characterized correctly the weakness in the existing text of the Convention, which "requires" states to cooperate in a way that may turn out to be meaningless. Articles 63 through 66 call for states to cooperate directly and also through subregional organizations, regional organizations, and appropriate international organizations. How do we identify and perhaps create these organizations?

I would like to ask Ambassador Nandan whether the Office of the Special Representative for the Law of the Sea of the United Nations could act as a catalyst to help establish the necessary regional, subregional, or appropriate international organizations and motivate them to do this work?

Nandan: The question was whether our office could act as a catalyst to bring together all the international and regional organizations and to help them address the problems relating to cooperation in the exploitation of the resources of the exclusive economic zone. Fisheries organizations come within the ambit of the work of the FAO, so to that extent we will be very reluctant to interfere.

On the other hand, we are trying to develop the idea of enhancing the coordination of activities of international organizations, including regional commissions. I think in that context we could also discuss this question with FAO and seek their assistance and cooperation in this area. I have no doubt that FAO is already very much involved in such activities. Part of the problem in bringing about such cooperation among states is the nationalism and mutual suspicion that exist among them. The coastal states are understandably reluctant to derogate their newfound jurisdiction in any way. But, in any case, we will certainly convey the message to FAO and other relevant organizations.

Background and Problems with the Fisheries Provisions

Bernard Oxman: This is not the first discussion on fishing that I have found distressing, as I am sure Mr. Colson will rapidly confirm. It is the first time, however, that I find myself sufficiently separated in time and space from governmental functions that I feel free to say so.

When we talk about deep seabed mining, the discussion is about high principle, abstract philosophy, and justice and equity for the poor. Indeed, one sometimes forgets that one is even talking about nodules or a new business. When we move to fisheries, we hear no mention of an international economic order, no mention of starvation, no mention of environmental protection, and no mention of maximum production to feed the world. We did not hear it here, and we never heard it at the Conference. Algeria once tried tentatively to say, "Maybe we should introduce some concepts of justice into the economic zone." The developing country coastal states, particularly our Latin American friends, immediately ran to Algeria and asked her to be "realistic." And that was that.

We could very easily have accepted the coastal state maximum proposition, created 200-mile fishing zones, and said nothing further. We felt, however, that this approach would not work well. The problems could have been deferred, but instead we tried to respond to three considerations in the text of the Convention.

Biological Characteristics

First, we tried to write a set of articles that recognize the fact that the fish are not going to read our laws and respect our boundaries. They are going to move around. We tried to write a set of complex articles that to some extent reflect the biological characteristics of the fish. The scientific community has told us, however, that we did not do it perfectly and that the Convention is flawed. They fail to recognize that the only other negotiable option was to do less, or nothing at all.

Conservation

Second, we recognized that the traditional international law of the sea seemed to impose on nations a duty to conserve fish stocks on the high seas but not in the territorial sea or fishing zones of coastal states. The 1958 Territorial Sea and Continental Shelf Conventions, insofar as they affect living resources, do not say one word about conservation. We tried to save the value of conservation, which had appeared in high seas law and which was confirmed by the Interna-

tional Court of Justice in the Iceland case,[2] by telling the coastal state that it was going to have to do something about conservation.

But this was not a treaty to manage a particular stock of cod in a particular part of the ocean. It was a set of principles to govern all the world's oceans, and it therefore had to be general. Indeed, Article 61 had to be flexible enough to accommodate conflicting scientific and economic theories about the proper approach to conservation. It may be that it came out a bit too vague, but nevertheless I for one would distinguish between qualifications for environmental reasons and qualifications for economic reasons. Be that as it may, it is clear that the coastal state is not free simply to ignore conservation.

Another important step was taken in Article 194(5), which some fisheries experts may not notice because it is in another chapter. That provision imposes a requirement to protect the habitat of fish stocks.

Professor Burke noted, but did not emphasize, that coastal states have flexibility and discretion, but they still have to act in good faith. What that means is that they at least cannot say they are violating the standards. This point could be important because some people in the United States seem to get a great kick out of proposing statutes that say we are violating the standards even though we do not have to violate them.[3]

The Global Food Supply and Article 62

Third, I think I can accurately say that the delegation at the Conference that worried most about the question of the global food supply was the United States delegation. Flexible and perhaps flawed as it is, Article 62 was designed to do two things. One was to promote a phase-down rather than abrupt termination of distant-water fishing that was harmonized with the expansion of coastal state capacity. The other was to impose on coastal nations an obligation to make a reasonable attempt to allow production in response to market forces when the coastal state, for cultural or other reasons, cannot maintain such production itself.

I do not agree with Ambassador Nandan that the coastal state would necessarily find it in its interests to have foreigners fish off its coast so it

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2 Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3.

3 H.R. 2061, 98th Cong., 1st Sess. (1983).

could collect revenue.[4] If you look at the way fisheries are talked about in Alaska, for example, you would find that many Alaska fishermen would be delighted to see the foreigners disappear and forgetabout the revenues. The attempt of Article 62, therefore, was to promote maximum produc- tion of animal protein from the sea by eliminating political restraints on the operation of market forces. If there is a demand for the fish then, subject to reasonable regulation, a coastal nation must allow the demand to be filled.

What Values Should Be Retained

Although I share Professor Burke's reservations as to what may become part of customary law,[5] in any discussion of what aspects of the Convention ought to be part of customary law we should bear these values in mind and ask ourselves whether we want them preserved. They can be retained under customary law through state practice, or they can be lost.

I believe some very important advances were made in these principles in the Convention, and I would hope that the members of this group would try to urge governments to pursue policies that reflect these values.

Available Protein Supply

Burke: I would just like to make one point. I have checked on food supply and protein, and I looked in one of the yearbooks that Mrs. Borgese edits from the University of Chicago. Sidney Holt, who is a real scholar in this business, reported that available protein supply as a percentage of requirements in 1974 approached something like 200 percent in every region of the world including Africa. (The actual figures by region are Asia 175%; Middle East 196%; Africa 164%; Latin America 224%; developed regions 327%; all regions 237%.)[6] I do not think that protein supply has much to do with the argument about the fish in light of those figures.

If you look at production as the problem, you are putting your money on the wrong horse. The problem is distribution. That does not mean we should not con-

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4 See pages 387-88 supra.

5 See pages 332-36 supra.

6 Holt and Vanderbilt, Marine Fisheries, in E. Borgese and N. Ginsburg (eds.), 2 Ocean Yearbook 9, 23 (Table 11--Daily Per Capita Food Requirements and Supplies) (1980).

tinue to produce fish, because they can be made available where there are shortages and nobody doubts that.

Criticism of Exclusive Rights of Coastal States

R.P. Anand: The strongest criticism against the creation of the exclusive economic zone has been that since most of the coastal states do not yet have the capacity to exploit all the zone's resources, to permit them to have exclusive rights will be a loss to mankind. It is interesting to note that this argument has come from distant-water fishing states that have gone to the coastal waters of other states and exploited their resources.

Now is it not true that after the creation of these economic zones, since 1975-76, the catch has indeed increased rather than decreased? There have been scores of agreements between countries for cooperation and technical aid to increase catches that would never have been entered into if these zones had not been recognized.

Rely on Proprietary Interests to Conserve Resources

Linda Paul, (Dept. of Zoology, University of Hawaii): As a fisheries biologist, I want to respond to Professor Burke's objections to the provisions that reserve to the coastal states the ability to set the allowable catch. As a biologist, I feel this is a step in the right direction because, in fact, fisheries biologists and managers do not really know in most cases what the real maximum sustainable yield is. For most cases, particularly with multi-species fisheries, all that we can give you is a "guesstimate." Instead, you have to rely on proprietary interests. In that respect, proprietary interests tend to look out for their own good, because if they have to come back to that same resource year after year in order to make a living, they are going to take care of it.

Oceans: Patrimony of Coastal States

Jorge Vargas: I think we can agree that the 200-nautical-mile zone originated in Latin America. In 1947, Chile and Peru were the first two countries in Latin America concerned about fisheries that made claims to 200 miles. Their view was that the oceans were a patrimony of the coastal states and they should be used to enhance the social conditions of the coastal populations. The thesis was that the coastal populations would have direct access to the oceans in order to use the limited resources for protein.

My concern is that because most of these developing countries at this moment, including my own Mexico, lack expertise to handle the coastal resources, we see many fishing fleets from major maritime countries exploiting and sometimes overexploiting these fisheries.

What is the United Nations now doing to help the developing nations? I remember in 1980, the Group of 77 addressed a very serious letter to the secretary-general of the United Nations stating that the mere establishment of the 200-mile zone would not solve the problems of these developing countries. It was necessary to have more than the mere establishment of the exclusive economic zone. It was going to be necessary to have marine scientists, to have information, infrastructure, science, technology, laboratories, libraries, and so on. The Group of 77 demanded that the United Nations create some type of coordinating committee and some special fund in order to provide developing countries with adequate technical systems and expertise to evaluate and to utilize their resources. Since 1980, however, the only thing we have is the program created by FAO on the exclusive economic zone, which has very limited funds. I think we should think in terms of justice, as Bernie Oxman said. How can we put the marine resources of the sea to the benefit of the developing countries?

John Bardach: Let me respond briefly by saying that whether or not you provide developing nations with tools, with scientists, with vessels, and what have you, the biggest fisheries problems in the world today are not scientific, are not apportionment, they are socioeconomic in nature, and they occur inside extended economic zones, and they are a national tragedy of the commonest nature.

A panoramic view of the deliberations in the Asia Room of Jefferson hall at the East-West Center in Honolulu.

David Colson, in the center of the picture, explains the U.S. position to the other participants.

One afternoon, the participants engaged in field study to investigate the ocean environment. From left to right are Luke Lee, Cori Lau, Anthony D'Amato, Nipant Chitasombat, John Craven, Bernard Oxman, Elisabeth Mann Borgese, Tommy Koh, Young-sun Song, and Dennis O'Connor Jr. Behind them is Sandy Beach on the Windward Coast of Oahu.

John Craven adjusts Ved Nanda's face mask at Hanauma Bay.

CHAPTER 7

ENVIRONMENTAL PROTECTION AND THE LAW OF THE SEA CONVENTION

INTRODUCTION

With the environmental provisions in the Law of the Sea Convention, the nations of the world have taken a major step forward in codifying the norms that govern ocean pollution and in providing remedies for those nations that suffer pollution because of the activities of others. Through a series of innovative approaches that build on other environmental treaties, the Law of the Sea Convention develops an overall approach that brings a new focus to the protection of the seas.

Professor Ved Nanda of the University of Denver School of Law opens this session with an overview of the environmental provisions, listing and explaining the new concepts in the Convention. His presentation is followed by a paper by Craig Harrison, which looks at the costs incurred by the United States in the environmental area if it persists in not joining the Convention. The major loss is the inability to take advantage of the Convention's dispute resolution procedures to enforce the standards that are made mandatory by the text. The United States may also find it awkward to play a leading role in the institutions of other environmental treaties, because decisions made in other fora become binding through the provisions in the Convention that refer to "internationally agreed rules, standards and recommended practices and procedures" (Articles 65, 120, and 207-12).

Nipant Chitasombat, professor of law at Chulalongkorn University in Bangkok, gives a short presentation on regional efforts in Southeast Asia to deal with the pollution problems in the Malacca Straits area. The final presentation is made by Jorge Vargas, Director of the Mexico-U.S. Law Institute at the University of San Diego School of Law, on marine scientific research and the transfer of technology.

All the participants agree that--although the Convention's provisions are a step forward--more work

is needed. Professor Elisabeth Mann Borgese describes the provisions as "soft" law because most of them encourage rather than require national action. Both Professors Borgese and Nanda discuss the many ambiguities in the Convention but agree that this is the most effective treaty yet on controlling pollution. Professor William Burke points out that the Convention says very little about land-based pollution, which is perhaps the biggest threat to coastal waters. The participants agree that the major focus for building on the Convention's provisions will be within regional arrangements such as the Regional Seas Programmes.

The U.S. position has been that the environmental provisions in the Convention are essentially part of customary international law and hence are binding on all nations whether they join the Convention or not. The participants analyze this position and tend to agree that many of the provisions can be thought of as customary law if one gives these provisions a broad and vague meaning. Most states appear, for instance, to accept the proposition that "States have an obligation to protect and preserve the marine environment" (Article 192). The problem involves who defines these terms and how the obligation is enforced. Disputes are likely to arise when the efforts of coastal states to regulate the environment conflict with the navigational right of the maritime states. To what extent can environmental concerns limit passage rights through straits and archipelagoes?

The important innovation in Article 218 "port state jurisdiction"--giving each nation the right to enforce environmental regulations against all vessels that come into its ports--is discussed in the papers of Ved Nanda and Craig Harrison, but the discussion of this concept is put off until Chapter 8, pages 500-03. Another development that is new at the international level is the requirement in Article 206 that environmental assessments be made in situations where substantial pollution may be caused.

All the participants agree that the Convention's provisions on marine scientific research are important codifications and that the "implied consent" provision in Article 252 is a major benefit that nonratifying nations will probably not be able to take advantage of.

PROTECTION OF THE INTERNATIONALLY SHARED ENVIRONMENT AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

by

Ved P. Nanda

INTRODUCTION

There is little doubt that the environmental provisions of the United Nations Convention on the Law of the Sea [1] are significant and that following the 1972 Stockholm Conference on the Human Environment [2] they constitute the single most important step forward toward the progressive development of international environmental law. During the last decade, the United Nations Environment Programme (UNEP),[3] established as a

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1 Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), reprinted in 21 Int'l Legal Materials 1261 (1982).

2 See Report of the United Nations Conference on the Human Environment (Stockholm, 5-16 June 1972), U.N. Doc. A/CONF. 48/14/Rev. 1 (1972) [hereinafter cited as Stockholm Report].

3 Following the UN Conference on the Human Environment, the UN General Assembly established UNEP in 1972. See G.A. Res. 2997, 27 U.N. GAOR Supp. (No. 30) at 43-45, U.N. Doc. A/8730 (1972), reprinted in 11 Int'l Legal Materials 1416 (1972).

coordinating body to lead, direct, and coordinate environmental initiatives and actions at the international level, has acted as a catalyst on global environmental assessment and management efforts.[4] Also, several noteworthy measures to improve the environment have been taken on the regional level.[5] Notwithstanding many significant accomplishments since Stockholm, however, grave environmental problems exist. As the UNEP Nairobi Declaration--adopted on May 19, 1982, to commemorate the tenth anniversary of the Stockholm Conference--notes, the Action Plan adopted at the Stockholm Conference

> has only been partially implemented, and the results cannot be considered as satisfactory, due mainly to inadequate foresight and understanding of the long-term benefits of environmental protection, to inadequate co-ordination of approaches and efforts, and to unavailability and inequitable distribution of resources. . . . Some uncontrolled or unplanned activities of man have increasingly caused environmental deterioration. Deforestation, soil and water degradation and desertification are reaching alarming proportions, and seriously endanger the living conditions in large parts of the world. Diseases associated with adverse environ-

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4 See, e.g., UNEP, The United Nations Environment Programme (1979); UNEP, Environmental Managements--An Overview, UNEP Rep. No. 3 (1981); UNEP, The Environment Programme: Programme Performance Report --Report of the Executive Director, UNEP/GC. 9/5 (Feb. 25, 1981).

5 On regional arrangements to control marine pollution, see generally Alexander, Regional Arrangements in the Oceans, 71 Am. J. Int'l L. 84 (1977); Okidi, Toward Regional Arrangements for Regulation of Marine Pollution: An Appraisal of Options, 4 Ocean Dev. & Int'l L. J. 1 (1977); Thacher and Meith, Approaches to Regional Marine Problems: A Progress Report on UNEP's Regional Seas Program, in E. Borgese and N. Ginsburg (eds.), 2 Ocean Yearbook 153(1980). For a summary assessment of regional arrangements established to control environmental degradation, see Nanda and Moore, Global Management of the Environment: Regional and Multilateral Initiatives, in V. Nanda (ed.), World Climate Change: The Role of International Law and Institutions 93, 112-16 (1983).

> mental conditions continue to cause human misery. Changes in the atmosphere[,] pollution of the seas and inland waters, careless use and disposal of hazardous substances and the extinction of animal and plant species constitute further grave threats to the human environment.[6]

In this context, this paper will discuss the framework of the Law of the Sea Convention for the protection and preservation of the marine environment, highlighting a few selected provisions of the Convention because of their special contribution toward the development of the international environmental law and identifying a few selected areas for further study.

FRAMEWORK OF THE CONVENTION

The Convention gives expression to the common interest in the protection and preservation of the marine environment and exploitation of living and nonliving resources in the most efficient manner. It strikes a delicate balance between environmental protection and resource management on the one hand and the requirements for navigation on the other. It represents an important step forward since Stockholm by raising to binding treaty obligations and form the contents of Principle 21 of the Stockholm Declaration on the Human Environment.[7] It may be recalled that Principle 21, while recognizing the sovereign rights of states to exploit their own resources pursuant to their own environmental policies, enunciates the correlative responsibility of states "to ensure that activities within their jurisdiction and control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction."

Under Article 192 of the Convention, states parties undertake the general obligation "to protect and preserve the marine environment." Although the sovereign right of states to exploit their natural resources pursuant to their environmental policies is acknowledged in Article 193, this right is to be exercised by states "in accordance with their duty to protect and preserve the marine environment." Next,

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6 See UNEP, Nairobi Declaration, UNEP/GC. 10/INF.5 at 1 (May 19, 1982).

7 See Declaration of the United Nations Conference on the Human Environment, in Stockholm Report, supra note 2, at 2, 7.

states are obligated by Article 194(1) to take all necessary measures, individually or jointly, "to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practical means at their disposal and in accordance with their capabilities. . . ."

Other obligations include a duty not to transfer damage or hazards or transform one type of pollution into another (Article 195) and the taking of necessary measures "to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto" (Article 196(1)).

States are obligated to undertake cooperative measures on both global and regional levels for the protection and preservation of the marine environment (Articles 197-201). Such measures include immediate notification of imminent or actual damage (Article 198), contingency plans against pollution (Article 199), and research programs and exchanges of information and data (Article 200). Provisions are contained for technical assistance to developing states by developed states (Article 202) and international organizations (Article 203). Also, states are obligated to undertake monitoring of the risk or effects of pollution (Article 204) and environmental assessment of activities that may cause substantial pollution (Article 206).

Under the Convention, states are granted varying degrees of competence to prescribe and apply laws to prevent, reduce, and control pollution of the marine environment from different sources. Six different sources of pollution are identified: (1) pollution from land-based resources (Articles 207, 213); (2) pollution from seabed activities subject to national jurisdiction (Articles 208, 214); (3) pollution from activities in the area beyond the national jurisdiction of states (Articles 209, 215); (4) pollution from dumping (Articles 210, 216); (5) pollution from ships (Articles 211, 217-21); and (6) pollution from or through the atmosphere (Articles 212, 222). Safeguards are provided to prevent possible abuses by states on the pretext of undertaking enforcement measures (Articles 223-33). Article 234 contains special provisions for ice-covered areas. The Convention also provides for state responsibility and liability (Article 235), sovereign immunity for state-owned ships used for noncommercial purposes and warships (Article 236), and state obligations under other conventions on the protection and preservation of the marine environ-

ment (Article 237). Related provisions include those on conservation, protection and utilization of living resources (Articles 61-67, 116-19) and on dispute settlement (Articles 279-85).

CONTRIBUTION OF THE CONVENTION TO INTERNATIONAL ENVIRONMENTAL LAW

The Convention provides a comprehensive framework for the protection and preservation of the marine environment. It makes a special contribution toward the development of international environmental law by imposing a legal obligation upon states parties to the Convention to protect and preserve the marine environment and, more specifically, to prevent, reduce, and control pollution in the marine environment. An appraisal of the Convention's contribution will be discussed here under the following headings: (1) environmental assessment, (2) lawmaking and law enforcement provisions of the Convention, (3) recognition of the special status of developing states, (4) provisions regarding conservation, protection, and utilization of living resources, and (5) dispute settlement provisions.

Environmental Assessment Provisions

The provisions in Articles 197-201 on states' obligations to undertake cooperative measures, including notification, consultation, exchange of information and data, and technical assistance are noteworthy. Article 204 on the monitoring of the risks or effects of pollution is equally useful. Of particular importance, however, is Article 206, which obligates states to assess the potential effects of planned activities under their jurisdiction or control when they have reasonable grounds for believing that such activities may cause substantial pollution of or significant or harmful changes to the marine environment. States are to make public reports upon such assessments (Article 205). It should be noted that there is an important precedent for this requirement that states file environmental impact statements for their major activities in the marine environment. That precedent is the environmental impact statement (EIS) procedure instituted in the U.S. National Environmental Policy Act of 1969.[8] Experience gained under the EIS

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8 National Environmental Policy Act of 1969, sec. 102, 42 U.S.C. secs. 4321-70, esp. secs. 4331-35.

procedure[9] should be of assistance in the implementation of this provision.

Lawmaking and Law Enforcement Provisions in the Convention

The Convention codifies the existing state practice on pollution from land-based sources. The competence of states parties to prescribe and enforce laws and regulations to prevent, reduce, and control such pollution is acknowledged (Articles 207, 213). Also, states are asked to "endeavour to establish global and regional rules, standards and recommended practices and procedures" for this purpose (Article 207(4)). In so doing, they are to take into account "characteristic regional features, the economic capacity of developing States and their need for economic development." In addition, states are to implement applicable international rules and standards.

On the subject of pollution from seabed activities within national jurisdiction--internal waters, the territorial sea, and the continental shelf--the Convention recognizes states' competence to prescribe and apply laws and regulations. However, Article 208(3) obligates states parties to ensure that such laws and regulations "shall be no less effective than international rules, standards and recommended practices and procedures." This obligation concerning the exploration and exploitation of the seabed within national jurisdiction, to implement minimum international standards for the safety of such operations, is a new obligation that the Convention imposes upon states parties. Also, seabed activities in the international area beyond the limits of national jurisdiction which cause pollution will be regulated by the International Sea-Bed Authority, which is to establish international rules, regulations, and procedures for this purpose (Article 145). For activities undertaken by ships, installations, structures, and other devices flying the flag or operating under the authority or registry of states parties, Article 209(2) recognizes states' competence to prescribe and apply laws which "shall be no less effective than the international rules, regulations and procedures" pertinent to such activities.

On the question of pollution from dumping, the Law of the Sea Convention builds upon the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters.[10] For enforcement purposes, the existing jurisdiction of the flag state

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9 See, e.g., T. Schoenbaum, Environmental Policy Law 86-186 (1982).

10 Done Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. no. 8165.

or the state of registry of aircraft is acknowledged in Article 216(1)(b). The coastal state's right to permit, regulate, and control such dumping is acknowledged in Article 210(5), which explicitly states that the express prior approval of the coastal state is a prerequisite for dumping within its territorial sea, exclusive economic zone, or continental shelf. National laws, regulations, and measures are to be "no less effective in preventing, reducing and controlling such pollution than the global rules and standards" (Article 210(6)). It should be noted that the provision on the right of coastal states to regulate and control dumping onto its continental shelf or in its exclusive economic zone is an innovation, not hitherto recognized under customary international law.

On the question of pollution from or through the atmosphere, Articles 212(1) and 222 recognize states' competence to prescribe and apply laws within the airspace under their sovereignty or with regard to vessels flying their flag or vessels or aircraft of their registry, "taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation."

It is, however, in the area of pollution by vessels that the Convention makes a special contribution to international environmental law. The Convention builds on the existing law--borrowing, clarifying, and expanding the law--and the product is a comprehensive and well-balanced framework. During negotiations, coastal states' concern with the flag-of-convenience vessels and likely pollution from them resulted in the recognition of coastal states' interest in controlling pollution in coastal waters. It was clear that the existing regime was not meeting the environmental needs of the coastal states. Consequently, it was felt essential that a balance be sought between the shipping interests of flag states and environmental and fishing interests of coastal states.

It is worth recalling that jurisdictional problems in finding a legal regime to solve vessel-source pollution were highlighted by the first major oil tanker accident causing marine pollution, the Torrey Canyon spill in 1967.[11] The vessel was owned by a Bermuda corporation, controlled by an American company, registered in and flying the flag of Liberia, manned by

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11 See generally Nanda, The "Torrey Canyon" Disaster: Some Legal Aspects, 44 Denver L. J. 400 (1967). See also Dempsey and Helling, Oil Pollution by Ocean Vessels--An Environmental Tragedy, 10 Denver J. Int'l L. & Policy 37 (1980) and Herman, Flags of Convenience--New Dimensions to an Old Problem, 24 McGill L. J. 1 (1978).

an Italian crew, chartered by a British oil company partially owned by the British government, insured by companies in the United Kingdom and the United States, and claimed for salvage by a Dutch corporation. Although the ship capsized off the southwest coast of England and sank in international waters, polluting the United Kingdom and French coastal waters, official investigation was done on behalf of Liberians in Italy by Americans.

Several existing laws and treaties on vessel-source pollution, most of which are of recent vintage, include the 1954 International Convention for the Prevention of Pollution of the Sea by Oil [12] and its subsequent amendments,[13] the 1958 Convention on the High Seas,[14] which obligated states to draw up regulations to prevent pollution of the seas "by the discharge of oil by ships"[15] and from the dumping of radioactive waste,[16] and the 1962 Convention on the Liability of Operators of Nuclear Ships.[17] Two important conventions were adopted by a 1969 international conference convened by the International Maritime Consultative Organization:[18] the International Convention on Civil Liability for Oil Pollution [19] and the International Convention Relating to Intervention

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12 Entered into force July 26, 1958, 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3.

13 Amendments were adopted in 1962, 1969, and in 1971. The text of the 1962 amendments, ratified by the United States in 1966, appears at 17 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332. For the 1969 amendments, see 28 U.S.T. 1205, T.I.A.S. No. 8505, reprinted in 9 Int'l Legal Materials 1 (1970), and for the 1971 amendments, see 11 Int'l Legal Materials at 267 (1972).

14 1958 Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

15 Id. art. 24.

16 Id. art. 25.

17 Reprinted in 57 Am. J. Int'l L. 268 (1963).

18 See generally Juda, IMCO and the Regulation of Ocean Pollution from Ships, 26 Int'l & Comp. L.Q. 558 (1977); UNEP, Environmental Law: An In-Depth Review 128 (1981) [hereinafter cited as UNEP Rev.].

19 Done at Brussels, Nov. 29, 1969, reprinted in 9 Int'l Legal Materials 45 (1970).

on the High Seas in Cases of Oil Pollution Casualties.[20] Other pertinent conventions include the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage,[21] the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters,[22] the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL Convention),[23] the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention),[24] and the 1978 MARPOL Protocol and the SOLAS Protocol.[25] Regional agreements include the 1969 Agreement concerning Pollution of the North Sea by Oil (Bonn),[26] the 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo),[27] the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki),[28] and the UNEP Regional Seas Programme.[29]

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20 Done at Brussels, Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068, entered into force for the United States, May 6, 1975, reprinted in 9 Int'l Legal Materials 25 (1970).

21 Done Nov. 18, 1971, reprinted in 11 Int'l Legal Materials 284 (1972).

22 Done Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165.

23 Done Nov. 2, 1973, reprinted in 12 Int'l Legal Materials 1319 (1973).

24 Done Nov. 1, 1974, reprinted in 14 Int'l Legal Materials 959 (1975).

25 Reprinted in 17 Int'l Legal Materials 546, 579 (1978).

26 Done June 9, 1969, reprinted in 9 Int'l Legal Materials 359 (1970).

27 Done Feb. 15, 1972, reprinted in 11 Int'l Legal Materials 262 (1972).

28 Done Mar. 22, 1974, reprinted in 13 Int'l Legal Materials 544 (1974).

29 See generally UNEP Rev., supra note 18, at 26-27; authorities cited in note 5 supra.

The Law of the Sea Convention, building upon these conventions, took many of their provisions verbatim and clarified and expanded upon certain others, providing a comprehensive and balanced approach. Thus, the Convention recognizes the competence of flag states to prescribe laws and regulations and to set standards for vessels flying their flags or of their registry, but in addition obligates flag states to have their laws meet "generally accepted international rules and standards established through the competent international organizations or general diplomatic conference" (Article 211(2)). For vessel-source standards, such an organization is the International Maritime Organization (IMO). Since the IMO standards are those contained in the 1978 MARPOL Protocol [30] and since only a few developing nations have ratified MARPOL,[31] the Convention makes a major contribution by mandating compliance by states that ratify the Law of the Sea Convention with the stringent vessel-source pollution standards of the MARPOL Protocol.

The Convention, moreover, goes beyond recognizing flag state competence and introduces an innovative concept of "port state jurisdiction" to set and enforce pollution standards for ships voluntarily entering a state's ports (Articles 211(3), 218). It also authorizes coastal states to establish anti-pollution laws and regulations for the territorial sea with a provision that any construction, design, equipment, and manning standards established by the coastal state will have to conform to international standards (Article 21(2)). It should be noted that under the Convention a coastal state's enforcement competence in its territorial waters is unlimited. This regime of coastal state jurisdiction would apply to the territorial waters outside of straits used for international navigation; states bordering such straits may adopt anti-pollution laws and regulations only by giving effect to international regulations (Article 42(1)(b)). Ships in transit passage are obligated to comply with international standards regarding environmental pollution (Articles 39(2)(b) and 43(b)) as well as safety (Articles 39(2)(a) and 43(a)).

The treaty, however, does impose certain limitations on punishment in the territorial waters. Impri-

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30 See note 25, supra, at 549.

31 MARPOL entered into force October 2, 1983. It has been ratified by only 15 states, four of which are developing states. U.S. Dept. of State, Treaties in Force (1983).

sonment may not be imposed under the Convention, for example, "except in the case of a wilful and serious act of pollution in the territorial sea" (Article 230(2)). Also, the coastal state has a concomitant duty not to hamper innocent passage through territorial waters by the imposition of any standards or requirements (Article 24(1)(a)), although it may adopt measures regulating innocent passage where necessary to ensure the "preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof" (Article 21(1)(f)), and the conservation of the living resources of the sea (Article 21(1)(d)).

In the exclusive economic zone, the Convention does not authorize the coastal state to set standards that differ from those established by "the competent international organization or general diplomatic conference" (Article 211(5)). Article 220(6) does, however, authorize the coastal state to take enforcement action in this zone, including detention of a vessel for a violation "resulting in a discharge causing major damage or threat of major damage" to the coastline or the resources of the territorial sea or the exclusive economic zone. Also, Article 211(6)(a) provides that under special circumstances a coastal state may, after consultation with the International Maritime Organization, promulgate standards in its exclusive economic zone when they are warranted by special oceanographical and ecological conditions, or for the utilization or the protection of the state's resources, or because of the particular character of its traffic. In ice-covered areas, which are particularly fragile and susceptible to damage from oil pollution, coastal states are authorized to prescribe and enforce laws and regulations for the prevention, reduction, and control of marine pollution from vessels within their exclusive economic zones (Article 234).

Port state jurisdiction authorizes a port state to set unilaterally its own entry requirements with respect to ship construction or crew standards (Article 211(3)). Port state enforcement includes investigation and possible institution of proceedings pertaining to "any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference" (Article 218(1)). A port state may also inspect vessels in its port (Articles 218 and 220), and if the ship is unseaworthy the port state may refuse to release it or have the release made conditional "upon proceeding to the nearest appropriate repair yard" (Article 226(1)(c)).

Articles 223-33 contain safeguards to ensure that coastal states in their zeal and enthusiasm to control marine pollution (or perhaps for political reasons) do not abuse the power and authority given to them, thereby causing unnecessary delay by investigations and proceedings. Although some commentators have expressed concerns that pollution controls might cause interference with navigation--especially for specialized ships and ships containing specific cargoes, under the guise that they pose a significant pollution risk, the Convention has provided a necessary, if delicate, balance between navigational rights and the protection and preservation of the marine environment.[32]

Recognition of Special Status of Developing States

The Convention recognizes the special interest of developing countries by underscoring the responsibility of industrialized nations for the protection and preservation of the marine environment. For example, Article 194(1) obligates states to take measures to prevent, reduce, and control pollution of the marine environment but adds that they should take steps "in accordance with their capabilities." The same term, "in accordance with their capabilities," is used in Article 199 in connection with states' obligations to develop and promote contingency plans against pollution. Also, regarding both the monitoring of the risks or effects of pollution and the assessment of potential effects of activities, Articles 204 and 206 use the term "as far as practicable." Article 207(4) provides for taking into account "the economic capacity of developing States and their need for economic development" in setting standards regarding pollution from land-based sources. Additionally, the Convention contains provisions for providing scientific and technical assistance to developing states from industrialized countries (Article 202) and requiring that preferential treatment be given to them by international organizations (Article 203).

Although these provisions were initially challenged by the delegates of industrialized countries as establishing "double standards," the delegate from Mexico who chaired the informal consultation group on the protection and preservation of the marine environment at the Third United Nations Conference on the Law of the Sea has stated that such provisions "must not be construed as recognizing double standards but merely as emphasizing the obvious limitations of developing countries and the special duties of those who have the

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32 See, e.g., Wulf, Comment, 46 Law & Contemp. Probs. 155, 166 (1983).

technology and the economic means to protect the oceans."[33]

Protection and Conservation of Living Resources

Article 194(5) establishes a duty on states to take measures to protect and preserve rare or fragile ecosystems and the habitat of depleted, threatened, or endangered species. Articles 65 and 120 also require states to cooperate "with a view to the conservation of marine mammals" and to work through "the appropriate international organizations for their conservation, management and study." The "appropriate international organization" is the International Whaling Commission. On conservation of the living resources, Articles 61(4) and 119(1)(b) require coastal states to consider "the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened."

Dispute Settlement Provisions of the Convention

Article 297(1)(c) provides for compulsory settlement of disputes related to the violation of standards for the protection of the marine environment. Thus, a party to a dispute concerning the interpretation or application of the Convention related to such standards could choose, in addition to the conciliation procedure (Annex VIII), any of the following means for the settlement of such disputes: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with the Convention, or a special arbitral tribunal constituted in accordance with the Convention provisions (Article 287).

AREAS FOR FURTHER STUDY AND ACTION

The Convention marks a significant step forward toward the progressive development of international environmental law. Several provisions in the Convention, however, need clarification and elaboration. To illustrate, Article 235(3) on responsibility and liability does not go beyond a reiteration of Principle 22

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33 Vallarta, Protection and Preservation of the Marine Environment and Marine Scientific Research at the Third United Nations Conference on the Law of the Sea, 46 Law & Contemp. Probs. 147, 148 (1983).

of the Stockholm Declaration.[34] It simply provides that although states are responsible for fulfilling their international obligations concerning protection and preservation of the marine environment and are liable in accordance with international law, they

> shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

It should be noted that not much progress has been made in developing international environmental law regarding state responsibility and liability since Stockholm.

Similarly, the Convention provisions on land-based sources show no marked progress beyond the existing norms contained in earlier conventions, including the 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources,[35] the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea,[36] and the Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources.[37]

In the enforcement provisions, states are to take the necessary measures to implement "applicable international rules and standards established through competent international organizations or diplomatic conference" to control pollution (see Articles 213, 214, 216, 217(1), 218(1), 219, 220(1), and 222). Although in many instances the pertinent international organization is known, such as the International Maritime Organization or the International Whaling Commission, these provisions lack certainty. Also, Article 209 on pollution from activities in the area beyond the national jurisdiction of states lacks

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34 Stockholm Report, supra note 2, at 7.

35 Opened for signature June 4, 1974, reprinted in 13 Int'l Legal Materials 352 (1974).

36 Adopted March 22, 1974, reprinted in 13 Int'l Legal Materials 546 (1974).

37 Opened for signature May 18, 1980.

specificity at present. Finally, the obligation of states in Articles 211(2) and 217(1) to prescribe and apply laws to control marine pollution from "vessels flying their flag or of their registry" is confusing and needs to be clarified.[38]

ENVIRONMENTAL PROVISIONS OF THE CONVENTION AS CUSTOMARY INTERNATIONAL LAW

Several environmental provisions of the Convention codify existing customary international law, but others introduce many new norms for the world community. To illustrate, Article 207 on land-based sources codifies existing norms on the subject, but the state obligation in Articles 208(3) and 214 to prescribe and apply international rules and standards "no less effective than" the pertinent international rules and standards concerning the exploration and exploitation of the seabed within national jurisdiction is an innovation introduced by the Convention. Articles 210 and 216 on dumping codify the existing competence of flag states or states of registry of aircraft, but introduce the new element of coastal state competence to control pollution within the exclusive economic zone or continental shelf. It should be noted that although a coastal state's jurisdiction to control pollution within its national jurisdiction already exists under the prevalent rules of international law, there is no customary international law regarding the scope and extent of its competence beyond its territorial waters.

The regime to control vessel-source pollution in Article 211 introduces innovative elements not contained in customary international law, some allowing

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38 Schneider, Codification and Progressive Development of International Environmental Law at the Third United Nations Conference on the Law of the Sea: The Environmental Aspects of the Treaty Review, 20 Colum. J. Transn'l L. 243, 274 (1981) forcefully argues:

> To most international lawyers the notion that there could be a difference between the flag state and that of registry borders on the incredible, and to most environmentalists the potential of convenience registries on top of "flags of convenience" presents yet another significant problem. In any event, it should certainly be clarified just what and how many states may be implied by the "or" (footnote omitted).

the coastal state an enlargement of its competence and others narrowing its competence. In the territorial waters, for instance, the Convention authorizes the coastal state to set standards for discharges but not for construction, design, equipment, and manning of ships unless such standards give effect to generally accepted international rules and standards (Article 211(6)(c)). Under previous international law, coastal states suffered no such limitations except that they were not permitted to set standards that hampered innocent passage.[39]

In the exclusive economic zone, the Convention does not authorize the coastal state to set standards. Coastal state enforcement in the exclusive economic zone is, however, permissible, including detention of a vessel, for a violation "resulting in a discharge causing major damage or threat of major damage" to the coastline or the resources of the territorial sea or the exclusive economic zone (Article 220(6)). On marine casualty, Article 221(1) explicitly recognizes the right of states

> to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

A gradual shift has apparently occurred in the law regarding coastal state competence to deal with marine casualties. Traditionally coastal states could intervene only in cases of severe marine casualties and then only in their territorial waters or contiguous zones. Now, the Convention authorizes anticipatory intervention in certain cases, which is a desirable development.

The provision regarding ice-covered areas permits the coastal state to set standards for such vulnerable

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39 See e.g., art. 15(1) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zones, 15 U.S.T. 1606, 516 U.N.T.S. 205, T.I.A.S. No. 5639, which states: "The coastal State must not hamper innocent passage through the territorial sea." The Law of the Sea Convention likewise states in article 24(1)(a) that coastal states shall not "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage."

areas. The 1970 Canadian Arctic Waters Pollution Prevention Act,40 which provided for preventive measures against oil pollution in a 100-mile area from Canada's Arctic coast, was the first such major unilateral attempt. Now the Convention legitimizes such unilateral acts. Perhaps the most innovative part of the Convention is the universal port state jurisdiction, which was discussed in the preceding section.

CONCLUSION

Particularly significant contributions of the Law of the Sea Convention include the elevation of Principle 21 of the Stockholm Declaration to treaty level and codification in one document of provisions from several prior treaties that had failed to attract a large number of states as parties. Although one could argue that some of the provisions in the Convention might unduly hamper efforts by coastal states in taking preventive action in their territorial waters (see, e.g., Articles 19(2)(h) and 21(2)), it is submitted that the enhanced role of coastal state and port state authority in controlling marine pollution, especially port state enforcement, is a most desirable development.

Many of the prescriptions in the Convention need detailed work before they will be specific enough for purposes of implementation, for in their present form many norms are abstract and are in need of elaboration on both the regional and global level. Only then would there be detailed and clear obligations for states and precise international standards and implementation measures. But the Convention's accomplishments are substantial indeed, for states parties to the treaty would assume responsibility for the prevention and control of marine pollution and would undertake the necessary cooperative measures for the protection and preservation of the marine environment.

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40 18-19, Eliz. 2, c. 47 (Can. 1970), reprinted in 9 Int'l Legal Materials 543 (1970). Initial reaction to such a unilateral action was generally unfavorable. For a commentary, see Bilder, The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea, 69 Mich. L. Rev. 1 (1970).

DISCUSSION

The Obligation to Protect and Preserve the Marine Environment

David Colson: Are Articles 192 and 235 now part of customary international law? I find Article 192 a very interesting and important statement. Whether or not it is customary law, I think it is clear that all states would say it is customary or conventional law. I mean we all would agree that we have a duty to protect the marine environment. What that means in practice and what states may do to protect the marine environment is the real question. Article 235 is of a similar scope. The precise nature of the responsibility and the liability is not spelled out. Everyone would concur in the general statement that there is responsibility and liability for damage that is caused to the marine environment or to another state's marine environment, but exactly how one implements that and what one does is the real question. That is not answered yet.

Enforcing the Environmental Provisions

Elisabeth Mann Borgese: I agree with Professor Nanda that Part XII is one of the most innovating and pioneering parts of the Convention and that it does make new law. Of course, nothing is perfect and Part XII is not perfect either. One basic defect that it has, and has to have at this juncture of history, is that it fails to create an institutional infrastructure to enforce the law that it creates. Many of the environmental norms, even though they constitute a big step forward, remain, therefore, in the "soft law" category at this stage.

Let us look, for instance, at the power of enforcement of the port states (Article 218). This is an interesting and useful innovation, but if you read it carefully you must come to the conclusion that the port

state may take enforcement measures. It does not say that it shall. Those of us who have the protection of the marine environment very high on our list of priorities feel a little bit cheated. It is not yet what we want it to be.

There is no reason to be pessimistic, however. Rome was not built in one day. Trends and processes to transform the relatively soft law of the Convention into hard and enforceable law are already clearly discernible, especially in the context of the Regional Seas Programmes.

The Regional Seas Programmes are important from a number of points of view. First, because they translate the soft law into hard and enforceable law. Second, because they adjust this law to regional needs and exigencies. Third, because they are regionally conditioned, they are in a better position to look more effectively into the interface between land and sea.

Ved Nanda: It needs to be emphasized that the Convention gives expression to the needs and desires of many countries to do something about the international environment. But not much had been done about it, and we are still nowhere near having any precise formulations on state liability and responsibility. For the first time, however, the contents of Principle 21 of the Stockholm Declaration have been embodied into a concrete written form in a treaty. The obligation in Article 192 "to protect and preserve the marine environment" can be used directly and precisely. I would have to say that this was not a previously existing obligation. If it was, it was merely in an evolving preliminary stage. Article 192 creates a new obligation in that sense.

Is the Article 235 obligation a codification of existing norms? Not really. It again is a new obligation, because the previous formulations of these obligations were not precise and were not universally accepted.

Borgese: I completely agree with Professor Nanda. I would even go so far as to say that the Regional Seas Programme would not be thinkable without the Law of the Sea Convention. It cannot be pushed forward and developed unless the treaty is ratified, and the people who work on the Regional Seas Programme are fully aware of that.

Colson: I would disagree with Professor Borgese that the Regional Seas Programme will have difficulty going forward or is dependent upon the treaty entering into force. It seems quite clear to me that the Programme is going forward full tilt without regard to

whether the Law of the Sea Convention enters into force.

What About Vessel-Source Pollution?

William Burke: I do not find the environmental protection provisions very innovative at all, with the exception of the enforcement provisions. They deal with the most insignificant of all the sources of marine pollution. The most important sources are not dealt with in the Convention at all, the land-based sources.[1] The Convention deals with vessel-source pollution and that is the least important. The recent GESAMP report on the state of the health of the oceans indicates that there is no ocean-wide pollution problem.[2] There are regional problems, and certainly there are problems whenever catastrophes take place.

Nanda: I share Professor Burke's concern that more needs to be done to protect the marine environment and that UNCLOS III left many topics unresolved. But the Convention does gather fragmented and ambiguous customary international law and put it into a comprehensive framework. Coastal state jurisdiction has been expanded, and port state jurisdiction has been clarified and strengthened. Before the Convention, all we had were the aspirations expressed in the 1982 Stockholm Principles.[3] If the Law of the Sea Convention came into force, we would have a real treaty obligation.

Linkages to Other Environmental Conventions and Activities

Colson: One of the most interesting things about Part XII of the Convention on the preservation and protection of the marine environment is that the obligations are in many ways contingent upon what will happen in other forums (see, for instance, Articles 65, 120, and 207-12). A great deal is happening in other forums right now that is creating the rules that will be applicable to a party under this Convention. For

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1 See Professor Oxman's comment at 267 supra.

2 GESAMP (IMCO/FAO/UNESCO/WMO/WHO/IAEA/UN/UNEP Joint Groups of Experts on the Scientific Aspects of Marine Pollution), The Health of the Oceans (UNEP Regional Seas Reports and Studies No. 16, 1982).

3 See Principle 21 of the Declaration of the Human Environment of the 1972 Stockholm Conference, GA Res. 2996 (XXVII), 27 U.N. GAOR Supp. (No. 30), U.N. Doc. A/8730 (1972).

example, a recent meeting was held of ad hoc legal experts on the London Dumping Convention. Furthermore, the 8th Consultative Meeting will be held in February, 1984, on the Dumping Convention which will be addressing the obligations of the parties to the Dumping Convention. These obligations will transfer themselves into obligations for parties to the Law of the Sea Convention.

Environmental Impact Statements

Jon Van Dyke: Another significant innovation is Article 206, which requires an environmental impact statement for ocean activities with the potential of causing substantial pollution. It is hard to ignore the importance of this step in trying to promote and protect the environment. The United States has required environmental impact statements for the past decade. I have been working in the nuclear waste area and have been comparing the very thick environmental impact statement that the United States prepared for the possible scuttling of nuclear subs in the ocean with the very small "site review" that the OECD Nuclear Energy Agency prepared for the European dumping that has been going on in the Northeast Atlantic for a number of years.[4] The U.S. EIS is a thick volume, documented extensively, not completely acceptable in all regards, but nonetheless formidable and informative. The OECD/NEA site review is sparse, does not have the multidisciplinary approach we are used to, and was put into final form without any opportunities for public comment. We do not now know what kind of impact statement Article 206 requires. It will be up to the nations of the world to give this provision meaning. Nonetheless it is an important first step.

Persons concerned about the marine environment are enthusiastic about the environmental provisions in the Convention as a major step forward. The big question is whether these provisions can now be considered binding customary law or whether they will be ignored if the Convention is not universally ratified.

The U.S. Oceans Policy Statement

Colson: Questions have been raised about the U.S.

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[4] U.S. Department of Navy, Draft Environment Impact Statement on the Disposal of Decommissioned, Defueled, Naval Submarine Reactor Plants (1982); OECD/NEA, Review of the Continued Suitability of the Dump Site for Radioactive Waste in the North East Atlantic (1980).

EEZ/Oceans Policy Statement,[5] because some observers apparently believe that the United States claimed more extensive jurisdiction over the 200-mile zone in this proclamation than that which is provided for in the text of the Convention. I do not believe that this is the case. It certainly was not our intention to do so, and we will not be implementing any jurisdiction in our economic zone beyond that which is permitted in the text of the Convention. Our claims are, however, somewhat different from those outlined in the Convention. We are not asserting marine scientific research jurisdiction. We are not asserting jurisdiction over tuna, as some nations would say they are authorized to do.

Ice-Covered Areas

The United States accepts the language of Article 234 on ice-covered areas but disagrees with Canada on its meaning. It was the United States' position throughout the Conference that Canada's Arctic Waters Pollution Prevention Act of 1970 is unlawful in international law and is not consistent with Article 234 of the text.[6] This continues to be our position, and it has most recently been communicated to the government of Canada by myself a few weeks ago. Canada has known of our views throughout the negotiation, and we have indicated our willingness to sit down with Canada and talk about what Article 234 might really mean. We do not feel that the entire legal regime of the ocean should be changed just because it is the Arctic.

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5 See Appendix A infra.

6 Arctic Waters Pollution Prevention Act, Can. Rev. Stat. c. 2 (1st Supp. 1970), reprinted in 9 Int'l Legal Materials 543 (1970).

COSTS TO THE UNITED STATES IN ENVIRONMENTAL PROTECTION AND MARINE SCIENTIFIC RESEARCH BY NOT JOINING THE LAW OF THE SEA CONVENTION

by

Craig S. Harrison

INTRODUCTION

Environmental protection is an area in which unilateral action by individual states is often ineffective. The Convention contains broader rules than ever before for the protection of the ocean environment from pollution by ships and from shore and for the protection of all marine species from overexploitation. Many observers believe that such provisions could not have been agreed upon except in the context of a comprehensive Convention covering all aspects of ocean affairs.

Marine pollution problems and the extinction of marine creatures transcend legal boundaries. The United States has been at the vanguard of world leadership in demanding stricter environmental rules for the protection of the marine environment and its resources.[1] Although some of the standards set by the Convention are lower than those advocated by the United

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[1] For example, the United States unilaterally passed domestic legislation requiring segregated ballast tanks for oil tankers entering its territorial waters, which convinced the recalcitrant IMO to take effective international action to require segregated ballast. R.M. M'Gonigle & M.W. Zacher, Pollution, Politics, and International Law 111-12 (1979).
(footnote continued)

States, slightly lower ones that will be complied with by most of the international community will ultimately be more effective than higher standards in strictly national legislation. In addition to specific provisions, the Convention establishes in Article 192 the general obligation of states "to protect and preserve the marine environment." This obligation already exists in numerous treaties,[2] but they apply to few parties and to limited regions. The Convention greatly expands this obligation to include all states and to apply to the global marine environment. What does the United States sacrifice by staying out of the Convention?

MARINE POLLUTION

The Convention urges all states to prevent, reduce, and control pollution from all sources.[3] Although hydrocarbon pollution was a major motivation for these provisions,[4] pollution is defined broadly and includes a wide variety of substances (Article 1(1)(4)). A primary concern of the international community during the negotiations was the poor record of

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[1] (continued)
Additionally, the United States has been a dominant force in convincing the International Whaling Commission to curtail whaling activities. Nafziger, Global Conservation and Management of Marine Mammals, 17 San Diego L. Rev. 591, 604-05 (1980).

[2] Hearings on the Law of the Sea Negotiations Before the Subcomm. on Arms Control, Oceans, International Operations, and Environment of the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 105 (1981) (statement of Clifton Curtis, Environmental Defense Fund) [hereinafter cited as 1981 Senate Hearings].

[3] The sources include vessels (Article 211), land (Article 207), seabed activities (Articles 208-09), dumping (Article 210), and the atmosphere (Article 212).

[4] About three million metric tons enter the oceans each year. About 54 percent emanates from the land, 35 percent from marine transportation, and 11 percent from seeps or offshore production. Almost two-thirds of the marine transportation portion is due to routine tanker operations. R.M. M'Gonigle & M.W. Zacher, supra note 1, at 16-20.

flag-of-convenience vessels. Their advanced age and poor standards of seamanship were widely recognized to be contributing factors in many oil spill incidents.[5]

The Convention fashions a solution to vessel-source pollution problems by addressing two key issues. First, Article 211(1) provides jurisdiction to set international performance standards to the "competent international organization." For vessel-source standards, this organization is the International Maritime Organization (IMO).[6] The IMO is responsible for establishing standards in a wide variety of marine activities, including procedures for dumping most waste materials, design and construction standards for ships, regulations for vessel-source pollution, and staffing of ships. Flag state laws and regulations are required to be at least as stringent as those of the IMO (Article 211(2)). These standards were informally understood to be those in the 1978 MARPOL Protocol.[7] Because MARPOL has been ratified by only 15 nations,[8] one important consequence of the Convention has been to extend strict performance standards to many more nations, particularly to the developing nations, which have rarely ratified or implemented IMO pollution conventions.[9] Only five developing nations have

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5 R.M. M'Gonigle & M.W. Zacher, supra note 1, at 21. Sebek, Oil Pollution of the Sea, 13 Bull. Int'l Council for Bird Preservation 180 (1979).

6 IMO, formerly IMCO, is a UN specialized agency. Other agencies are the competent international organization for other issues. For example, the International Atomic Energy Agency will probably set standards for oceanic dumping of nuclear wastes.

7 The 1973 Convention for the Prevention of Pollution from Ships, 12 Int'l Legal Materials 1319 (1973) has been implemented through the 1978 Protocol, 17 Int'l Legal Materials 546 (1978) [hereinafter cited as the MARPOL Convention]. Hearings on the Status of the Law of the Sea Treaty Negotiations Before the Subcomm. on Oceanography and the House Comm. on Merchant Marine and Fisheries, 97th Cong., 1st Sess. 255 (statement of Terry Leitzell) [hereinafter cited as 1982 House Hearings].

8 U.S. Dep't of State, Treaties in Force (1983). MARPOL entered into force October 2, 1983, for the 15 nations that have ratified it.

9 R.M. M'Gonigle & M.W. Zacher, supra note 1, at 339.

ratified MARPOL.[10] The Convention is a major step forward in encouraging worldwide compliance with strict vessel-source pollution standards.

The second key element needed to solve pollution problems is jurisdiction to enforce environmental standards. The Convention recognizes flag state and coastal state enforcement regimes and creates a port state regime. Flag states must enforce throughout the world the standards and laws established by the IMO on vessels that fly their flag (Article 217(1)). Flag states are required to enforce international requirements for the design, construction, equipment, and staffing of ships (Article 217(2)). When a violation occurs, the flag state is obliged to conduct an immediate investigation and to assess penalties commensurate in severity, to discourage future violations.[11]

Coastal states can regulate marine dumping. A prior permit is required for any activities in the territorial sea, exclusive economic zone (EEZ), or the continental shelf, and measures must be no less effective than those established by the competent international organizations (Article 210(6)). A coastal state may set standards stricter than those established by international organizations for vessel-source discharges within its territorial sea,[12] but it may not exceed international standards in the EEZ (Article 211(5)), except in ice-covered areas.[13] Design, construction, equipment, and staffing

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10 The developing states are Colombia, Liberia, Peru, Tunisia, and Uruguay. U.S. Dep't of State, supra note 8. About 130 states are considered to be developing nations. J.M. Sweeney, C.T. Oliver & N.E. Leech, The International Legal System 1126 (2d ed. 1981).

11 Article 217(8). Past fines, even in the environmentally-conscious nations, have been far too small to influence behavior. The courts of the United Kingdom, Canada, and the United States have assessed fines that average $1,200 per incident. Insurance coverage further limits the deterrent value of fines. R.M. M'Gonigle & M.W. Zacher, supra note 1, at 334.

12 However, such laws and regulations may not hamper innocent passage. Article 211(4).

13 Ice-covered areas are particularly fragile and especially susceptible to damage from oil pollution (Article 234).

requirements may not exceed international standards (Article 21(2)). The restriction on coastal state activities in these areas is part of a careful balancing process that seeks to protect innocent passage.

Port State Jurisdiction

Port state jurisdiction is an important innovation in the Convention. A port state may unilaterally set its own entry requirements with respect to ship construction or crew standards (Article 211(3)). This provision provides a strong incentive for the IMO to strengthen international standards and thereby to remove marginal vessels from commerce. A port state may inspect vessels in its ports and can prevent a sufficiently unseaworthy ship from sailing until proper modifications have been made.[14]

The Convention is especially beneficial to the United States because its geography is such that virtually all vessels passing off its coasts call at one of its ports.[15] Consequently, the United States can use port state entry requirements to set standards that exceed international minima, without restricting innocent passage.[16] Port state jurisdiction also limits the flag state monopoly over enforcement.[17] A port state can enforce most violations of pollution standards that occur anywhere in the world,[18] and it may be the only means of enforcing regulations on the

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[14] Article 226. However, in many instances the "physical" inspection is limited to an inspection of documents. See discussion at pages 500-03 infra.

[15] About 90 percent of the vessels that enter the U.S. EEZ are destined for U.S ports. About 95-99 percent are destined for U.S. or Canadian ports, and discussions have been held to establish a joint agreement to prosecute violations in either EEZ. 1982 House Hearings, supra note 7, at 263 (statement of Terry Leitzell).

[16] Id. at 256.

[17] See generally R.M. M'Gonigle & M.W. Zacher, supra note 1, at 200-51.

[18] Article 218. States with identical port entry requirements are expected to cooperate with one another to achieve effective enforcement.

high seas.[19] A flag state may supercede an investigation by a port state, but only if no major damage has occurred and the flag state has a good record of effective enforcement.[20]

The Convention maintains the status quo with regard to most vessel-source pollution requirements, especially for the United States, which already has very strict standards. Most of the rights in this area are already customary law, and the United States enforces domestic laws that implement Convention provisions without serious challenge from other nations.[21]

The right of a coastal state to take measures beyond the territorial sea to prevent damage to its coastline or related interests from maritime casualties is recognized under customary law.[22] This right is considerably broadened by allowing enforcement throughout the EEZ, but inspection rights of passing ships are limited to situations where pollution is substantial and the documentation of the passing ship is inadequate (Article 220).

The Costs of Not Joining the Convention

If the United States does not join the Convention, it faces three costs regarding marine pollution. First, it is possible that nonparticipation by the United States in the Convention will result in fewer

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19 Cycon, Calming Troubled Waters: The Developing International Regime to Control Operational Pollution, 13 J. Mar. L. & Com. 35, 49 (1980).

20 Articles 218(4) and 228. In the past, certain flag-of-convenience states have not performed their duties as flag states in a responsible manner. In the 1970s, for example, Liberia did not even respond to any of eleven complaints made concerning vessels flying her flag. R.M. M'Gonigle & M.W. Zacher, supra note 1, at 228. Query whether this record will be considered as part of the "repeatedly disregarded its obligations" standard under Article 228(1)?

21 For example, the United States controls dumping out to 12 miles, even though it officially recognizes only a 3-mile territorial sea. 33 U.S.C. secs. 1401-02, 1411-21 (1982). In addition, the U.S. Ports and Waterways Safety Act, 33 U.S.C. sec. 1221 (1982) sets up conditions for entry to U.S. ports and protects the marine environment in the EEZ.

22 1981 Senate Hearings, supra note 2, at 240 (report of the Committee on Law of the Sea).

ratifications, leading to less progress in curbing marine pollution. Other nations may be encouraged to make a similar assessment of the treaty, treating favorable provisions as customary law and ignoring provisions that do not advance national economic interests. Developing nations in particular view such issues as problems for developed nations to solve, and may be unwilling to devote resources toward minimizing marine pollution in the absence of a "package deal" treaty. Global minimum standards might not be raised and the degradation of the marine environment might continue unchecked. Furthermore, the United States would be unable to acquire leverage on some states with respect to the enhanced applicability of other environmental treaties.[23]

A second cost to the United States is a potentially diminished role in the IMO.[24] Because the IMO is the "competent international organization" for many pollution issues under the Convention, its role has been greatly elevated and expanded. Although the United States has always wielded a great deal of influence in the negotiation of IMO treaties,[25] its future as a leader in marine pollution issues may be compromised by a perception that it is a maverick with regard to the Convention. IMO established its Marine Environmental Protection Committee (MEPC) in 1973 at the request of the United States.[26] MEPC can act in a

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[23] For example, Article 210(6) requires states parties to follow the "global rules and standards" for the dumping of nuclear wastes in the ocean. Because such standards emanate from the London Dumping Convention, 26 U.S.T. 2403, T.I.A.S. No. 8165, the Convention effectively makes each state party a party to the London Dumping Convention.

[24] In 1983, 123 nations were members of IMO. U.S. Dep't of State, Treaties in Force (1983).

[25] For example, the United States was an important force behind the International Convention on Civil Liability for Oil Pollution Damage, 9 Int'l Legal Materials 45 (1970); the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 11 Int'l Legal Materials 284 (1972); the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 9 Int'l Legal Materials 25 (1972) and the MARPOL Convention, supra note 7. See generally, R.M. M'Gonigle & M.W. Zacher, supra note 1.

[26] R.M. M'Gonigle & M.W. Zacher, supra note 1, at 48.

"quasi-legislative" capacity with respect to the MARPOL Convention, which permits amendments to technical provisions adopted by MEPC to enter into force unless objected to by a certain percentage of parties to MARPOL.[27] Because the MARPOL standards will be used for vessel-source pollution,[28] MEPC is likely to have a very important role as the standard-setting committee of IMO. Although how the IMO or MEPC will set the standards for the Convention is ambiguous, parties may rightfully question whether the United States should participate in setting international standards for a Convention to which it is not a party. Given the technical expertise of the United States and its past efforts to minimize the pollution of the oceans, such a result would be unfortunate.

A third cost to the United States would be its inability to utilize the dispute settlements provisions of the Convention for disputes that concern marine pollution. Disputes about the violation of standards for the protection of the marine environment are subject to compulsory procedures entailing binding decisions (Article 297(1)(c)). As a nonparticipant attempting to enforce portions of the Convention under a customary law theory, the United States could not force a binding procedure on another state. The United States would have less leverage on flag states and might have difficulties in enforcement unless the vessel in question actually entered a U.S. port.

A flag-of-convenience oil tanker carrying Mexican oil to Europe might threaten Florida coasts if the vessel standards were inferior. A developing nation might decide to dump nuclear wastes from its emerging nuclear power industry in the North Pacific just beyond the EEZ of Hawaii. The United States would have no direct means of enforcing international standards on such activities. This problem would be especially serious if such nations claimed to comply with the standards of a "competent international organization" that was not the organization the United States expected to set international standards. Most important, vessel-source pollution issues may become pretexts for attempts to limit navigation by U.S. vessels. Such disputes will become embroiled in general foreign relations negotiations rather than being settled on their merits.[29]

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[27] Id.

[28] MARPOL Convention, supra note 7.

[29] A fourth cost might also be considered. The concept of port state authority to enforce marine pollution

(footnote continued)

THE PROTECTION OF LIVING RESOURCES

The Convention contains numerous provisions that serve to protect living resources from various threats caused by human exploitation of resources. These provisions require states to consider the effects of their marine activities on individual species and on ecosystems. The United States will be unable to enforce such provisions if it does not join the Convention and its inaction may weaken the resolve of the international community to respect the noneconomic values that the Convention could protect. By not joining the Convention, the United States suffers five costs relating to the protection of living resources.

First, the Convention requires states to assess the potential effects of any activity that may cause "substantial pollution of or significant and harmful changes to the marine environment."[30] This provision requires states to prepare an environmental impact statement for many development activities in the marine environment. This assessment requirement would, for instance, apply to the dumping of nuclear wastes in the oceans or the placement of OTEC facilities.[31] One

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[29](continued)
laws for offenses committed virtually anywhere is novel in the Convention. Arguably some nations (such as those whose ships have been arrested in U.S. ports under this doctrine) may object that port state enforcement authority is not part of customary international law and is available only to signatories of the Convention. Some U.S. commentators have pointed out that under international law it is probably possible to attach any conditions a state might desire for entry into one of its ports, but

> to actually allow a vessel in and then to prosecute for actions which took place either in your own economic zone or possibly even beyond I think would be very hard to justify under current [international] law.

1982 House Hearings, supra note 7, at 262 (statement of Terry Leitzell).

[30] Article 206. In addition, states are required to monitor the effects of pollution. Article 204.

[31] OTEC is an acronym for "ocean thermal energy conversion." It is a means to produce energy in tropical
(footnote continued)

result of the provision is to extend the assessment requirements of the London Dumping Convention to many more states.[32] This requirement applies to the activities of states "under their jurisdiction," and consequently would apply to activities in the EEZ or on the continental shelves of states parties. By not joining the Convention, the ability of the United States to demand assessments of potential effects[33] would be ambiguous or nonexistent.

Second, Article 194(5) establishes a duty for all states to protect and preserve rare or fragile ecosystems and the habitats of endangered species. This broad duty could serve to protect the habitats of many species in coastal ecosystems throughout the developing world. The United States has been a world leader in its concern for endangered fauna, but remaining outside the Convention would make it difficult for the United States to use its provisions to protect, for example, coral reefs in Palau from a superport or turtles in Mexico from commercial overexploitation.[34]

Third, the Convention requires states to cooperate to conserve marine mammals and to work through "the appropriate international organizations," primarily the International Whaling Commission (IWC).[35] This provision is important in two respects: it encourages the IWC to devote more attention to the smaller cetaceans (porpoises) than its current policies

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[31] (continued)
oceans by harnessing the differences in temperature between the warm surface waters and the cold deep waters. See generally, Keith, Laws Affecting the Development of Ocean Thermal Energy Conversion in the United States, 43 U. Pitt. L. Rev. 1 (1981).

[32] The Convention on the Prevention of Pollution by the Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165. The parties to this convention are bound by regulations promulgated by the International Atomic Energy Agency, which require an environmental assessment.

[33] States are required to publish reports of their environmental assessments. Articles 205, 206.

[34] See generally K.A. Bjorndal (ed), Biology and Conservation of Sea Turtles (1981).

[35] Article 65 applies to the EEZ and Article 120 applies to the high seas.

allow,[36] and it requires all nations to accept the management recommendations of the IWC. Prior to the Convention, the IWC had authority solely over its members.[37] Some nations that harvest whales commercially have avoided the jurisdiction of the IWC by not joining or by withdrawing from membership.[38] Some nations have apparently served as flag-of-convenience states for members of the IWC.[39] Under the Convention, no state party can avoid its responsibilities to protect and carefully manage marine mammal stocks. If it does not join the Convention, the United States would lack standing to enforce IWC regulations against nations that are not members of the IWC. Because U.S. citizens and scientists are among the most knowledgeable and concerned about marine mammals, the prospects for sound international management of marine mammals would be diminished.

A fourth important provision in the Convention is the requirement to consider "the effects on species associated with or dependent upon harvested species..." in fishery management.[40] Although stated somewhat weakly, "with a view to," nations for the first time are required to protect "nontarget" species,[41] both in waters under their jurisdiction and on the high seas. Although the terms "associated or dependent species"

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[36] Meith, Saving the Small Cetaceans, 13 Ambio 2 (1984).

[37] Membership is limited to states that have ratified the International Convention for the Regulation of Whaling, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72.

[38] For example, China, North Korea, Somalia, and Panama are not members of the IWC. U.S. Dep't of State, supra note 8. Chile, Peru, Portugal, and Spain catch significant numbers of whales and are not members. Nafziger, supra note 1, at 602 n.48.

[39] Holt, Changing Attitudes Toward Marine Mammals, Oceanus, Spring 1978, at 2,7.

[40] Article 61(4) applies to the EEZ and Article 119(1)(b) applies to the high seas.

[41] Biologists have recognized a need for such considerations for many years. See generally, Holt & Talbot, New Principles for the Conservation of Wild Living Resources, 59 Wildlife Monographs 1 (1978).

are vague and as yet have no common usage,[42] biologists and marine resource managers can point to many situations where such language clearly would apply. For example, parties will be obligated to consider the mortality of porpoises in purse seine fishing for tunas.[43] Fishing nations will be required to consider the effects of the overexploitation of tuna stocks on tropical seabird colonies.[44] Various gillnet fisheries drown endangered turtles[45] and the high seas salmon gillnet fisheries are responsible for drowning hundreds of thousands of birds[46] and large numbers of porpoises annually.[47] Gillnet fisheries are sometimes referred to as strip mining of the oceans, and technologies to harvest high seas resources using such techniques are

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[42] Burke, U.S. Fishery Management and the New Law of the Sea, 76 Am. J. Int'l L. 24, 31 (1982).

[43] This issue has long plagued the U.S. tuna fleet, which is subject to U.S. domestic law requiring minimization of porpoise mortality. Certain fishermen have apparently begun to sail under foreign flags to avoid U.S. jurisdiction, but this provision will make the flag state much less relevant in the enforcement of laws that protect porpoise populations. See Norris, Tuna Sandwiches Cost at Least 78,000 Porpoise Lives a Year, But There is Hope, 7:11 Smithsonian 44 (1977); Anderson, Anderson & Serles, The Tuna-Porpoise Dilemma: Is Conflict Resolution Attainable? 18 Nat. Resources J. 505 (1978).

[44] Harrison, Hida & Seki, Hawaiian Seabird Feeding Ecology, 85 Wildlife Monographs 1 (1983).

[45] See Hillestead, Richardson, McVea & Watson, World-wide Incidental Capture of Sea Turtles, in K.A. Bjorndahl, supra note 34, at 489.

[46] As many as 750,000 birds are estimated to drown each year. Ainley, DeGange, Jones & Beach, Mortality of Seabirds in High-Seas Gill Nets, 79 Fishery Bull. 800 (1981).

[47] Provisions to study the drowning of Dall porpoises have been included in a Memorandum of Understanding included in the 1978 Protocol that amended the High Seas Fisheries Treaty for the North Pacific Ocean. T.I.A.S. No. 9242.

expanding rapidly.[48] Proposed fisheries for krill in the Antarctic are expected to have impacts on populations of whales, seals, and penguins there.[49] The commission established by the recent Antarctic Living Marine Resources Treaty[50] might be a "competent international organization" for the krill fishery, and nonparties to that treaty may be required by the Convention to accept the commission's recommendations concerning acceptable levels of harvest for krill. The Convention provides a means of controlling incidental harm created by fishing nations, but by not joining the Convention the United States will have difficulty influencing such activities.

A fifth cost incurred by the United States is in the dispute settlement area. Outside the Convention, the United States will not be in a position to invoke the compulsory provisions provided by Article 297(1)(c). Issues concerning the permissible bycatch levels of porpoises or the assessment of the environmental effects of marine activities should be decided by competent neutral experts primarily using technical criteria. Instead, the United States will have to resort to the general international political arena to remedy such problems or, worse, simply ignore them. This problem could be ameliorated if other nations will agree to submit issues to compulsory dispute settlement procedures in bilateral or multilateral treaties. The history of effective action in the management of resources in the commons is particularly sorry, and it is unlikely that effective alternative forums will be available.

MARINE SCIENTIFIC RESEARCH

Developed Western nations, including the United States, strongly advocated freedom for scientific

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[48] For example, a squid fishery in the North Pacific began in 1981 and already has 534 catcher boats. Japan, Taiwan, and Korea are participating in the fishery and 118,000 metric tons were taken in the first year. Statement of Warren King, president of International Council for Bird Preservation-USA Section, at ICBP Meeting in Cambridge, U.K., August 1982.

[49] See generally, Beddington & May, The Harvesting of Interacting Species in a Natural Ecosystem, Scientific American, May 1982, at 62.

[50] T.I.A.S. No. 10240.

research in the EEZs during UNCLOS III. This position lost; the regime in the Convention is fundamentally restrictive. Coastal states control research over about 42 percent of the oceans and 90 percent of their known resources.[51] Because half of the marine scientific research U.S. scientists conduct occurs in the EEZs of other nations, a large segment of U.S. academic oceanographers are affected by the Convention.[52] Disagreements concerning what constitutes marine scientific research will surely occur because the Convention does not define this term.[53]

Developing nations want increased control over research in their EEZs for several reasons.[54] Scientific information generated by research can be a basis for bargaining between opposing interests, rather than material deserving independent analysis.[55] Even within developed nations, access to information is central to decision making in the management of natural resources. Governments that are limited to information supplied to them by industries are rarely in a position to make informed decisions. Control over research by developing states ensures their access to research results and enhances opportunities for their nationals to be trained in state-of-the-art research techniques. Technical competence is a major source of influence in natural resource management, and developing nations hope to foster indigenous scientific research so that they can interact with developed states on an equal basis.

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51 1982 House Hearings, supra note 7, at 246 (statement of Dr. David A. Ross, Woods Hole Oceanographic Institution).

52 Wooster, Ocean Research Under Foreign Jurisdiction, 212 Science 754 (1981).

53 Ross and Knauss, How the Law of the Sea Treaty Will Affect U.S. Marine Science, 217 Science 1003, 1004 (1982).

54 Another more emotional reason may also be involved. Citizens of any nation do not like foreigners in their waters if there is apparent competition with local economic interests. In 1982, a Japanese research vessel with U.S. scientists on board conducted exploratory fishing for squid in the EEZ near Hawaii. So many complaints about a foreign vessel fishing in U.S. waters were received that subsequent research was cancelled.

55 R.M. M'Gonigle & M.W. Zacher, supra note 1, at 257.

Marine scientific research can be conducted in the territorial sea only with the express consent of the coastal state (Article 245). Innocent passage does not include research or survey activities (Article 19(j)). All states have the right to conduct marine scientific research in the water column beyond the EEZ (Articles 87(1)(f) and 257) and in the seabed Area (Articles 143 and 256).[56]

A foreign researcher must accept substantial obligations as a condition precedent to carrying out scientific investigations in the EEZ.[57] States generally are obliged to grant consent for research (Article 246(3)), but not if a research project "is of direct significance for the exploration and exploitation of natural resources, whether living or non-living" (Article 246(5)(a)). Pure and applied research are merely the two poles in the spectrum of scientific research activity. Few states will lack the imagination necessary to exclude almost any research project on the grounds that the results could be directly significant for the exploitation of natural resources. Dispute settlement provisions in this area protect the discretion of the coastal state to withhold its consent on such grounds.[58]

State Practices on Scientific Research

The Convention cannot be evaluated outside of the context of recent developments in national legislation that affect research in the EEZ. Almost 90 nations

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[56] Articles 143, 256. Ross & Knauss, supra note 53, at 1006, state that there are no significant restrictions on marine scientific research in the Area.

[57] A state that intends to undertake marine scientific research must provide the coastal state a prescribed set of information, including the objectives, methods, precise study area, and extent to which the coastal state should be able to participate (Article 248). In addition, the coastal state must be given the right to participate if it so desires, access to all data and samples, and assurance that research results will be available. Article 249.

[58] Article 297(2) removes disputes that concern research in the EEZ from binding settlement procedures. Rather, nonbinding conciliation is used. The conciliation commission is admonished not to question the exercise of a coastal state's discretion to withhold consent because a project is of direct significance for the exploration or exploitation of natural resources.

have legislation that restricts scientific research, many with measures more strict than those in the Convention.[59] The obligations of such national legislation are not standard, and some nations claim unilateral rights to control all research.[60] Studies in the 1970s indicated that denials of permission to conduct research by coastal states were increasing.[61] Almost half of the denials were without apparent reason, and difficulties tended to be political rather than technical in nature.[62]

The U.S. position on marine scientific research was recently clarified by President Reagan's Proclamation on the EEZ.[63] The United States now recognizes the right of all nations to control research in their EEZs as long as such rights are exercised reasonably and in a manner consistent with international law. The United States does not have an interest in asserting jurisdiction over research within its own EEZ and therefore does not claim such jurisdiction. In so doing, the United States hopes to influence state practice toward supporting the freedom of scientific research.

The Convention achieves four concrete benefits for marine scientific research.[64]

- It defines the activities for which a coastal state may withhold consent.
- It establishes minimum standards for granting consent.
- It defines the scope of coastal state jurisdiction over scientific research and the criteria for advance consent.

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59 1982 House Hearings, supra note 7, at 243 (statement of Dr. David A. Ross, Woods Hole Oceanographic Institution).

60 Id. at 247.

61 Wooster, supra note 52, at 754.

62 Id. at 755.

63 See Appendix A infra, at 553 and 556, paras. 10 and 25-26.

64 1982 House Hearings, supra note 7, at 84 (statement of Clifton Curtis).

- It provides for implied consent when no response for a clearance request has been received from the coastal state after six months (Article 252).

The concept of implied consent is especially important for scientists. In the past, coastal states have frequently denied access without stating any reason, by simply ignoring requests for clearance.[65]

The Costs of Not Joining the Convention

The United States suffers two primary costs by remaining outside the Convention. First, it may not be able to utilize the implied consent regime in the EEZ. Implied consent does not exist in national legislation, and the Convention provides scientists with much greater access than most states would otherwise grant. Coastal states may argue that implied consent privileges extend only to signatories. The U.S. government could claim that the implied consent regime has become customary international law by virtue of the widespread acceptance of the Convention. This argument is weak because this concept arose directly from the Convention--unlike the concept of an EEZ, it has not evolved gradually and has not existed for a sufficient period of time to have permitted the development of an extensive state practice.[66] State practice on this issue is not "virtually uniform,"[67] nor can such a practice be considered general or universal.[68] Most important, the situation is sufficiently ambiguous that oceanographic administrators are unlikely to risk seizure of their research vessels and scientific staff.[69] Research is likely to proceed only with express consent,[70] which may necessitate the

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65 Wooster, supra note 52, at 754.

66 North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 42.

67 Id. at 43.

68 Fisheries (U.K. v. Nor.), 1951 I.C.J. 2, 132.

69 See discussion at 459 infra.

70 Some funding agencies in the United States have informally stated that funds will not be given for marine scientific research unless permission to work in foreign waters is in hand. 1982 House Hearings, supra note 7, at 244 (statement of Dr. David A. Ross, Woods Hole Oceanographic Institution).

negotiation of bilateral agreements with each coastal state where research may occur.

The second cost to the United States is the probable increase in the politicization of scientific research issues.[71] Oceans research can easily become a hostage to U.S. political relations. Scientists may face increased resistence to their research proposals because retaliation against science is a passive and safe act compared to most alternatives. Coastal states may harbor hostile attitudes toward the United States because of its position on the Convention.[72]

Few U.S. marine scientists are enthusiastic about the Convention. Emerging law is viewed by scientists to result in inefficient use of scarce scientific resources and lost research opportunities.[73] Paperwork and the bureaucratic load will increase.[74] However, most knowledgeable commentators believe the situation would be worse in the absence of a Convention, and prospects could be improved through the negotiation of bilateral agreements.[75] The disturbing prospect is that coastal states may use research to retaliate against the United States for a variety of reasons. The Convention provides ample opportunities to do this, and marine scientists may bear a disproportionate share of the cost of the U.S. decision not to sign and ratify it.

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[71] The Convention requires all communications concerning scientific research projects to go through the appropriate official channels (Article 250). This may serve to politicize the permit process and is a change from the previous approach in which scientists made many of the arrangements directly.

[72] For example, United States-Mexico relations may suffer from hostility due to a wide range of oceans law problems. Many recent requests for United States-Mexico cooperative research have been disapproved by Mexico. Ocean Science News, Sept. 26, 1983, at 6.

[73] Wooster, supra note 52, at 255.

[74] Id.

[75] For example, research in Canadian and Mexican waters accounts for half of the U.S. foreign research. Bilateral agreements with these two states would clearly be very useful. 1982 House Hearings, supra note 7, at 245 (statement of David A. Ross, Woods Hole Oceanographic Institution).

SUMMARY AND CONCLUSION

This paper cannot balance the net gains and losses of President Reagan's decision not to sign the Convention, but it can point to many costs of this decision in environmental protection and research. Many privileges established by the Convention that are favorable to the United States may be asserted only by parties and will not achieve the status of customary international law in the near future. The Reagan administration probably attaches little weight to costs in research and environmental protection because such activities do not generate immediate or visible economic benefits--it seems to have been most influenced not to sign the Convention by a few wealthy oceans industries.

The most pervasive cost is the loss of the Convention's sophisticated dispute settlement provisions. If it stays outside the Convention, the United States must resolve such disputes within the context of general foreign policy considerations. Extraneous issues such as trade relationships or defense arrangements may influence decisions in environmental protection or scientific research. This prognosis is unfortunate because most disputes in this area are complicated and are best resolved by experts using technical, not political, criteria.

The U.S. position undermines attempts to control global marine pollution. The United States loses an opportunity to demand the equivalent of an environmental impact statement for activities that pose significant and harmful changes to the marine environment. It may also forego its position as a world leader in the management of marine mammals, the protection of endangered marine species and ecosystems, and the protection of nontarget species in marine fisheries. The United States also will lose an opportunity to assert implied consent for its marine scientists.

Most significantly, the U.S. position may convince other nations not to ratify the Convention but rather to adopt a similar stance, asserting that favorable provisions in the Convention are customary international law and ignoring provisions that are unfavorable to national economic interests. If this were to occur, much of the effort of UNCLOS III to arrive at rational solutions to marine resource problems could be thwarted.

REGIONAL APPROACHES TO ENVIRONMENTAL PROTECTION

by

Nipant Chitasombat

The Third Committee of UNCLOS III has adopted approaches to marine environmental management that have evolved from the philosophy of the Stockholm Conference 1972,[1] but display an originality reflecting trade-offs between environmental responsibility and authority and a movement away from an analogy between treaty and legislation. The provisions present a wide range of language from specific to general in an attempt to fill the gap between the need for uniformity and real world diversity. Intra- and inter-regional diversities must be recommended in the implementation of this portion of the text.

The 1982 Law of the Sea Convention requires two kinds of regional arrangements: (1) Regional arrangements to supplement the principles and procedures, and (2) Regional organizations to participate in the application of the Convention.

Although the Convention may fail to be accepted in general, many of the provisions and some of the formulations have remained unchanged through the last

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1 See Report of the United Nations Conference on the Human Environment (Stockholm, 5-16 June 1972), U.N. Doc. A/Conf. 48/14/Rev. 1 (1972).

decade. As a result, these provisions have gained certain juridical significance in customary international law.[2]

The Law of the Sea Convention contains numerous references to the need for regional arrangements for the protection and preservation of the marine environment, especially in Part XII, Articles 197, 200, and 204, for example.[3] Part XII also contains references to competent international organizations whether global or regional.[4] The Convention provides the possibilities for regional cooperation but does not propose concrete guidelines.[5] The vagueness in the text occurs in some cases because "regionalism" was an easy way out of some difficult problems. In the absence of an effective and widely ratified global Law of the Sea Convention, regionalism may be the highest-attainable level of multilateral activity. Although global cooperation may be preferable, even partial cooperation on a regional basis may be better than the alternative of no cooperation and unilateral approaches. Moreover, regionalism may facilitate the eventual achievement of global solutions. It may be easier for a few regional organizations eventually to arrive at common agreements than for a great number of individual states to do so.

The Malacca Straits

The Malacca Straits provide an appropriate focus

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2 D. M. Johnston, Environmental Management in the South China Sea: Legal and Institutional Developments 12 (East-West Environment and Policy Institute Research Report No. 10, 1982).

3 Article 197 provides for cooperation on a global or regional basis "in formulating and elaborating rules, standards and recommended practices and procedures... for the protection and preservation of the marine environment...." Article 200 calls for similar cooperation in research programs and the exchange of information, and Article 204 deals with regional arrangements for monitoring pollution.

4 See Articles 197-200, 202, 204, 210-14, 216-18, and 222.

5 Clingan, UNCLOS III and the Future of Regional Arrangements in Proceedings of the Symposium on Marine Regionalism 20 (University of Rhode Island, 1979).

to analyze the environmental issues in more detail.[6] In recent years, several accidents in the Malacca Straits have posed serious hazards to the coast states. In 1967, for example, the Tokyo Maru of 151,288 dead weight tons (dwt) scraped its bottom while passing through the Malacca Straits, and, in January 1968, a supertanker of 200,000 dwt was grounded near the Singapore harbor.[7] During the period of 1968-76, the Malacca Straits Council of Japan reported a total of 43 casualties involving 71 vessels, of which a large proportion were tankers.[8]

This trend has become more threatening with increasing numbers of supertankers navigating through the Malacca Straits. For example, in the month of May 1972, 15 supertankers of over 200,000 dwt passed through the Malacca Straits,[9] but in the month of

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6 The Malacca Straits are a funnel-shaped waterway. Their width varies from 3 miles at its narrowest passage near Singapore Island to 300 miles at its widest, near the northwestern entrance between Sabang and the Kra Isthmus. The Malacca Straits include a tremendous sea area from the northwestern entrance between Palau Perak (Perak Island) and Diamond Point to the southeastern entrance between Tahan Datok (Mount-Datok) and Tanjong Pergam (Pergam Coast). In this zone there are at least three strait groups traditionally used for navigation by the coastal states. Accordingly, "Malacca Straits" is a collective term for many straits or strait groups, among which the Singapore Straits hold the key to the whole straits area. Munadjat Danusaputro, Elements of an Environmental Policy and Navigational Scheme for Southeast Asia with Special Reference for Straits of Malacca in D. Johnston (ed.), Regionalization of the Law of the Sea, 11 L. Sea Inst. Proc. 176 (1978)).

7 Id. at 182.

8 "Approximately half of the tankers involved were of 100,000 dwt or more, and a quarter of them were over 200,000 dwt in size." Chia Lin Sien, The Straits of Malacca and Singapore: Navigational, Resource, and Environmental Considerations in Chia Lin Sien (ed.), Southeast Asian Seas, Frontiers for Development 258 (1981).

9 Danusaputro, supra note 6, at 179.

October 1982, 106 tankers over 180,000 dwt passed through the same straits.[10]

The coastal states are aware of the pollution caused by oil spills from tankers which can destroy fishing industries. Malaysia and Indonesia have taken action to avoid the risk of grounding in the shallow and narrow waters of the straits. In order to guarantee safe navigation, particularly for supertankers of over 200,000 dwt, the Indonesian government has recommended that tankers use the sea route through the Straits of Lombok and Makassa rather than the Malacca Straits. However, the supertankers persist in using the Malacca Straits, and on January 6, 1975, the supertanker Showa Maru of 237,698 dwt grounded just three miles from Singapore harbor.[11] This incident pressed the foreign ministers of the three coastal states of Indonesia, Malaysia, and Singapore to meet in Singapore in February 1975 to take action for the protection of the marine environment of the Malacca Straits against the growing threats and dangers of oil pollution.[12] In their joint statement, the three coastal states agreed that the safety of navigation in the Malacca Straits is a vital concern.[13]

At the Manila session of the ASEAN foreign ministers meeting in February 1977, recommendations on measures to enhance the safety of navigation and to promote close cooperation and coordination on antipollution policy were adopted as the Tripartite Agreement on Safety of Navigation in the Malacca Straits of February 24, 1977.[14] Under this agreement, all tankers and large vessels navigating these straits must carry adequate insurance and compensation coverage. In 1981, a traffic separation scheme was implemented in the Malacca Straits.[15]

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10 Press Release, Marine Department, Republic of Singapore (LTE/jl-7/12/82 - SSTDS (Press) 3/disk SSI).

11 Danusaputro, supra note 6, at 182.

12 Id. at 185.

13 Id.

14 Danusaputro, supra note 6, at 186.

15 Abu Bakar Jaafar, Prospects for Marine Regionalism in the Malacca and Singapore Straits 227 (A dissertation submitted to the Graduate Division of the University of Hawaii in partial fulfillment of the requirements for the degree of doctor of philosophy in geography, May 1984).

Thailand and the Straits of Malacca

The effects of oil spills from the supertanker incidents in the Straits of Malacca to the marine environment of Thailand should also be mentioned. We cannot ignore that Thailand is also a coastal state of the Straits of Malacca, although not in the sense of a "State bordering straits" under Article 42 of the Law of the Sea Convention. Under Article 58, all coastal states are authorized to extend their jurisdictions over environmental protection in the exclusive economic zone area. In the case of Thailand, the width between the northwestern entrance between Sabang, Indonesia, and the southern part of the Thai coast is only 300 miles. The marine pollution from oil spills in the Straits of Malacca sea route along the Sumatra coast might spread into the Thai exclusive economic zone. Who will be responsible for the pollution in this case?

Although Articles 192 and 235 impose responsibilities on states for pollution affecting other states, the general language in these articles may not be adequate to protect Thailand from frequent small oil spills from ships entering the Straits of Malacca. Because the Convention provides more possibilities for extending national jurisdiction to geographically advantaged states such as Indonesia and less to geographically disadvantaged states such as Thailand and Singapore, which cannot extend the exclusive economic zone up to the maximum limit of 200 miles, there is urgent need for regional cooperation in marine management. Thailand gained relatively litle from the Law of the Sea Convention, especially compared to its neighbors in Southeast Asia. Regional approaches appear to offer the easiest, most rational, and most promising solutions to the particular marine problems involved. This is clearly the case where such problems are uniquely regional, as in the case of the pollution of enclosed or semi-enclosed seas such as the South China Sea. In this case, only the states in the region are likely to be directly concerned and to take effective action; if strong regional organizations are in place, composed of member states sharing common perceptions, they can lead to more rapid and effective action.[16]

In the case of the Malacca Straits, there remains a need for cooperation in improving the safety of navigation by Malaysia, Indonesia, and Singapore without regard to their different political and technical per-

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16 Article 123(b) directs states bordering an enclosed or semi-enclosed sea to cooperate, directly or through an appropriate regional organization, in protection and preservation of the marine environment.

spectives. The regional rules for navigation in the straits remain unenforced even though one-quarter of the large tankers traveling eastbound through the Straits still fail to observe the minimum under-keel clearance.[17] The three straits states do not place the same degree of priority or urgency on marine pollution. Malaysia gives high importance to the Malacca Straits, but has done little to curb pollution from vessels. Indonesia has not adequately developed its environmental laws and regulations. Singapore pays the most attention to pollution control but does not see the rationale for regional cooperation in protecting the whole of the region from the threat of pollution.

These nations need to work together with each other and with Thailand to make further progress in controlling the environmental threats to the Malacca Straits region.

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17 Jaafar, supra note 15, at 231; see also page 288 supra.

DISCUSSION

Regionalism in Southeast Asia

Hasjim Djalal: I am grateful for the paper presented by Professor Nipant Chitasombat, but I think some things need to be clarified. First of all, concerning the declaration of the three coastal states, Indonesia, Singapore, and Malaysia, on the Straits of Malacca in 1971: We agreed to cooperate on the safety of navigation in the Straits of Malacca. The declaration was motivated by the physical conditions and the actual traffic in the Straits. We hope it will improve the environmental problems in the Straits of Malacca. In 1957 Indonesia declared a 12-mile territorial sea. In 1969 Malaysia also declared a 12-mile territorial sea. Thus, certain parts of the Straits of Malacca became territorial sea by 1969, and the coastal states found the need to regulate safety of navigation.

Thailand was not included in this arrangement because no part of Thailand's territorial sea is in the waters under consideration. Thailand is several hundred miles north of this area. We thought that when we began to regulate traffic in the Straits of Malacca we were regulating territorial seas that Thailand is not part of. The question existed whether the Straits of Malacca are territorial sea because the 12-mile rules applicable in Indonesia and Malaysia had not been recognized by all. Singapore stated that they neither denied nor claimed a 12-mile territorial sea and would wait for the Law of the Sea Conference to complete its deliberations. Singapore did agree that the safety of navigation should be regulated by the coastal states. Singapore was included in the tripartite arrangement because it was thought that if a set of rules was adopted in the Strait of Malacca and another set of rules in the Strait of Singapore, because the participants were different, then boats would be confused.

The three countries thus agreed that for the purpose of safety of navigation--I must emphasize this, for the purpose of safety of navigation--the three coastal states considered the Straits of Malacca and Singapore as one strait. This decision has nothing to do with its status as a territorial sea or as a fishing zone. That is why the Law of the Sea Convention clearly stated that the question of safety of navigation in the straits has nothing to do with the status of the straits as a whole. Thailand never indicated that it wanted to participate in the arrangements on the safety of navigation.

The question of protection of the environment is another problem. Professor Chitasombat is correct that the environment must be considered as a whole. ASEAN has established a committee for the environmental protection of the ASEAN countries. This committee is working not only in the Straits of Malacca and Singapore but for the whole of ASEAN because when it comes to pollution, it can come not only from ships, but also from the land and from the exploration of the sea.

Finally, I would like to respond to Professor Chitasombat's statement that Thailand did not get anything from the Law of the Sea Convention. That is not true. Thailand has jurisdiction over more than half of the Gulf of Siam. Thailand never offered to share that with Indonesia. All the fishing in the Gulf of Siam is monopolized by Thailand. Practically half of the Andaman Sea belongs to Thailand, and they get a lot more than the rest of us in those waters.

Concerning the sharing of the resources, I do not think any country in Southeast Asia is prepared to do more than Indonesia. We conducted a six-month survey with Thailand on what we can do together. Which fish would they like to take, and where. Not only in Indonesia's EEZ but also in the Indonesian archipelagic waters. What was the result? Thailand said it would like to catch fish with trawlers within 12 miles of the coastline of Indonesia. Unfortunately, Indonesia has banned trawlers even for its own people. We offered to let Thailand take part in our tuna fisheries, but Thailand told us they have no experience, no equipment, and no capacity to deal with tuna. Indonesia has quite a lot of tuna and it is open to everyone to cooperate with us on its development. These differences in knowledge and technology make cooperation, for the time being anyway, difficult between Indonesia and Thailand.

Concerning the transfer of technology, Thailand is prepared to transfer technology to us. Fine, as long as the technology is useful. But if the technology is trawlers, we do not need it.

Nipant Chitasombat: Thailand has always viewed the Gulf of Siam as a historical bay. We cannot fish

so much there now because of land-based pollution and also because of disputes over boundaries with our neighbors Kampuchea and Vietnam. Our fishing trawlers have been arrested by Vietnam. We need cooperation on fisheries. For example, we need to know the correct age of the fish for maximum utilization. It does not mean one has to win and another lose, but we have to share the prosperity and the resources in that region.

Regionalism in the South Pacific

Camillus Narokobi: Some regional environmental programs have developed in the Pacific since the signing of the Law of the Sea Convention, which the United States has participated in. The United States has taken part in the Caribbean regional environmental program concluded in 1983. Presently, the United States, France, and the United Kingdom are also involved with a program in the South Pacific region through the South Pacific Commission based in Noumea, New Caledonia.

I wish to mention two trends here. First, the definition of marine pollution so far seems to be consistent with the definition in the Law of the Sea Convention (Article 1(1)(4)). I think the same definition was also used in the Caribbean Convention.

The second point is the geographical scope of the regional treaty area. It appears now that the high seas beyond the exclusive economic zones are becoming part of the area of regional treaties. In the Caribbean region, this was the case, and it is becoming the case now in the South Pacific region. In the South Pacific region, the region has been defined by the geographical coordinates of the South Pacific Commission area. The areas south of the South Pacific Commission, including the 200-mile zones of New Zealand and Australia, will require further discussion. It seems that the high seas between the exclusive economic zones will be included in this Convention area.

Environmental Concerns of Pacific Islanders: Nuclear Testing and Dumping

Rabbie Namaliu: The questions of managing the environment relate not only to fish, but also to something that we have strongly objected to for some time: nuclear testing. We do not think the Convention is adequate on questions of nuclear testing. The testing is already happening, and there is also the possibility of future dumping of nuclear waste.[1] This to us poses a real danger, and we have been trying to deal with it on a regional basis.

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[1] See Van Dyke, Smith, and Siwatibau, Nuclear Activities and Pacific Islanders, 9 Energy, no. 9/10 (forthcoming).

MARINE SCIENTIFIC RESEARCH AND THE TRANSFER OF TECHNOLOGY

by

Jorge Vargas

I would like to discuss two topics--marine scientific research and the development and transfer of technology--which are contained in Parts XIII and XIV of the Convention. These two topics are important for three major reasons. First, the international law of the sea is firmly based on the development of science and technology. The international law of the sea would not exist without the development of science and technology.

Second, these two topics are closely related to the harmonious and equitable development of humankind. Science and development are essential for the stability of our society on this planet, and they are essential for the maintenance and preservation of peace.

The third reason is that the provisions related to marine scientific research and technology transfer are among the most innovative, creative, and dynamic chapters of the international law of the sea.

Part XIII of the Convention on marine scientific research contains 28 articles. Prior to this Convention, the topic of marine scientific research was not discussed in a systematic way. It is mentioned in the 1958 Convention on the Continental Shelf. Article 5(8) creates a consent regime--no state can conduct scientific research on the continental shelf unless they have the consent of the coastal states, which should be normally granted.

The debate over Part XIII of the 1982 Convention focused on the controversy between developed nations and developing nations over the freedom of marine scientific research. For a number of years, developed nations, using Article 2 of the 1958 High Seas Convention, argued that the paragraph at the end of the article indicating that other freedoms might exist implicitly included freedom of scientific research. This view was questioned by developing nations arguing that there was no such freedom.

One of the first proposals presented to Committee Three in UNCLOS III by the developed nations was a proposal recognizing a notification regime. Because there was this freedom of marine scientific research, the developed nations argued, it was only necessary to notify the coastal states in order to conduct marine scientific research activities off the shores of those states.

As the discussion progressed, the strategy of the developed nations changed, and we were presented with a second proposal stating that for the conduct of marine scientific research activities relating to the resources of the marine environment, coastal states could require consent prior to research activities, but if the marine scientific research related to basic research or pure research, namely, research activities not relating to the resources, it would be enough only to notify the coastal state.

The 1982 Convention, as it finally developed, has a provision that establishes the freedom of marine scientific research on the high seas. This is one of the new freedoms added to the four traditional freedoms of Article 2 of the High Seas Convention. This new freedom is explicitly listed in Article 87(1)(f) of the Convention along with the freedom to construct artificial islands in Article 87(1)(d).

Article 143 also stipulates that all states have the right to conduct marine scientific research activities for peaceful purposes and for the benefit of humankind as a whole in the Area. I hope this is going to be interpreted by states and by the International Sea-Bed Authority with a flexible and ample definition.

Within any area under the jurisdiction or the sovereignty of the coastal state, no marine scientific research activities can take place unless the coastal state gives its consent or authorization to the researching state. I hope most of you are going to agree with me that this is one of the most valid, clearest, and needed contributions that we have in the Law of the Sea Convention. The principle of consent departs from the traditional notion of the so-called freedom of marine scientific research. Articles 245 and 246 have a very clear set of provisions applicable to the territorial sea, the continental shelf, and exclusive

economic zone to control and regulate access of researching states.

In my opinion, the principle of consent applicable to scientific research in coastal-state zones is one of the clearest emerging principles of customary international law. I hope coastal nations will not use this requirement to limit the activities of scientists. Some observers may not classify this as an emerging principle of customary international law, but rather as an example of the instant generation of a principle of customary international law.

This important principle of consent is probably going to require the scientific community to coordinate its research and increase the cost of the conduct of marine scientific research. It will pose some coordination problems. No system is a perfect system, and Part XIII of the Convention is the best we have. The advantage of these new provisions is that they establish very clear principles. This is a tremendous advantage. We are eliminating one of the irritants between developed countries and developing countries. I think these principles are going to promote direct communication and international cooperation between developed countries and developing countries.

The Transfer of Technology

The development and transfer of technology are contained in Part XIV of the Convention, Articles 266-78. Most of the states bordering the Pacific basin are developing countries. They are poor and underdeveloped. They have a totally different perspective on the Law of the Sea Convention. They are not interested in the implacement on the sea floor of very sophisticated underwater electronic devices. These poor countries are not interested in the naval displacement of military forces in the oceans of the world. These countries have a different perspective and a different expectation generated for this treaty. They envision the oceans as a source of food, as the source of future protein. The ocean with all its uses and resources is considered to be a means to promote their social and economic development. They are eager to see the Law of the Sea Convention come into force to help achieve these goals. They think they are going to improve their standards of living. They hope to live in a peaceful world, and they also hope to establish a more just and equitable international economic order. I agree with these goals.

Let us try to be less formal and to think about the content of the Convention. The Convention may be too close to lawyers and too far away from justice. Think about that, please. How can we transfer technology, how can we transfer science to these poor countries so they can use the oceans facing their

coasts for their own benefit? The traditional approach has been through a treaty, fruitful in the future, that establishes a number of bilateral relationships and agreements between the developed countries and the developing countries.

I propose a different approach in order to help the peoples of the developing countries use the resources of the deep seabed. We should persuade all countries to have required meetings in Asia, Africa, Latin America, and the Pacific. These meetings should be geared toward training on the uses of the seabed, to develop our human resources through a scientific and technical infrastructure related to the use of the ocean and to support a marine organization.

The May 1983 meeting of the Organization of American States made a beginning toward these goals when 65 participants met to consider information, orientation, and national priorities and goals, toward a marine development program.

I think the effort was most successful, and I would like to see if we could continue with this type of activity.

DISCUSSION

R.P. Anand: A short comment on what Dr. Vargas was saying about law and justice. Law must be just in order to be effective, but people disagree on what constitutes justice. Law is merely a compromise between conflicting interests. It is not the best, but the best possible. The language in the Convention is all that we could attain, and I believe that is where we now stand.

Elizabeth Rodgers (Dana Fellow, American Society of International Law): One comment on Professor Vargas's presentation. I think that as international lawyers, we frequently do overemphasize the legal over the just. Professor Vargas's discussion on world hunger and the possibility of using the Convention to feed people is an area we should not overlook.

Abu Bakar Jaafar: I would like to draw your attention to the presentation made by Professor Vargas relating to Article 246, especially paragraph 6, which contains the most exciting and the most interesting provisions ever drafted or ever conceived by the Third Committee at the Third United Nations Conference on the Law of the Sea. This provision has direct linkage to the concept of the common heritage of mankind. If the Convention is not ratified, I can foresee a great loss not only to the researching states but also to the International Sea-Bed Authority and the coastal states.

If we look at this provision closely, we can summarize it by saying that coastal states may not withhold consent with respect to marine scientific research projects to be undertaken in their continental shelf areas that extend beyond 200 nautical miles. If the Convention is not ratified, I can see that the coastal states may well deny consent to research in their continental shelf areas that extend beyond 200 nautical miles.

Scientific Research

Anatoly Kolodkin: I would like to make a comment with regard to scientific research. We must emphasize that Article 87(1)(f) grants all states, coastal and landlocked, the right to conduct scientific research on the high seas, subject to Parts VI and XIII. This is a great achievement of mankind. Professor Vargas suggested that this freedom must be regulated. Of course, every freedom must be regulated. Freedom of navigation, freedom of fisheries, and freedom of scientific research must all be regulated in accordance with this Convention.

If we turn to the marine scientific research in the EEZ and on the continental shelf, I agree that the most important provision is that coastal states now enjoy the right to give consent before scientific research can take place. Under Article 246(3) "Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organizations...." The "coastal States shall establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably." We can now conclude that the requirement that coastal states consent to such research is a rule of customary international law. Article 246(5), however, limits coastal states' discretion to withhold their consent to four circumstances. Moreover, Article 246(6) says coastal states may not withhold consent for scientific research on the continental shelf beyond 200 nautical miles unless they are specifically engaged in resource exploitation.

What Does "Consent" Mean?

Anthony D'Amato: May I comment on Professor Vargas's notion that the consent regime in Article 246 is now a principle of customary law and on Professor Kolodkin's reply? I think if we look at Article 246 closely, it gives us a strained use of the word consent when it says consent must be given in certain circumstances. There were diplomatic reasons for using this language, but from a logical and linguistic standpoint, it really means that the researching state's activities are not dependent on the consent of the coastal states at all. Unless the listed circumstances exist, the researching nation can proceed after it gives notice, because the coastal state cannot then withhold consent. The requirement of consent is not therefore really a principle of customary law. Notification is required, and consent can be withheld in certain circumstances.

The Consent Regime

William Burke: I agree with Jorge Vargas that the provisions on marine scientific research are among the most important parts of the Convention. I have always

thought so because they contribute so much to the development of other areas of law.

I do not think we need to debate whether the consent regime is the greatest invention since fire. Entirely apart from the Convention, I think today we have a consent regime. The United States put its stamp of approval on that in its Oceans Policy Statement in March 1983.[1] There might be some questions about the details, but a consent regime now exists as a part of customary international law because so many states have made it evident that that is what they expect.

I do not believe, however, that the implied consent concept in Article 252 has become customary international law. In fact, I do not believe we will be able to confirm any time soon whether or not implied consent is a part of customary international law. Very few oceanographic institutions will risk losing an oceanographic research vessel on implied consent. The problem now is how to operate under a consent regime, and my expectation is that there will be a number of parts of the world where no consent will be given.

I doubt if you will see American research vessels operating off the coast of India, for example, unless there are private agreements changing Indian law. The requirements of Indian law for prior consent to publication will turn off all American research because no American scientist will submit to those provisions. Science assumes publication. Recent surveys of U.S. scientists indicate that approximately 99% of them would not engage in research under those conditions. Trinidad and Tobago in the Caribbean present similar problems. Research will occur where it is most feasible and convenient. Where coastal states implement a regime that requires delay and costly expenditures for assessments, the research will simply go elsewhere. This is unfortunate, but it follows from the nature of the regime.

I hope none of these predictions is true, that states are reasonable in the requests they make and do act promptly in response to requests for consent. I do not, however, believe that many states would feel obliged to respond to requests from research institutions in the United States.

I disagree completely with Jorge Vargas about the freedom of scientific research on the high seas.[2] I think most observers viewed it as a real freedom of the sea both prior to and subsequent to 1958. Its place in the Convention (Article 87(1)(f)) is highly desirable,

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[1] See Appendix A infra at 553, para. 10.

[2] See page 454 supra.

but I do not believe it is innovative in the sense of creating a freedom that did not exist prior to that time.

Basis for U.S. Policy on Marine Scientific Research

Brian Hoyle: The United States will not assert jurisdiction over marine science in our coastal areas, but we will recognize the right of other states to exercise jurisdiction over marine science in compliance with international law. We did not assert jurisdiction because our marine scientists came to us and said they do not trust the United States government to act reasonably. If we were to regulate foreign marine scientists, we might begin to regulate domestic scientists. We really do not have any immediate need to regulate marine science, so we have left it alone.

CHAPTER 8

ENFORCEMENT AND DISPUTE RESOLUTION

INTRODUCTION

The international legal system does not have a strong executive or centralized police force to make sure that nations always follow the governing principles of international law. Professor Louis Henkin once wrote that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (see page 494 infra). But in those instances when a nation fails to observe a principle of international law, military power may be the only mechanism available to enforce the obligation, and its use obviously has drawbacks.

The negotiators of the Law of the Sea Convention sought to rectify this problem with regard to ocean disputes by developing jurisdictional and dispute resolution principles that allow nations to enforce the rules of the Convention against other nations that fail to observe its provisions. National jurisdiction is expanded in the 200-mile exclusive economic zones, and carefully developed dispute resolution mechanisms are made available to nations that disagree on the interpretation or application of the provisions of the Convention.

The outline that opens this chapter presents the Convention's strategy in a composite format. This summary was developed by Chad Taniguchi, class of 1985 at the Richardson School of Law, University of Hawaii, and degree student at the East-West Center. Although it reduces some of the complexities and subtleties of the Convention text in a way that may at certain points be an oversimplification, this outline should provide a useful overview to persons unfamiliar with the valuable innovations that are included in the Convention.

Dr. R.P. Anand then presents a scholar's analysis of how the Convention's text assists nations in

resolving disputes. He also focuses on the problems that nonratifying nations such as the United States will face if they persist in staying outside the Convention.

Professor Anthony D'Amato follows Dr. Anand by addressing the Convention's impact on nonparties. This presentation builds on Professor D'Amato's earlier analyses in Chapter 3 and responds in some detail to the points made by other panelists. His presentation closes with a discussion on the use of military power in enforcing customary international law.

David Colson then asks whether nonparties might be able to use the Convention's dispute resolution mechanisms, at least in some circumstances. Satya Nandan, Tommy Koh, and Dr. Anand all reply that they doubt whether a nonparty could invoke these procedures against an unwilling party, because no nation should be able to take advantage of the benefits of the Convention without also accepting its burdens.

The participants then discuss "port state jurisdiction," which is generally thought of as one of the innovative enforcement procedures in the Convention. It allows a nation to enforce the environmental provisions of the Convention against any ship in its ports in appropriate circumstances regardless of where the violation occurred. Professor William Burke argues that this idea was always implicit in customary law, but Professor Bernard Oxman responds that French-trained international lawyers do not agree with this view.

The session closes with Drs. Anatoly Kolodkin and Anatoly Zakharov of the Soviet Maritime Law Association asking whether port states can enforce their own view of appropriate environmental standards or whether they must use only internationally agreed-upon standards. Professor Oxman responds by noting that this issue is in dispute and is likely to create conflicts between maritime and coastal states.

This discussion illustrates the range of problems and possibilities created by the Convention text on dispute resolution. If the Convention were to achieve universal ratification, these provisions could go far in creating a new peaceful order of the oceans and also in providing an example for resolving disputes among nations in other arenas.

JURISDICTION, ENFORCEMENT, AND DISPUTE SETTLEMENT IN THE LAW OF THE SEA CONVENTION

by

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The following summary of the UN Law of the Sea Convention presents an overview of how the enforcement and dispute settlement provisions in the Convention may be applied depending on the location of ocean activities and the status of the parties involved. Because it is a simplification of the Convention text, the reader should refer to the various Convention articles for full details.

This summary will help readers understand the discussions that occurred in this workshop. The references to dispute settlement procedures may be helpful in appreciating what the United States lost when it decided not to become a party to the Convention.

TERRITORIAL SEA

The territorial sea extends to 12 nautical miles beyond a coastal state's land territory (Articles 2, 3).

Coastal State Jurisdiction, Generally

The sovereignty of the coastal state extends over the waters, airspace, seabed, and subsoil of its territorial sea, subject to the Convention and other rules of international law (Article 2). The coastal state's sovereignty and general ability to enforce its laws in

the territorial sea are qualified by the rights of other states to:

a. innocent passage,
b. transit passage,
c. archipelagic sea lanes passage,
d. immunities of warships and other government ships, and
e. the rights of landlocked and geographically disadvantaged states to access to oceans.

Coastal states have exclusive rights to regulate and consent to research in their territorial sea (Article 245).

Rights of Other States

Innocent passage in the territorial sea (Articles 17-33). Ships of all states enjoy the right of innocent passage through the territorial sea (Articles 17-19). The coastal state:

a. may adopt laws and regulations relating to innocent passage in conformity with the Convention and international law covering: navigational safety, cables, conservation, fisheries, environmental preservation and pollution control, scientific research, and customs, fiscal, immigration, and sanitary regulations (laws applying to design, construction, staffing, or equipment of foreign ships must follow generally accepted international rules (Article 21));
b. shall not unreasonably impair the right of innocent passage or discriminate against states (Article 24);
c. may require sea lanes and traffic separation schemes (Article 22);
d. may prevent passage that is not innocent (Article 25; see Article 19);
e. may suspend innocent passage temporarily if essential for its security, including weapons exercises, after publication of notice (Article 25);
f. may charge a fee only for specific services rendered (Article 26);
g. has jurisdiction to make an arrest or investigate a crime on board a foreign ship passing through the territorial sea only in limited circumstances:
    i) the crime occurred in the coastal state's internal waters,
    ii) the crime extends to the coastal state or disturbs the peace,
    iii) by request of the flag state, or
    iv) to suppress drug traffic (Article 27);
h. should not exercise jurisdiction over crimes committed before a ship entered the territo-

rial sea, except for violations of the coastal state's laws protecting the EEZ (Article 27, see Articles 73, 220);

i. should not stop a foreign ship passing through to exercise civil jurisdiction over a person on board (Article 28);

j. may in its contiguous zone (up to 24 nautical miles from land territory) prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws within its territory or territorial sea (Article 33); and

k. may adopt laws to control pollution from foreign vessels exercising the right of innocent passage, but such laws shall not hamper innocent passage of foreign vessels (Article 211(4)).

Transit passage through international straits (Articles 34-45):

a. States have sovereignty or jurisdiction over the waters, air space, seabed, and subsoil of the straits they border (Article 34). All ships and aircraft enjoy the right of transit passage (freedom of navigation and overflight) in straits used for international navigation (Articles 37, 38).

b. States bordering straits:

i) may designate sea lanes and traffic separation schemes for safety in conformity with generally accepted international regulations after referral to other states bordering the strait and international organizations (Article 41);

ii) may adopt laws covering navigational safety, pollution control, fishing prevention, and customs, fiscal, immigration, and sanitary regulations (Article 42);

iii) shall not hamper or suspend transit passage (Article 44); and

iv) may take appropriate enforcement measures against violations of navigational safety and pollution control laws causing or threatening major damage to the environment (Article 233).

Archipelagic sea lanes passage (Articles 46-54). The sovereignty of an archipelagic state extends to the waters, air space, seabed, subsoil, and resources enclosed by the archipelagic baselines (Article 49). Ships of all states enjoy the right of innocent passage through archipelagic waters (Article 52). Ships and aircraft enjoy the right of archipelagic sea lanes

passage (navigation and overflight in the normal mode for transit between one part of the high seas/EEZ and another part of the high seas/EEZ) (Article 53).

Archipelagic states:

a. may suspend innocent passage temporarily for security (Article 52(2)) but may not suspend archipelagic sea lanes passage (Articles 44, 54);
b. may designate sea lanes and air routes in conformity with generally accepted international regulations (Article 53); and
c. may adopt laws covering navigational safety, pollution control, fishing prevention, and customs, fiscal, immigration, and sanitary regulations (Article 42).

Immunities of warships and other government ships (Article 32). Warships and other noncommercial government ships:

a. enjoy immunity from prosecution (Article 32); but
b. may be required to leave the territorial sea if they do not comply with coastal state regulations (Article 30).

The flag state is responsible for any damage caused by noncompliance with coastal state laws (Article 31).

Right of landlocked states to access to the oceans (Articles 124-32). Landlocked states enjoy a right of access to the sea through transit states as established by bilateral, subregional, or regional agreements (Article 125).

Coastal State Enforcement Rights

Coastal states shall adopt and enforce laws and take other measures to control pollution from land-based sources, taking into account international standards. They shall adopt laws and take other measures to implement international rules (Articles 207, 213).

Coastal states shall adopt and enforce laws and take other measures to control pollution from seabed activities and artificial structures subject to national jurisdiction, such laws to be no less effective than international standards. States shall adopt laws and take other measures to implement international rules (Articles 208, 214).

States shall adopt laws and take other measures to control pollution by dumping. Such laws shall be no less effective than global rules. Permission to dump in the territorial sea, EEZ, or continental shelf must be expressly approved by the coastal state, after consideration of the matter with other states that may be adversely affected (Article 210).

Enforcement shall be:

a. by the coastal state regarding dumping within its territorial sea, EEZ, or continental shelf; and
b. by any state regarding loading of wastes within its territory or terminals
c. (no obligation to institute proceedings is imposed when another state has already done so) (Article 216).

Vessel-source pollution:

a. When a vessel is voluntarily in port, a coastal state may institute proceedings for any vessel-source pollution within the territorial sea or EEZ of the coastal state (Article 220(1)).
b. When a vessel is navigating in the territorial sea and there are clear grounds for believing a vessel has violated an international pollution control rule, the coastal state may undertake physical inspection and, if warranted, institute proceedings and detain the vessel (Article 220(2)).
c. When a vessel is navigating in the EEZ or territorial sea and there are clear grounds for believing the vessel has violated an international pollution control rule in the EEZ, the coastal state may require information regarding the vessel's identity, registry, last and next port of call (Article 220(3)).
d. When a vessel is navigating in the EEZ or territorial sea and there are clear grounds for believing the vessel has violated an international pollution control rule and a substantial discharge causing or threatening significant pollution has resulted, the coastal state may undertake physical inspection of the vessel if
   i) the vessel refused to give information, or
   ii) the information is manifestly at variance with the evidence, and circumstances justify the inspection (Article 220(5)).
e. When a vessel is navigating in the EEZ or territorial sea and there is clear objective evidence that a vessel has violated an international pollution control rule resulting in a discharge causing or threatening to cause major damage to the coastline or resources of the territorial sea or EEZ, the coastal state may institute proceedings and detain the vessel (Article 220(6)).
f. (If bond is posted, the vessel shall be allowed to proceed) (Article 220(7)).

g. See also Port State Jurisdiction (Article 218), page 479 infra.

Only monetary penalties may be imposed for violations of pollution control laws in the territorial sea, except in the case of willful and serious pollution (Article 230).

Atmospheric pollution. States shall adopt and enforce laws and take other measures to control pollution through the atmosphere within the airspace under their sovereignty taking into account international rules. States shall adopt laws to implement international rules (Articles 212, 222).

EXCLUSIVE ECONOMIC ZONE (EEZ)

The EEZ is an area up to 200 nautical miles from a nation's baselines, beyond and adjacent to the territorial sea (Articles 55, 57).

Coastal State Jurisdiction, Generally

In the EEZ the coastal state has (1) sovereign rights for exploring, exploiting, conserving, and managing all natural resources, and other economic rights such as exploitation of energy from water, currents and winds; (2) jurisdiction with regard to:

a. artificial islands and structures,
b. marine scientific research, and
c. protection and preservation of the marine environment;

and (3) other rights and duties provided in the Convention (Article 56).

Coastal states shall have due regard to rights and duties of other states (Article 56(2)):

a. Other states have the freedoms of navigation, overflight, laying of submarine cables, and pipelines.
b. Other states shall comply with laws adopted by coastal states in accordance with the Convention and international law (Article 58).
c. Landlocked and geographically disadvantaged states have nontransferable rights to exploit a part of the surplus of the EEZ of the subregion or region, as established by agreements (Articles 62, 69, 70, 72).

Where the Convention does not prescribe rights or jurisdiction in favor of the coastal state or other states, conflicts should be resolved on the basis of equity, in light of all relevant circumstances, weighing the interests of the parties as well as the international community (Article 59).

Compulsory settlement procedures may be invoked when it is alleged that:

a. a coastal state has violated other "user" states' freedoms and rights of navigation, overflight, or laying of submarine cables and pipelines, or
b. a "user" state has violated the Convention, coastal state regulations, or international law in the exercise of the aforementioned freedoms and rights, or
c. a coastal state has violated international rules and standards for the protection of the marine environment (Article 297(1)).

Sovereign Economic Rights

Coastal states shall:

a. conserve and maintain living resources at maximum sustainable yield by determining the allowable catch and implementing conservation and management measures (various environmental and economic factors must be considered, and information must be exchanged through international organizations) (Article 61);
b. optimally utilize living resources by giving other states access to surplus catches (considering relevant factors) (Article 62);
c. regulate fishing through a variety of measures including licensing, fixing quotas, requiring information, placing observers, and utilizing enforcement procedures (Article 62);
d. seek to conserve the stocks through subregional or regional organizations where stocks straddle the EEZ of another state or the high seas (this applies to coastal or fishing states) (Article 63);
e. regulate exploitation of marine mammals more strictly than the Convention (international organizations may also do this) (Article 65);
f. have primary interest and responsibility for anadromous stocks originating in their rivers, taking into account the interests of other states (enforcement of regulations beyond the EEZ shall be by agreement between the state of origin and other states) (Article 66);
g. have responsibility for management, egress, and ingress of migrating fish when catadromous species spend the greater part of their life cycle in their waters (if migration straddles the EEZ of another state, management shall be by joint agreement) (Article 67); and
h. cooperate directly or through international organizations with states fishing for highly migratory species to ensure conservation and optimum utilization of such species (Article 64).

Regarding **enforcement**, a coastal state may exercise its sovereign economic rights over the EEZ by taking the following measures:

a. boarding,
b. inspection,
c. arrest, and
d. judicial proceedings to enforce all laws adopted in conformity with the Convention (Article 73(1), see also Article 220).

Vessels must be promptly released upon posting reasonable bond (Article 73(2)). Penalties for fisheries violations shall not include imprisonment or corporal punishment (Article 73(3)).

Dispute settlement procedures:

a. **Compulsory settlement inapplicable:** the coastal state has sovereign rights over the living and nonliving natural resources in its EEZ (Article 56). The coastal state need not, therefore, submit to compulsory settlement procedures regarding its discretionary powers for determining allowable catch, its own harvesting capacity, allocation of surpluses to other states, and conservation and management regulations (Article 297(3)(a), see Article 62).

b. **Compulsory conciliation applicable:** the coastal state may, however, be forced to accept **compulsory conciliation** procedures when it is alleged to have:
   i. manifestly failed to ensure the maintenance of living resources through proper conservation and management,
   ii. arbitrarily refused to determine the allowable catch and its own capacity to harvest stocks that another state wants to fish, or
   iii. arbitrarily refused to allocate its declared surplus stocks to any other state (Article 297(3)(b), see Articles 62, 69, 70).

   c. The concilation commission (five members) cannot substitute its discretion for that of the coastal state, and is limited to issuing a report of its findings, which is not binding (Article 297(3)(c,d)).

Artificial Islands and Structures

Coastal states shall authorize and regulate the construction, operation, and use of artificial islands, installations, and structures, including safety zones, and shall have exclusive jurisdiction over them (Article 60).

Marine Scientific Research

States and international organizations intending to do research in the EEZ and on the continental shelf shall provide the coastal state with full information at least six months before the research project begins (Article 248).

The coastal state:

a. shall normally grant consent and may not delay or deny consent unreasonably, but coastal states may withold consent if the project
   i. is of direct significance for exploitation of natural resources,
   ii. involves drilling, explosives, or harmful substances,
   iii. involves construction of artificial structures,
   iv. contains false information, or
   v. involves research by a state with outstanding obligations from previous projects (Article 246(5), see Article 297(2));

   (On the continental shelf beyond the EEZ, coastal states have discretion only to designate specific areas off limits to scientific research because of the coastal state's economic exploitation of those areas (Article 246(6));

b. will be considered to have granted consent by implication and researchers may proceed six months after providing the necessary information unless the coastal state within four months withholds consent or requires more information (Article 252);

c. may suspend research in progress in its EEZ or continental shelf if not conducted according to information or not in compliance with Articles 248 and 249 (Article 253); and

d. has the right to participate in the research project without payment and to have access to data, reports, and results (Article 249).

On questions of marine scientific research involving discretion, coastal states need not submit to compulsory settlement procedures but must submit to **compulsory conciliation** (the conciliation commission shall not review the coastal state's discretionary decisions under Article 246, and in any case, the commission's findings are not binding) (Article 297(2)).

Protection and Preservation of the Marine Environment

Regarding Regulation and Enforcement--See Territorial Sea, Coastal States Enforcement Rights, pages 466-68 *supra*. In addition, coastal states:

a. may adopt laws and institute proceedings to control pollution from vessels in their EEZ,

such laws to conform to international rules (in special circumstances, more stringent mandatory measures to control vessel pollution may be adopted by a coastal state after other states and a competent international organization are consulted) (Article 211(6));

b. have the right to enforce, by measures proportionate to actual or threatened damage, the protection of their coastline (including fishing) from major pollution that may be caused by a maritime casualty beyond the territorial sea (Article 221); and

c. can adopt and enforce laws to control pollution in ice-covered areas in their EEZ where pollution could cause major harm (Article 234).

Regarding penalties:

a. Only monetary penalties may be imposed for pollution violations beyond the territorial sea (Article 230).

b. Coastal state proceedings for violations beyond the territorial sea shall be suspended if the flag state undertakes similar proceedings within six months, unless
   i. there is major damage to the coastal state, or
   ii. the flag state repeatedly has not effectively enforced international rules against its own vessels

   (there is a three-year statute of limitations from the date of violation; only one state may institute proceedings, but the flag state may impose additional penalties) (Article 228).

Dispute settlement procedures:

a. Compulsory dispute settlement procedures may be invoked when a coastal state has violated international rules and standards for the protection of the marine environment (Article 297(1)).

b. A coastal state may claim an optional exception to the compulsory procedure for its law enforcement activities in the EEZ regarding scientific research and fisheries (Article 298(1)(b)).

CONTINENTAL SHELF

For coastal state rights, the continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of its land terri-

tory to the outer edge of the continental margin (but not beyond 350 nautical miles from the state's baselines) or to a distance of 200 nautical miles, whichever is greater (Article 76).

The coastal state:

a. has sovereign rights to explore and exploit the natural resources of the seabed, subsoil, and sedentary species of its continental shelf beyond the EEZ to a maximum of 350 miles (Article 77); but
b. must make payments to the International Sea-Bed Authority for exploitation of the continental shelf beyond 200 miles (Article 82); and
c. has no sovereign rights over the superadjacent waters and air space (Article 78).

Regarding Pollution Control Rights--See Territorial Sea, Coastal State Enforcement Rights, pages 466-68 supra.

Regarding Marine Scientific Research--See EEZ, Marine Scientific Research, pages 471 supra.

HIGH SEAS

The high seas are those waters not included in the EEZ, territorial seas, internal waters, or archipelagic waters of any state (Article 86). The high seas are reserved for peaceful purposes and are not subject to any state's sovereignty (Articles 88, 89).

Rights of All States

All states have:

a. the right of navigation by flag vessels that have genuine links to the flag state (Articles 87(a), 90, 91);
b. freedom of overflight (Article 87(b));
c. freedom to construct artificial islands and installations, subject to rights of coastal states to regulate same on their continental shelves (Article 87(d));
d. freedom of scientific research (Article 87(f));
e. the right to lay submarine cables and pipelines (Articles 87(c), 112), subject to the rights of a coastal state on its continental shelf (Article 79);
f. the right to fish on the high seas (Article 87(e), 116), subject to the rights of a coastal state over straddling stocks (Article 63), highly migratory species (Article 64), anadromous species (Article 66), and catadromous species (Article 67);

g. immunity from jurisdiction of other states for warships and government ships on noncommercial service (Articles 95, 96);
h. immunity from visit by warship encountering foreign ship unless there are reasonable grounds for suspecting that the ship is
   i. engaged in piracy,
   ii. engaged in the slave trade,
   iii. engaged in unauthorized broadcasting,
   iv. without nationality, or
   v. of the same nationality as the warship
   (the warship must first check the suspected ship's documents, and then if suspicion remains, may further examine the ship) (Article 110); and
i. the right of hot pursuit by warships or military aircraft of a coastal state beginning from the internal waters, territorial sea, contiguous zone, EEZ, or continental shelf, into the EEZ or high seas if pursuit is uninterrupted (Article 111).

Duties of All States

All states must:

a. repress piracy by seizing, arresting, and penalizing pirate ships (Articles 100, 105) (but a state making a seizure without adequate grounds is liable for resulting loss or damage (Article 106));
b. suppress illegal drug traffic (Article 108);
c. suppress unauthorized broadcasting by arrest and prosecution (Article 109);
d. adopt laws to provide punishment or compensation for breaking of submarine cables by its nationals or flag vessels (Articles 113, 114); and
e. cooperate in the conservation and management of living resources of the high seas (Articles 117, 118, 119).

Duties of Flag States

All flag states must:

a. effectively exercise jurisdiction and control over flag vessels in administrative, technical, and social matters (Article 94);
b. maintain registry of vessels (Article 94(2)(a));
c. assume internal legal jurisdiction (Article 94(2)(b));
d. ensure safety at sea (other states may report lack of proper jurisdiction and control to the flag state for investigation and action) (Article 94(5,6));

e. inquire into casualties or incidents involving flag vessels that cause serious damage or injury to other states' nationals, ships, or the environment (Article 94(7));
f. exercise penal jurisdiction over the ships' personnel in the event of collision (no other state may arrest or detain the ship, even for investigation) (Article 97);
g. require flag vessels to render assistance to persons lost, in distress, or involved in collisions (Article 98); and
h. prevent and punish transport of slaves (Article 99).

THE AREA

The Area means the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction. Activities in the Area refer to activities of exploration for and exploitation of the seabed mineral resources of the Area (Articles 1, 133).

Common Heritage

The Area and its resources are the common heritage of humankind (Article 136) and are open to all states exclusively for peaceful purposes (Article 141).

All states have the right to conduct scientific research in the Area (Articles 256, 257).

The International Sea-Bed Authority (Articles 156-58)

This Authority:

a. shall have international legal personality and legal capacity necessary for its functions and purposes (Article 176);
b. has express powers and functions conferred by the Convention and such incidental powers necessary for the exercise of those express powers and functions (Article 157);
c. shall enjoy privileges and immunities in the territory of each state party (Article 177)—immunity from legal process (Article 178), search and seizure (Article 179), restrictions, controls, and moratoria (Article 180), and taxation (Article 183);
d. may carry out marine scientific research in the Area (Article 143);
e. shall adopt rules, regulations, and procedures to protect the marine environment (Article 145) and human life from harmful activities in the Area (Article 146);
f. shall exercise necessary control over activities in the Area to secure compliance with provisions of the Convention, assisted by states parties (Article 153(4));

g. shall establish and enforce international rules to control pollution from activities in the Area (Articles 209, 215); and
h. shall have the right to inspect all installations in the Area (Article 153(5)).

The Council (Articles 161-62)

This governing body (comprised of 36 members elected according to stated categories by the Assembly):

a. shall direct and supervise a staff of inspectors to determine whether terms of any contract with the Authority are being complied with (Article 162(2)(z)), and
b. shall issue emergency orders to prevent serious harm to the marine environment from activities in the Area (Article 162(2)(w)).

The Assembly (Articles 159-60)

This body (containing all states parties to the Convention) may suspend members for violations (Article 160(m), see Article 185).

States Parties

States parties:

a. are responsible to ensure that their activities in the Area, or those of their state enterprises or natural or juridical persons, are carried out in conformity with the Convention (Article 139);
b. may carry out marine scientific research in the Area (Article 143);
c. may request an advisory opinion from the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea (Annex VI, Sec. 4) (requires one-fourth or more of the states parties) (Article 159(10)); and
d. shall lose their votes in the Authority if they are in arrears for the amount of two years' contributions (Article 184), and may have their privileges and rights of membership suspended for persistent violations of the Convention (Article 185).

Coastal States

Coastal states (across whose jurisdictions resource deposits lie)

a. shall be consulted, and their consent shall be obtained if activities in the Area may result in exploitation of resources in their EEZ (Article 142(1-2)); and
b. may take measures necessary to prevent, mitigate, or eliminate grave and imminent danger to their coastlines from pollution or threat

of pollution caused by activities in the Area (Article 142(3), see Article 215).

Seabed Disputes

All states parties are bound to accept the nearly exclusive compulsory settlement jurisdiction of the **Sea-Bed Disputes Chamber** of the International Tribunal for the Law of the Sea for disputes relating to activities in the Area (Article 287(2)). The Sea-Bed Disputes Chamber has jurisdiction over disputes with respect to seabed mining activities in the Area:

a. between states parties (Article 187(a)) (but disputes between States Parties may also be submitted to:
   i) a **special chamber** (3-5 or more members) of the International Tribunal for the Law of the Sea, by request of both parties, or
   ii) an **ad hoc chamber** (3 members) of the Sea-Bed Disputes Chamber by request of any party (Article 188(1)(a,b), see Annex VI, Articles 15, 17, 36))

   (disputes concerning contract interpretation shall be submitted to binding commercial arbitration at the request of any party; a commercial arbitral tribunal has limited jurisdiction over the contract only and none over the Convention, which is reserved to the Sea-Bed Disputes Chamber (Article 188(2)(a-c));
b. between a state party and the Authority (Article 187(b)); and
c. between parties to a contract (states parties, the Authority or the Enterprise, state enterprises and natural or juridical persons sponsored by states parties) (Article 187(c,d,e))

The Sea-Bed Disputes Chamber has no jurisdiction over the Authority's discretionary legislative powers and cannot substitute its discretion for that of the Authority. The Sea-Bed Disputes Chamber can only rule on the application of Authority rules, regulations, and procedures, not on their validity. The Chamber can, however, rule on the Authority's lack of competence or misuse of power and on damage claims (Article 189). The Chamber shall render advisory opinions when requested by the Assembly or Council (Article 191).

RIGHTS, DUTIES, AND LIMITATIONS OF ALL STATES, FLAG STATES, AND PORT STATES

All States

All states:

a. shall cooperate on a global or regional basis, directly or through international organiza-

tions, to formulate international rules, standards, and recommended practices for protection of the marine environment (Article 197) (specific environmental obligations adopted under previous or future agreements--consistent with the Convention--are not prejudiced by this Convention (Article 237));

b. shall monitor the risks or effects of pollution (Article 204);

c. (and international organizations) are responsible to ensure that research done on their behalf is in accordance with the Convention (they shall be liable for damages caused by such research (Article 263)); and

d. shall ensure that compensation is available for pollution damage caused by persons under their jurisdiction and shall cooperate to develop procedures for payment of adequate compensation, such as compulsory insurance (Article 235).

Flag States

Flag states:

a. shall adopt laws no less effective than the international rules to control pollution from flag-state vessels, installations, and structures in the Area (Articles 209, 215);

b. shall enforce rules on dumping violations with regard to its flag vessels and aircraft, but have no obligation to institute proceedings if another state has done so (Article 216);

c. shall adopt laws to control pollution from flag vessels and shall ensure compliance and effective enforcement irrespective of where the violations occurred, such rules to be at least as effective as international rules (Articles 211(2), 217(1));

d. shall prohibit flag vessels from sailing unless they meet international standards for pollution control, design, construction, equipment, and manning of vessels (Article 217(2));

e. shall inspect flag vessels periodically and issue certificates (Article 217(3));

f. shall investigate violations of international pollution rules on their own or at the request of any state, and institute proceedings if necessary (Article 217(4));

g. shall inform the requesting state of the outcome (Article 217(7));

h. shall impose penalties severe enough to discourage violations (Article 217(8)); and

i. shall adopt and enforce laws and take other measures to control pollution through the atmosphere within the airspace under their sovereignty or by their flag vessels or aircraft, taking into account international rules (Articles 212, 222).

Port State Jurisdiction

A port state may:

a. investigate and institute proceedings for discharge from vessels in violation of international rules that occur outside the port state's internal waters, territorial sea, or EEZ;
b. (for violations in the internal waters, territorial sea, or EEZ of a third state, the port state may) not institute proceedings unless requested by the third state, the flag state, or a state damaged or threatened by the discharge, or unless pollution is likely to occur in the port state's jurisdiction;
c. prevent an unseaworthy vessel from sailing until the violation is rectified (Article 219); and
d. transfer port state proceedings to a coastal state where the violation occurred (Article 218).

Limitations on Enforcement Powers

Enforcement may be exercised only by officials or ships and aircraft clearly marked as in the military or government service (Article 224).

States shall not expose a vessel or the environment to unreasonable risk of danger during enforcement (Article 225).

States are liable for damages from unlawful or excessive enforcement measures (Article 232).

States shall not delay vessels longer than necessary. Physical inspection is limited to examination of documents; if there are clear grounds for suspecting that documents and the actual condition of the vessel do not match, further physical inspection may be undertaken. Release of an unseaworthy vessel (which presents an unreasonable threat of environmental damage) may be refused until it is repaired (Article 226).

States shall not discriminate against foreign vessels during enforcement (Article 227).

Civil proceedings instituted for damages from pollution are not affected by the Convention (Article 229).

Part XV, SETTLEMENT OF DISPUTES relating to the interpretation and application of the Convention, is divided into three sections. **Section 1, GENERAL PROVISIONS AND GENERAL OBLIGATIONS,** offers states parties (or state enterprises or natural or juridical persons possessing the nationality of states parties) a range of noncompulsory procedures under which they are instructed to:

a. settle disputes by any peaceful means of their own choice (Article 279, 280);
b. attempt to utilize previously agreed-upon general, regional, or bilateral binding procedures for dispute resolution (Article 282); and
c. expeditiously exchange views regarding good faith negotiations and remain in communication even when settlement procedures fail (Article 283).

There is also a conciliation procedure whereby a state party may invite the other party to submit voluntarily to (nonbinding) conciliation under Annex V (Article 284):

a. Each party appoints two conciliators from a list maintained by the UN secretary-general. The four conciliators appoint the fifth conciliator (the chairman) (Annex V, Article 3).
b. The conciliation commission hears the parties, examines the claims, and proposes settlements. If no agreement is reached, the commission states conclusions and recommendations for an amicable settlement in a nonbinding report (Annex V, Articles 6-7).

If no settlement is reached by these means, any party may submit the dispute to a court or tribunal under **Section 2, COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS,** which covers any dispute concerning the interpretation or application of the Convention, subject to Section 3 (Article 286).

A state party may consent in advance to one or more procedures for settling disputes:

a. the International Tribunal for the Law of the Sea (21 independent members, representative and geographically diverse, elected by states parties for nine-year terms (Annex VI, Section 1));
b. the International Court of Justice (ICJ);
c. an arbitral tribunal (five members, one each appointed by parties individually, remaining three appointed jointly; if no joint agreement after 60 days, any party may ask the president

of the International Tribunal for the Law of the Sea to appoint the remaining members (Annex VII, Article 3)); and

d. a special technical arbitral tribunal (each tribunal composed of five experts for disputes relating to fisheries, protection of marine environment, marine scientific research, and navigation--including pollution from vessels and dumping; the parties individually appoint two experts and jointly appoint the fifth expert; if no agreement after 30 days, the UN secretary-general shall make the appointments, including individual appointments not made by a party (Annex VIII, Article 4)).

If none of these procedures is chosen, the state party is deemed to have accepted the arbitral tribunal. If disputing state parties have not consented to the same procedure, they are deemed to have consented to the arbitral tribunal (Article 287).

Access

Part XV settlement procedures are open to states parties and to a state enterprises or natural or juridical persons sponsored by states parties (Articles 153, 187, 291).

In a dispute between states parties, local remedies must first be exhausted if required by international law (Article 295).

Powers

Any court or tribunal, once chosen, which considers itself to have jurisdiction, may prescribe provisional measures to protect parties' rights or the environment or may do so for a yet-to-be-constituted arbitral tribunal if urgency requires (Article 288, 290).

A court or tribunal may order the prompt release of a detained vessel if a bond has been posted (Article 292).

The court or tribunal shall apply the Convention and other rules of international law not incompatible with it, and, if the parties agree, the decision shall be made ex aequo et bono (Article 293).

Decisions shall be final and binding, but only upon the parties to the particular dispute (Article 296).

Limitations and Exceptions

Section 3 of Part XV provides exemptions to the compulsory and binding procedures in Section 2, above. These limitations and exceptions vary according to the type of dispute:

a. **Marine Pollution** and Basic **Freedoms and Rights in the EEZ: No Limitations**--see EEZ, Dispute Settlement Procedures, page 470 supra.

b. **Fisheries** and **Marine Scientific Research** Disputes in the **EEZ: Compulsory (Nonbinding) Conciliation**--see EEZ, Compulsory Conciliation, page 470 supra.

c. **Marine Boundary Delimitation Disputes: Compulsory Conciliation**; with exceptions that a state party may declare in writing that the compulsory settlement procedures do not apply to delimitation of the territorial sea, historic bays or titles, EEZ, and continental shelf between states with opposite or adjacent coasts. If there is no agreement within a reasonable time using noncompulsory procedures, however, a party may force the other to submit to compulsory conciliation (but any dispute that involves the concurrent consideration of sovereignty of land territory shall be excluded). If the conciliation commission's report does not result in an agreement, the parties shall by mutual consent submit to a compulsory settlement procedure (Article 298(1)(a), see Article 74).

d. Other **Optional Exceptions: No Compulsory Procedures:**

   i. military activities and law enforcement activities regarding scientific research and fisheries (Article 298(1)(b)), and

   ii. disputes handled by the UN Security Council (Article 298(1)(c)).

The parties may always agree to another procedure to reach a settlement (Article 299).

THE SETTLEMENT OF DISPUTES AND THE LAW OF THE SEA CONVENTION

by

R.P. Anand

Enforcing International Law

One of the most difficult issues in international law is implementation and enforcement. Because of the absence of enforcement mechanisms, international law is sometimes said to be merely positive morality. We have seen a long struggle to provide a compulsory means for the settlement of disputes. When the Permanent Court of International Justice was established after World War I, compulsory jurisdiction could not be conferred on it. All it was given was "optional compulsory jurisdiction," which sounds like a contradiction in terms. Only 42 or 43 states have accepted the jurisdiction of the International Court of Justice. Even the declarations of these states are riddled with so many reservations that they take away with one hand what they seek to give with the other.

Asian and African countries have been especially reluctant to accept the jurisdiction of the International Court of Justice. These nations are new actors in international society and are not in all respects satisfied with the present international law. Moreover, for years the International Court of Justice was primarily a European court. The socialist countries have never accepted the International Court of Justice. In 1919, the Soviet foreign minister, Mr. Litvinov, said that there was not one world but two, the Soviet and the non-Soviet, and only an angel could be unbiased in judging Russian affairs. Because the Soviets know

and believe that no angels sit on the ICJ, they have never accepted its jurisdiction. Even the Western countries, who claim to be champions of the rule of law, have been extremely reluctant to accept the jurisdiction of the court. For example, when the United States accepted its jurisdiction, it made many reservations, including the Connally reservation, which is self-judging. Sometimes it is disputed whether the United States has accepted the jurisdiction of the Court at all.

The Convention's Dispute-Settlement Provisions

It is against this background that we should look at the provisions relating to settlement of disputes in the Law of the Sea Convention. The thrust of these provisions is that states should be persuaded to settle their disputes by peaceful means, through the procedures suggested in Article 33 of the UN Charter. These include traditional means, such as negotiations, mediation, conciliation, arbitration, or judicial settlement. Articles 279-281 of the Convention give parties the freedom and time to settle their disputes among themselves. Article 282 provides for settlement of differences through regional or bilateral agreements. The only obligation under Article 283 is for the parties to exchange views expeditiously. Article 284 encourages conciliation. Article 287 provides that the parties may, when signing, ratifying, or acceding to the Convention, choose one or more of the four stated means for settlement of disputes: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal (Annex VII), or a special arbitral tribunal of technical experts in marine affairs (Annex VIII).

Article 287(3) provides that a state party that does not make a specific declaration shall be deemed to have accepted arbitration in accordance with Annex VII. I believe this is a progressive step. This is a novel procedure that has almost never been generally accepted by countries, especially by the socialist countries. Annex VII explains how the arbitral tribunal is to be established, which is one of the most difficult problems in holding an arbitration. Since reservations are not permitted while signing or ratifying the Law of the Sea Convention, all the countries that do ratify, including the socialist countries, will have accepted compulsory arbitration in the settlement of disputes.

But Part XV delineates the limitations and exceptions to the dispute settlement provisions. Disputes that arise out of coastal state jurisdiction with respect to boundary delimitation, military activities, and certain law enforcement measures by coastal states in the EEZ are excluded from the compulsory settlement provisions. In spite of these limitations, this is a

progressive step and is the result of a long struggle for the compulsory settlement of international disputes.

Professor Yuan told us that China would never accept the compulsory jurisdiction of the ICJ or any other court and would never appear before it.[1] This seems to be rather strange. It has been emphasized again and again here that states cannot pick and choose provisions of the Convention. These statements have been directed primarily against the United States but would apply also to China, which claims to be a supporter of the Convention.

Paul Yuan: Let me clarify my position. Professor Anand has stated that I said China would not subject itself to a compulsory international dispute process. Yes, I said this, but we have to remember that international law is developing and things are not static. Until international law develops to such an extent that it is in favor of the Third World countries, I do not think China will subject itself to compulsory international court decisions. But things are changing. When China feels it is in the interest of Third World countries, China will accept such compulsory international court decisions.

Anand: Mr. Yuan has said that China will not accept the compulsory jurisdiction of an international court until international law is in favor of the Third World countries. I do not really know what that statement means because it is too vague and uncertain.

Nonparties to the Convention and Transit Passage

One of the most important questions is which Convention provisions apply to nonparties. Several parts of the Convention might have become part of customary law, but under customary law there is no compulsory jurisdiction. A nonparty cannot force parties to appear before an arbitration tribunal.

The United States argues that it has the right of navigation or transit passage through straits and archipelagoes, because such rights are part of customary law. Other countries disagree. Ambassador Djalal questioned why Indonesia should allow United States ships to pass.[2] What would happen in such a situation? Even if compulsory adjudication existed, the matter would not be free from doubt.

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1 See page 187 supra.

2 See pages 54-55 and 301 supra.

The U.S. Oceans Policy Statement of March 10, 1983, says the United States will accept the 12-mile territorial sea provided that transit passage through straits and archipelagic waters is accepted.[3] Suppose some countries do not allow the right of transit passage because they claim that the United States has not accepted its part of the bargain. Can the United States insist that the rest of the world go back to the 3-mile limit? A 3-mile territorial sea was never accepted as part of customary law. All through the 1930s there was no agreement. In 1958 and 1960 there was no agreement. In fact, various territorial water limits have been accepted by various states. Therefore, the United States cannot force other countries to roll their territorial sea back to 3 miles.

The United States Has Four Alternatives on Passage

Four alternatives are left for the United States. The United States can say, "If you do not let us have transit passage, we will shoot our way through." I wonder if this would be a very wise policy. Another alternative is to go to the International Court of Justice. The United States' argument that transit passage through straits and archipelagoes has become part of customary law may be upheld by the Court, but can the United States afford to wait for the Court's decision if its strategic interests are at stake? A third possibility is that the United States may negotiate bilateral agreements with strait states. The United States may attempt, in effect, to purchase the right of passage. This approach could be extremely expensive. A fourth possibility would be to conclude that in this era of intercontinental ballistic missiles the United States does not need transit passage anyway.

My submission is that even if some of these navigational rights under the Convention have become part of customary international law, the United States may not be able to exercise them effectively. It has not accepted the Convention, and some of the countries, irritated by the U.S. stand, may just say, "Because you have not accepted it, you cannot take advantage of transit passage provisions."

On the other hand, the United States is arguing that it has the right to exploit the deep seabed resources under the doctrine of the freedom of the seas. This is questionable, and the matter may be taken before the International Court of Justice. There is no possibility, as Mr. Welling has explained, for the United States or any company to exploit the deep seabed resources until the twenty-first century. If that is the case and if seabed resources are not important at

[3] See Appendix A infra at 552, paras. 6 and 7.

present, one wonders why the United States has not signed the Convention. If the United States does sign, there would be absolutely no doubt that many provisions of the Convention would become part of customary international law.

THE ENFORCEMENT OF NORMS AND RULES WITH RESPECT TO NONPARTIES

by

Anthony D'Amato

My topic is not the enforcement mechanisms within the Convention, but rather the enforcement of norms and rules with respect to nonparties. I believe that to ask how international law is enforced is another way of asking whether international law is real. There has to be enforcement if we are talking about law in the real sense. But because enforcement is a function of what the law is, it may be useful first to deal with some of the themes that have been suggested in this meeting so far, where people are making claims about what is legal and what is illegal. We have heard a lot of rhetoric about law that leads us to ask whether in some cases the speaker was really talking about enforceable law. In this category, I want to deal with five different kinds of views.

China and International Law

First, Professor Yuan talked about bourgeois rules that are not binding on China, and then later he said that rules that are disadvantageous to China are not binding on China.[1] I do not really think the professor was talking about law here. He is making a claim that

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1 See pages 192 and 206 supra.

China is a major power, is not bound by any rules that it does not want to be bound by, and can do pretty much what it likes. I think the international community should reject this kind of rhetoric. It is not in the interest of the international community to have any one power self-defining what the rules are, because then there are no rules. Rhetoric aside, however, China, like most nations, has been behaving in ways that are relatively reasonable. Actions count, not rhetoric. We have to move beyond some of these verbal screens that are thrown up for reasons that do not really have to do with legal analysis.[2]

Descriptive and Normative Views of International Law

Second, Mr. Colson's view of law appears to be a description about what nations do as to the oceans, which is a highly descriptive view rather than a normative view. If nations engage in these practices, apparently that is law, according to him. How issues are managed between governments, he says, is what the law of the sea is really all about. But I do not see why the way nations manage their issues has anything to do with the compulsory process that we call law. A problem arises when nations disagree. When the United States and Canada disagree, and Mr. Colson ably represents the United States before the ICJ at the Hague on that issue,[3] I am sure his arguments are not going to be: "Well, let the United States and Canada manage this issue." Instead, he will argue that the law favors the position of the United States.

We have to get away from a mere description of what nations do, to the more normative and realistic concept of law. Fortunately, when we see what Mr. Colson and Mr. Hoyle have to say about the U.S. position, we find in fact that the United States has a rather traditional view of international law, and I think we can be rather reassured by that. We find a

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2 Paul Yuan: Let me answer Professor D'Amato's statement. Yes, China is following international law in certain respects. This is happening because international law is now moving away from its traditional Western roots because of the efforts of China and other developing nations. China cannot, however, accept the international law that was developed and imposed on the rest of the world by the Western imperialist powers or, more recently, by the two superpowers.

3 The United States and Canada have submitted their boundary dispute in the Gulf of Maine to a special chamber of the International Court of Justice.

relatively sound, reasonable position. One can disagree with particular positions, but the commitment to the rule of law seems secure.

The reason the United States takes these discussions so seriously is that it believes in compliance with international law. I think this is a very big strength. One of the world's powers--and other major powers feel this way, too--believes in compliance. It is in the self-interest of nations to comply with international law because international law in the aggregate reflects the self-interest of nations. International law is not something that somebody imposed from the outside. Rather it comprises the rules that we infer from the behavior of nations over centuries. It is no surprise that the rules that have emerged are collectively in the interest of the nations that have generated them. Although a nation may not like a particular rule, when balanced against the regime of the international system, it almost invariably prefers a system of rules with a few rules it does not like rather than no rules at all.

Mini-Treaty

A third approach that has been suggested is the notion that a mini-treaty would be illegal. That I find very amusing. It is a rather poetic use of the term international law, not an analytic one, because clearly, nations are free to enter into treaties. There is nothing illegal about a group of nations entering into a mini-treaty. What might be illegal is what their practices might be under the treaty. We would have to wait and see whether the rules generated by the Convention would not be followed by the nations who were parties to a mini-treaty. But certainly signing a treaty is not illegal, any more than signing the Law of the Sea Convention was illegal.[4]

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[4] The Legality of the Mini-Treaty

Borgese: I want to try to clarify my own mind with regard to the dispute between Tommy Koh and myself on one hand and, on the other, Tony D'Amato, who says that the mini-treaty is legal. In order to do that, I suggest we divide the issue into two parts. Supposing that the Convention on the Law of the Sea was not in force yet, and that none of the parties of the mini-treaty were signatories, then I think your point would be well taken. But if members of the mini-treaties are signatories to the Convention, then this thing is illegal as far as they are concerned. It is in violation of Article 311 quite clearly.

(Footnote continued)

Specificity and Customary Law

A fourth, perhaps more troubling, notion is that customary law consists of vague and general provisions lacking specificity. That is not true. Professor Van Dyke has asked, "Can a nonsignatory nation claim the benefit of the implied consent provision on maritime scientific research in Article 252?" Article 252 provides basically that if within six months the coastal state has not responded to a request for permission to conduct scientific research, the requesting institution can claim implied consent. This rule is very specific. Six months is not vague like due process or equal protection.

Can a nonparty claim the benefit of that rule? Dr. Anand told us earlier that the United States cannot obtain any rights from the Convention because it has not signed it.[5] I agree. No nonparty can claim a particular benefit within the Convention.

What might happen in practice? Suppose a nonparty asks a coastal state for consent and no consent is forthcoming. After six months, the nation goes ahead and engages in scientific research. If there is a dispute before an international court as to the legality of proceeding without consent, I think the answer would be very clear. The nation that engaged in marine scientific research would claim, citing McDougal and Burke,[6] that "reasonableness" is the criterion. I was reasonable, I asked for consent, and I did not get it within a reasonable period of time. To support my claim that waiting for six months is "reasonable," I cite the Law of the Sea Convention, where it says six months. That is a Convention that a number of states have signed and ratified. If there is no other law on the subject about what the time period is, the Convention is the very best evidence. And I think this could

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4 (continued)

Now suppose the other hypothesis, that the Convention has come into force, all the members of the mini-treaty are nonsigners, but they are only about five or six, whereas 130 have joined the Convention. Then, this matter will be taken to Court and the Court will decide. We all know how it will decide. It will declare the mini-treaty to be illegal, so it will turn out to be illegal under any circumstances.

5 See pages 114-20 supra.

6 M. McDougal and W. Burke, The Public Order of the Oceans 56-58 (1962).

be a winning argument. Even a detail like "six months" can become part of customary international law because no other alternative is better. Therefore, the detailed provisions of the Convention can become part of customary international law, binding, through the mechanism of customary law, upon nonparties as well as parties.

Uncertainty and International Law

A fifth notion is that when something is uncertain it might not be part of customary international law. Professor Van Dyke has quoted me as saying that we infer international law from the behavior of states.[7] But then he added something that I did not say. He said that where we do not have enough behavior, we might conclude that the state of the law is uncertain. This issue has permeated many of our discussions. How certain would we have been three days ago about a five-to-four decision that the U.S. Supreme Court handed down yesterday? If we had been asked about the state of the law last week, would we have known what it was? Of course not. But that does not mean there was no law on the subject. We simply could not predict it very well in those cases. There are hundreds of cases in domestic legal systems where reasonable lawyers cannot state with much assurance which way the decision will go. But they will never say there is no law on the subject; they will just say that a particular area is uncertain. Unpredictability is not the same as lack of law. There is plenty of customary law out there, but sometimes the divergent behavior of states makes it difficult to predict exactly what it is. We should not ask, "Has the Law of the Sea Convention made any impact on law?" Of course it has, but in some areas the impact is less certain than in others.

The Obligations of Nations to Follow International Law

Once we have a norm of international law, what is the nature of nations' obligations to follow it? It is important to recognize that international law is not anything like national legislation.[8] For example, a law that you cannot drive more than 55 miles an hour remains on the books, even though many cars exceed the speed limit. The fact that some cars speed will not change the law. The law is what is in the books. In other words, in domestic legal systems where we have statutes, behavior that is contrary to custom cannot change customary law. But in international legal

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7 See pages 4 and 131 supra.

8 See pages 129-31 supra.

systems, contrary subsequent behavior can and does change custom. If that were not true, customary law would not have evolved at all. We would still have the rules of 500 years ago. It is always true that customary law evolves if the subsequent behavior is contrary to the rule. We do have a possibility, through the mechanism of custom, of changing the very rules that regulate the behavior of nations.

We have the principle of the common heritage. for example, which by general consensus of this workshop, is a principle of customary international law. Can that be changed? I will suggest a way that it could be changed, although I do not think this scenario will happen in fact. Suppose the United States decided to appropriate a portion of the deep seabed, and a deep seabed venture company began to mine it.

If other nations did not object, we would have a new principle. Suppose other nations objected, claiming the United States cannot make this claim because of the common heritage concept, but did not do anything about it. Even then a new principle is becoming established. Contrary to the common heritage principle, we would have a principle of whoever wants it can get it. The common heritage principle would be destroyed by the subsequent behavior that contradicts it. In this sense, Mr. Colson is quite right in saying that it is not only the Convention that is important, but subsequent practice in conforming to it. We do not need subsequent practice to validate the Convention, but if subsequent practice opposes it. the subsequent practice becomes the new norm. If the United States does act in conformity with the Convention, it will help to create and reinforce the norms therein. If it acts contrary to the Convention, and gets away with it, then that practice begins to establish a new contrary norm.

Enforcement Mechanisms

Judicial enforcement. If the United States appropriated an area of the ocean bed, what could other nations realistically do about it to indicate contrary behavior so that the United States' practice would not destroy the common heritage principle? Three kinds of enforcement mechanisms are possible. The first is judicial enforcement. If other nations sued the United States in the ICJ, what would be the outcome? It is crystal clear: The United States loses because we had a norm of common heritage and one nation's action in violation will not change the norm. If a court were called on to decide whether the United States or the plaintiff nation is right, the only material they can look to is the material that has established the common heritage principle up to now. Should there be international judicial enforcement, I think the common heritage provision would be reestablished. Sometimes this

type of enforcement is not pursued because of a lack of compulsory jurisdiction or a lack of ability and interest of nations in obtaining it.

Military enforcement. A second kind of enforcement is sheer power: police or military enforcement. Would it be possible for other nations to send their boats out to that area and relieve the deep sea venture boat of its manganese nodules? The military vessels would be acting under a claim of right, enforcing the common heritage principle. Would this work? The United States is a strong power, but many U.S. tuna vessels have been confiscated by states that could not face up to the United States in a war. Sometimes a show of strength would be enough to establish and reinforce the principle.

The reason the United Kingdom lost the Anglo-Norwegian Fisheries Case was not because of lack of protest.[9] was not because of lack of protest. England had been protesting those fisheries since 1935 and 1937, but it could not protect English vessels that were being blocked from fishing in those waters. The United Kingdom could not expend millions of dollars to use military ships to protect its fishing vessels because the costs far exceeded the value of the fish. The rule of law, however nascent it was in its formation at that point, favored Norway. This is what the International Court in its wisdom figured out.

Systemic enforcement. The third possibility is systemic enforcement of rules. It has nothing to do with judicial enforcement or power enforcement, but rather it is enforcement of rules by applying pressure in some other areas. For example, if the United States were to start a deep seabed mining operation, other nations might retaliate by denying the United States some prerogatives in a different sphere. The systemic enforcement of the aggregate of rules gives rise to the potential of reciprocal rule violation as a means of enforcing the primary rules. This is the real reason why the United States is not going to expropriate a portion of the high seas. The United States does not want to unravel the international rules system, which it might do by defying international law on this point.

Professor Henkin said in one of his books, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[10] Why is that? Because they do not

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9 Fisheries (U.K. v. Nor.), 1951 I.C.J. 116.

10 L. Henkin, How Nations Behave 42 (1968).

want to unravel that system of rules. If on the one hand they would like to achieve an immediate end, and on the other hand they realize that the whole fabric of rules can unravel, they will undoubtedly think twice before acting.

We are talking about something at this workshop that is very important. Even though some political scientists claim that international law is just positive morality and that you cannot predict the behavior of nations, I think that if you understand these international rules you can make some useful predictions. I can predict with some confidence that the United States is not going to try to appropriate a portion of the deep seabed area.

DISCUSSION

The Role of Force in Enforcing International Law

Hasiim Djalal: Professor D'Amato, am I right in understanding your thesis that customary international law is a function of the force used to impose one nation's views on others? If a state continues to insist on something and nobody challenges that state either by force or by repetitious acts of protest or anything like that, did you say that the first state's view will become law? That sounds Machiavellian to me. It sounds like might makes right in the formation of customary international law. Am I right in interpreting it that way?

Anthony D'Amato: It would be nice if we had an ideal theory in international law that handled all questions on the basis of pure law without regard to the use of force. My reading of the history of international relations, however, is that force in international law has played a role in shaping the law just as force in domestic law does. The government in any domestic state has a monopoly of force and it has a police system. If you do not like some of the laws, you might wind up in jail if you try to dispute them. So force is used.

In the international system, the use of or show of force may likewise have a significant bearing on custom. Often, however, it is not cost-effective for a nation to use force to impose its views on others, as in the Anglo-Norwegian Fisheries case.[1] The international system tends to gravitate, therefore, toward those rules that are most efficient in allocating competences. Efficiency is usually defined

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1 See discussion at page 494 supra.

as the absence of a need to employ force. Over the centuries, the rules that have evolved are those that best keep the international system in equilibrium without a need for force, even though force may have played some role in the original shaping of those rules. This is a good question, one that should be commended to pure scholars of international law for further research.

R.P. Anand: Ambassador Djalal has asked whether international law has historically developed through force. Yes, it has in fact. Freedom of the seas developed through force, enforced by the United Kingdom, which acted essentially as a policeman for almost a century.

Can Nonparties Use the Convention's Dispute-Resolution Mechanisms?

David Colson: Let us imagine that the Convention has come into force and is a functioning and viable international instrument with all its institutions in place, but the United States is not a party. Would the United States have access to the International Tribunal for the Law of the Sea (Annex VI) or the Commission on the Limits of the Continental Shelf (Annex II) under the Convention?

Tommy Koh: I would think that based upon the jurisprudential discussion we have had that clearly these are institutions to which a nonparty would not have access.[2] Now, you may say, David, that the text of the Convention uses language such as "States," "all States," "any State," and one can say that by the common usage of these terms they could mean all states irrespective of whether they are parties or nonparties.[3] But the reason why the text was written this way was because throughout the Conference it was assumed that the Convention would be supported by everyone,[4] especially by the United States, which, until 1980, was the nation most committed to the treaty process. If you ask how we should interpret these words "all States," "every State," "any State," "States," I would say that--at least in those parts of the Convention that refer to institutions--they clearly should be interpreted to mean only states parties. I

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2 See pages 136-37, 173-74 and 176-77 supra.

3 See Lee, The Law of the Sea Convention and Third States, 77 Am. J. Int'l L. 541, 546 (1983).

4 See id. at 548.

appreciate Tony D'Amato's point that one has to make a distinction between provisions in the Convention that are generalizable and those that are not,5 and I think he agrees with my view that provisions that establish institutions are clearly not provisions that are generalizable. With respect to other provisions of the Convention that speak about "any State," "every State," "all States," and "States," I think one has to look at them on a case-by-case basis to determine whether the benefits conferred may be enjoyed by all states irrespective of whether they are parties to the Convention.

Luke Lee: The text of the Law of the Sea Convention makes a very clear distinction between Part XI on Seabed Mining and Part XV on the Settlement of Disputes, on the one hand, and the rest of the Convention, on the other. In Parts XI and XV, the text uses "States Parties" rather than "all States," "any State," or "every State," thus indicating a conscious decision that insofar as seabed mining and dispute settlements are concerned, these apply only to member states, to the exclusion of other states.

Satya Nandan: I want also to respond to David Colson. Ambassador Koh has said that he did not think that a nonparty to the Convention will have access to the International Tribunal of the Law of the Sea. I think Ambassador Koh is right. He also pointed out that when the Convention was negotiated, it was very clearly understood that the most important negotiators would become parties to it. As it turns out, some have not, or do not intend to.

Article 20 of Annex VI states that the International Tribunal shall be open to states parties. It goes on to say the Tribunal shall be open to entities other than state parties in any case expressly provided for in Part XI or submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to the case. The first part of the subsection deals with entities other than state parties. Here, perhaps, there may be some confusion as to what entities other than state parties one is talking about. I suppose one interpretation could be that a nonsignatory state is an entity, but I believe that what was envisaged at the time was juridical entities (corporations and other business associations) rather than state entities. The Tribunal itself will ultimately have to decide whether it has compe-

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5 See pages 136-37, 173-74, and 176-77 supra.

tence in particular cases where nonparties might wish to apply to it to adjudicate a particular dispute.

If, of course, two parties reach an agreement, they can submit the case to the Tribunal even if one is not a ratifying state. In this case as in all others, however, the Tribunal must apply the Convention or other rules of international law compatible with the Convention to the dispute submitted to it (Article 293). Finally, the type of issues that can be submitted must be issues related to the purposes of the Convention as provided in Article 288.

Koh: Ambassador Nandan has discussed whether, when the text speaks of entities other than states parties that may have access to the international tribunal, it refers to states that are not parties or refers to entities such as state enterprises and consortia and companies that will be undertaking exploration and exploitation in the international area. My recollection of the text is that when we made that exception in favor of entities other than states parties, we had in mind that we wanted to give access to the Tribunal to those entities that were engaged in developing the resources of the seabed--which may be state enterprises of socialist countries or private consortia or corporations.

Colson: I do not disagree with the remarks of Ambassadors Nandan and Koh concerning the text of Annex VI, although I might shade it slightly differently. The real question is whether the Convention is designed to help states settle disputes or whether we are still trying to politicize it because of other objectives. Let us take the United States out of it for a minute. Suppose Greece and Turkey have a pollution dispute of some sort in the Aegean Sea. Suppose Greece is a party to the Convention and Turkey is not. If they were prepared to submit it to dispute settlement in the Sea-Bed Tribunal, could the parties take their case there? The way I read the text, they could. By agreement, they could go to the Sea-Bed Tribunal.

Likewise, the Boundary Commission is basically the same. Imagine a coastal state in Latin America that has a long coastline but is not a party to the Convention. Suppose the Convention is operating, the Authority is geared up, deep seabed mining is going on. All parties would have an interest in knowing what the boundary is between the international Area and the coastal state. Why should not the coastal state have access to the Boundary Commission in order to insure that a dispute does not arise? Even the ICJ is open to states not party to it and not members of the United Nations, and so there is no reason why the Sea-Bed Tribunal should be a closed shop.

Anand: I still think, in spite of what Mr. Colson has said, that nonparties cannot appear before the Law of the Sea Tribunal.

Environmental Protection and Port State Jurisdiction

Brian Hoyle: In the area of environmental protection and marine pollution, I do not know where we are going to go in the future except that it will be within the parameters of international law set forth in the Convention. The United States in the Oceans Policy Statement did not see the need to extend our coastal state jurisdiction over offshore maritime traffic because we fortunately enjoy a situation in which 97% of the maritime traffic that comes within 200 miles of our coast is destined to a U.S. port. We can employ the port state jurisdiction principle much more effectively than jurisdiction over the zone off our shore. If a tanker comes into our port, we have jurisdiction over it. We also know that trying to stop a tanker on the high seas is likely to create a greater danger and threat to our coast than waiting until it comes into port.

Another reason why we have not sought to extend our jurisdiction over pollution is the question of dispute settlement. Dispute settlement was an objective of the United States in negotiation and we now do not have the means of dispute settlement contained in the Convention available to us. We are looking at alternative means, which exist outside the Convention but are less convenient. Part of our work agenda for the future is to create new dispute settlement mechanisms. I hope that it will be borne in mind that the United States continues to be the largest user of the oceans. As much as we need dispute settlement, other countries that feel that what we are doing in the oceans is inimical to their interests also need it. Somehow we have to sit down and work these things out.

How Does the United States Interpret Port State Jurisdiction?

Koh: One of the innovations of the Convention in the environmental protection area is the creation of a worldwide network of port states which have new jurisdiction to take enforcement action against ships that have caused pollution, pollution not only in the jurisdiction of the port states but anywhere else. My two questions to our American colleagues are: first, would the United States claim to exercise such port state jurisdiction against ships that come to your ports which have committed pollution outside your jurisdiction? Second, would you accept the right of other port states similarly to take such enforcement action against your ships?

Colson: Would the U.S. enforce in its ports international standards for violations outside? The only way I can answer that is that it would be consistent with the Oceans Policy Statement for us to do so.[6]

William Burke: Would we do it?

Colson: We do do it to some extent now, but it is consistent with the Oceans Policy Statement that we do it all the way. We would be prepared to do it, but we do not have the domestic legal infrastructure right now to do it all the way.

Port State Jurisdiction Is Part of Existing Customary Law

Burke: My reading of the enforcement provisions are that they restrict port state jurisdiction. They do not create it. Unless I am completely incorrect, a port state is authorized under existing customary international law to condition access to its ports as it wishes, and that can include subjection to port state jurisdiction for events taking place outside the port or outside the national jurisdiction totally. A number of other international agreements specifically provide not only for subjection of a ship for events taking place outside national jurisdiction but also for claims against any other ship that belongs to the owner of the ship in port.

As I read the Convention, it is more restrictive. It does not permit proceedings to be brought in a port state if the events occurred in an area subject to another national jurisdiction without a request by either the flag state or the other coastal state or some affected state. So port states are not unrestricted in what they can do insofar as actual actions called proceedings are concerned. Investigations can be conducted at the port state's initiative, but not proceedings.

Bernard Oxman: I agree with Professor Burke's conclusion that port state jurisdiction is part of customary law, but the international law on this question seems to depend in part on the language one speaks. English-speaking international lawyers, particularly in the United States, run around agreeing with Professor Burke and each other on that point. The French delegation, however, argued that one could not

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6 See Appendix A infra at 552, para. 6.

support port state jurisdiction under the Lotus decision.[7] You will recall that France was a party to the Lotus case. They interpret the Lotus decision as requiring an effect to support jurisdiction (prescriptive competence), and no effect in the port state is necessary under the Convention. Thus, I agree with Professor Burke that Article 218 is consistent with our own view of a permissible condition on port entry, but there was a different European view adhered to at least by the French and possibly by the British and Germans during the negotiations. We lost on that issue in the negotiation of the 1973 MARPOL Convention.[8] Thus, the Law of the Sea Convention settles an important point of principle in our favor in exchange for some limitations on the application of that principle.

Port State Enforcement: Can National Standards Be Stricter Than International Norms?

Anatoly Kolodkin: Two trends are occurring in regard to marine pollution--multilateral conventions are being negotiated that adopt and apply generally accepted rules and standards, and unilateral and regional measures are also being taken to deal with pollution problems. The crucial point is that unilateral measures must now be in compliance with generally accepted rules. Current national measures must now recognize not only innocent passage through territorial waters and transit passage through straits, but also the regime of vessels in foreign ports. Can a nation impose standards on maritime traffic more strict than the international standards? Senator Magnuson told the U.S. Senate in 1977 that the United States had ample legal authority to establish safety standards stricter than those agreed upon internationally. This position was criticized by the president of the American Institute of Merchant Shipping, Mr. Reynolds, who said that "Neither the United States nor any other country has a monopoly of what is the best in maritime safety and environmental matters."

It is unclear at present whether a state may impose standards on foreign ships calling at their ports stricter than those recognized internationally.

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7 The Lotus (Fr. v. Tur.), P.C.I.J., Ser. A., No. 10 (1927).

8 The 1973 Convention for the Prevention of Pollution from Ships, 12 Int'l Legal Materials 1319 (1973), and 1978 Protocol, 17 Int'l Legal Materials 546 (1978).

Certainly it would be preferable if international agreement could be reached on these standards.

Colson: Professor Kolodkin has made an interesting comment concerning the desirability of an international agreement stating that port states could not impose stricter measures in their ports for visiting ships than the standards set internationally. This proposal is not one that the United States would agree to right now. I recall about a year and a half ago that a ship carrying nuclear waste wanted to come into Honolulu, and the governor of Hawaii gave the U.S. State Department fits because the State of Hawaii wanted to exclude this particular vessel from its port. We ended up telling a good friend and ally that they could not bring a particular ship into this port. It has over the years been a fundamental principle of international law that a nation has the complete authority to determine what ships might call at its ports.

"Generally Accepted" Rules and Regulations

Anatoly Zakharov: Some articles of the Convention raise a problem by saying that nations should adopt rules no less effective than "generally accepted international rules and standards" (see Article 211(2), for instance). The Convention does not clearly define how to identify these generally accepted rules and regulations. "Generally accepted" rules are rules that are accepted by almost all states or by the state participants in the international agreement or are recognized by such participants as rules of international customary law. A case for such a norm is stronger if it is recognized by the states of different social systems. Environmental norms that are new in this Convention cannot be thought of as binding until we see about 25 to 50 ratifications.

Oxman: I think Dr. Zakharov and Dr. Kolodkin should consult with each other because, although they share the same objective, they seem to be moving in different directions. If Dr. Zakharov's interpretation of "generally accepted" is correct, then it is likely that we will see unilateral standards not only by port states but by coastal states in the territorial sea, in straits, and in the exclusive economic zone. The only way we can avoid unilateral standards is by taking a liberal view of what international standards are "generally accepted," and thus enforceable by port states and coastal states. If you take as conservative a view as Dr. Zakharov just put forth, then it is clear that many coastal states will feel compelled to assert the right to establish standards unilaterally.

CHAPTER 9

THE COSTS AND BENEFITS OF NOT JOINING THE CONVENTION

INTRODUCTION

In this chapter, the participants evaluate the costs and benefits of President Reagan's decision to stay outside the Convention, examine the position of isolation that the United States now finds itself in, and look into the future to ask how all nations can work constructively to develop a legal order for the oceans that will serve the interests of all.

Professor Bernard Oxman makes the opening presentation, looking at the Convention from his vantage point as a negotiator throughout most of the Conference and as an observer of the final sessions. He states that he sees no benefit whatsoever--aside from political symbolism--in the U.S. refusal to sign the Convention. He suggests the United States could have signed, then delayed ratification if the Preparatory Commission's work proved to be unacceptable. He predicts that the U.S. decision will lead to greater instability in ocean affairs and that the contest for customary law will intensify, with nations resorting to self-help and violence and deviating from the Convention rules to serve their national goals.

In the discussion that follows, David Colson and Brian Hoyle argue that--by not signing--the United States gains the benefit of being able to try to construct a workable alternative deep seabed mining regime that provides U.S. companies with greater access to mineral resources. Mr. Hoyle states that the reviews conducted by the Reagan administration in 1981 and 1982 weighed the costs in greater uncertainty in navigation against the benefits of having a free hand in the deep seabed. The administration's conclusion was that the navigational principles could be maintained as a matter of customary international law and that the negative features of the deep seabed regime were so serious that they required U.S. rejection of the Convention. Mr. Hoyle discusses these negative features in detail in

Chapter 4, where he emphasizes the problem of the decision-making structure of the International Sea-bed Authority and the concern that this might serve as a model for other international organizations.

The uncertainty about navigational rights is a real cost, however, as all the participants agree. David Colson says:

> I can make speeches about how transit passage is customary law, and somebody else can make a speech that it is not. That really does not resolve the issue. We have to come up with a means of managing the problem. (See page 518 infra.)

This uncertainty is magnified by the loss of the very sophisticated dispute resolution mechanisms that are included in the Law of the Sea Convention. Mr. Colson states that those "compulsory dispute resolution provisions were essential to the acceptance by the maritime states of the enhanced jurisdiction that the coastal states were given over marine pollution in their 200-mile zone." (See page 520 infra; emphasis added.) The other maritime nations may not be as willing as the United States to challenge coastal state claims to greater control over navigation in the 200-mile zones, the archipelagic waters, and the straits used for international navigation, and therefore--because the United States cannot use the compulsory procedures--such claims may not be effectively challenged.

Other costs to the United States include strains on bilateral relationships with many of its allies. Ambassador Hasjim Djalal described earlier the feeling of being pressured or tested by the United States, without any U.S. understanding of the problems his nation faced. (See page 301 supra.) Professor Oxman notes that the Convention may become an anti-Western symbol. He suggests the possibility that widespread ratification over U.S. objections may be a matter of international pride for the rest of the world. Ambassador Tommy Koh expresses regret that the United States will lose the opportunity to lead majority coalitions in world affairs by its isolationist stance.

Professor Oxman also points out that the process of multilateral consensus negotiation is weakened when countries such as the United States or Peru decide not to ratify the Convention after having played such an active role during the negotiations.

Part B of this chapter focuses directly on the "loneliness" that the United States has been experiencing recently in the United Nations and other multinational forums. Brian Hoyle alluded to this phenomenon in his analysis of the deep seabed negotia-

tions in Chapter 4 (page 272 supra), and the other participants have useful views on the reasons and consequences of this isolation. Dr. R.P. Anand states that the United States has not yet adjusted to the emergence of the formerly colonized nations into the world arena and refuses to accept the validity of the viewpoints held by other nations. Ambassador Koh argues that the Reagan administration has not made good use of the trained diplomats in the U.S. Foreign Service and that the United States has taken a hostile attitude toward multinational forums, preferring instead to deal with other nations through bilateral diplomacy "in which the United States has a greater leverage" (see page 528 infra). Professor Oxman comments that this isolation may be a result of one of our national characteristics:

> The same streak of independence, the same belief in the perfectability of man . . . leads us to the perhaps arrogant belief that the answers we have chosen for ourselves at any given moment are the answers for the world. (Page 526 infra.)

Part C then turns to the future, and the participants discuss what constructive steps might be taken to build a coherent legal order for the oceans despite the current differences between the United States and most of the rest of the world. Ambassador Djalal opens this part ot the discussion by looking at the changes that are likely to occur during the coming decade on the national, regional, and international levels.

On the national level, ratification of the Convention will proceed slowly because of the necessary changes in national law that must first occur and because of translation problems. Each nation will also have to finish its own studies as to how it can best take advantage of the Convention. After these hurdles are overcome, ratification will be rapid.

Regional negotiations will increase between neighboring states. The Convention will be important in the Pacific whether or not the United States cooperates with the other nations in the region.

At the international level, the Convention will come into force. International disputes will be framed around the Convention's provisions. The Convention will become a fact of life, and nonsignatories will become more isolated as time goes by.

Elisabeth Mann Borgese agrees with Ambassador Djalal's analysis of future development and adds that the UN agencies should be strengthened to meet the new national and regional needs for ocean development. The structure of the International Sea-Bed Authority may need to be tinkered with somewhat, particularly to

define the regions more appropriately. She urges the United States to come to the Preparatory Commission at least as an observer so it can have an impact on the seabed provisions.

Ambassador Koh closes the session by noting that apart from Part XI on deep seabed mining, all nations seem to agree that the Law of the Sea Convention reflects customary international law. Given this similarity of views, what can the United States do to help future development of the law of the sea? Ambassador Koh suggests three approaches:

- o Fidelity -- conform to the Convention in domestic law and national activities; change the U.S. tuna policy, which involves a resource important to the South Pacific and relatively unimportant to the United States.

- o Encourage self-help -- help develop coherent ocean policies and scientific know-how in developing countries and encourage all countries to develop their ocean resources.

- o International cooperation -- develop an intense North-South cooperation on law of the sea issues so that the resources of the sea can benefit all and conflicts can be avoided.

In the concluding Part D, the editor summarizes the themes developed at the workshop and the differences that remain between the United States and most other nations over the status of the Law of the Sea Convention and questions of ocean governance for the coming generation. The discussions at this week-long workshop brought clarity to these controversies, and all participants agreed that efforts should continue to find a basis for cooperation so that the resources of the oceans can be developed in a peaceful manner for the benefit of all.

A. EVALUATING THE CONVENTION

BALANCING THE COSTS AND THE BENEFITS

by

Bernard Oxman

Academic vs. Political Goals

First, I want to make a comment addressed primarily to my academic colleagues. It is addressed mainly to pure scientists, but also to lawyers and social scientists to the extent that they are engaged in descriptive rather than normative endeavors.

Academics are engaged in a search for truth. Negotiators and politicians are engaged in a search for peace and other policy ends. The two goals may not be compatible. This difference raises ethical problems for academics who participate in the political process and for politicians who attend academic meetings.

Let me give some examples. It serves the cause of truth to know that my opponent is a rogue, but it may not serve the cause of peace for me to say so. It serves the cause of truth to know that a child born 20 months after his mother's husband left on a trip was fathered by someone else, but it may serve the child's interest for the law to pretend that his mother's husband is his father so that the child is entitled to support and, in some societies, does not suffer disgrace. Geologists have to know where nature divides the continental margin from the abyssal plain, but for purposes of enhancing peace among states, lawyers need

only know where the dividing line between coastal and international areas is. It can be purely arbitrary.

If the law appropriates words like "continental shelf" or "maximum sustainable yield" from other disciplines, it does so to influence the legal concept with scientific considerations; it does not thereby delegate lawmaking power to scientists, be it Hollis Hedberg or anyone else.[1] As a matter of law, the continental shelf is what states say it is. If they want to say that it extends over the abyssal plain to 200 miles from the coast because this enhances peace, economic development, and other values, there is no need and no basis for scientists to complain that this is unscientific. We simply have to understand that the same words have one meaning in law and another meaning in science.

The primary function of this meeting is academic. We are engaged here in a search for truth about legal and political situations affecting the law of the sea. Therefore, I am going to say some things that may disturb the peace of this meeting. I hope that they are taken in the spirit of my own commitments to truth, to the Law of the Sea Convention, and to global multilateral institutions.

No U.S. Benefit for Not Signing

Let me first address the costs and benefits of not signing the Convention. I always remind my students that they will be penalized if they fail to distinguish accurately between the meaning of the words "sign" and "ratify" or "signatory" and "party." I take the question on "signature" literally because the United

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1 Dr. Hedberg, a geologist, was critical of an artificial continental shelf boundary because it has no natural or logical basis. He preferred natural boundaries based on geomorphic features of the continental slope, instead of an arbitrary, legal determination. See Hedberg, National-International Jurisdictional Boundary on the Ocean Floor (Law of the Sea Institute, Univ. of Rhode Island, Occasional Paper No. 16, 1972). Later, he suggested a uniform and internationally agreed boundary zone to be established by an International Marine Boundary Commission. Hedberg, Relation of Political Boundaries on the Ocean Floor to the Continental Margin, 17 Va. J. Int'l. L. 57, 72 (1976). Dr. Hedberg's criticism of the Convention as finally agreed upon can be found in Hedberg, A Critique of Boundary Provisions in the Law of the Sea Treaty, 12 Ocean Dev. & Int'l L. 337 and 345 (1983).

States, for reasons that baffle me, decided not to sign the Convention.

Aside from political symbols, I can see no benefits in not signing the Convention. First, there is the argument that signature implies an intent to ratify, and therefore a state should not sign unless it intends to ratify. That argument is fine if you are looking at the issue solely in terms of treaty law. More is involved here. As Professor D'Amato has made clear, signature enhances the influence of the Convention on the development of customary law and uniformity of state practice, at least for the moment. It also affects participation in the Preparatory Commission. Many states--I suspect most states--that have signed the Convention have not decided whether they will ratify. For many of those states, like the United States, the governmental organ competent to sign cannot alone make a decision to ratify.

Second, President Reagan's Oceans Policy Statement itself makes clear that the United States shares the desire of the signatories to the Convention to see international law coalesce around the rules of the Convention.[2] The exceptions are the deep seabed mining provisions. However, save for the principles in Part XI, Section 2, which do not refer to functions of the Sea-bed Authority, and which I believe can be and may already have been absorbed into customary law, Part XI and its Annexes are not amenable to absorption into customary international law as such.

Finally, the supposed problem posed by Article 18 of the Vienna Convention has been blown out of all proportion.[3] has been blown out of all proportion. The cost of pressing the issue raised by Professor Borgese and others with respect to Article 18 will be to restrain signature of this and, more importantly, other multilateral treaties. That is a very high price. I do not think it serves the general interest to press Article 18 arguments terribly far. In my view, it is not even legally sound.

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2 See Appendix A infra at 552, paras. 4 and 7.

3 Vienna Convention on the Law of Treaties, Article 18, done May 22, 1969, U.N. Doc. A/CONF. 39/27:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: a) it has signed the treaty...subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;...

Article 18 is a nonissue in my opinion. The article simply cannot be used to create backdoor treaty obligations. If France and Japan say that their purpose in signing the agreement with the United States was to defeat the seabed mining regime set forth in the Convention--well, there we may have an Article 18 situation. The French and Japanese tend to be more subtle.

Accordingly, I do not think the United States gained anything from not signing that it could not have gained from signing and then delaying ratification. The flat decision not to sign gains nothing for the United States or, for that matter, Peru. I assume the Group of 77 will be very cautious in future negotiations about making concessions to Peru which greatly disturb the Western states when it appears at the end of the day that the Peruvian government will not accept the package anyway.

Signing the Convention and Article 18 of the Vienna Treaty on Treaties

David Colson: I would like to comment on Bernie Oxman's remarks about Article 18 of the Vienna Convention on Treaties. Article 18 is not the be-all and end-all and is not the only standard that international law has used with respect to the obligation of states relating to agreements that they have signed. There is certainly at least one other legal standard available. That standard is a different standard, a more restrictive standard, but it is a standard that the United States has applied and used in its customary practice: the requirement of a signatory not to render a treaty impossible to perform.

This standard is quite clearly different from that in Article 18. During the course of the U.S. interagency review, many argued that we could go ahead and sign the Convention while pursuing the policies of our domestic legislation under this other customary law standard. In other words, we could develop our own actions in a way that would not render it impossible for the United States to perform its obligations under the Convention were the United States to become a party to the Convention.

But I would only note that there was a great deal of what I would call "garbage legal analysis" relating to Article 18 that suddenly hit the street by both proponents and opponents of the United States continuing with the Convention. Both very conservative types and very liberal types were coming out with the same conclusion that the United States could not go ahead and sign this Convention while pursuing its domestic legislation. Getting that argument from both sides of

the street really did end up boxing us in. This phenomenon is useful to keep in mind as we examine other issues.

Contest for Customary International Law May Intensify

Oxman: The issue of the costs and benefits of ratification is a very tough question surrounded by a lot of myths. As I indicated in my Oslo paper,[4] the costs and benefits of the Convention have to be measured against predictions of the state of the law (or nonlaw) in the absence of ratification. The contest for customary international law between different positions--a contest that makes life so interesting for Professor D'Amato, me, and other law professors--is exactly what the world hoped to reduce, bring under control, and subject to arbitration and adjudication procedures in the Convention.

The most important conclusions regarding the costs and benefits of the treaty have less to do with the content of future customary law than with several other factors. First, the contest for law is going to be more pronounced unless widespread ratification of the Convention brings it under control. Second, it is possible but not very likely that universal compulsory arbitration will be available to settle disputes in the absence of a Convention. Third, the longer we wait, the harder it will be to achieve universal ratification because state practice will inevitably drift away from the Convention rules. It might drift away after ratification also, but that is a somewhat different matter because states do not feel they are contradicting entrenched national positions by ratifying.

This leads to another conclusion that may surprise you. In the near term, the U.S. attitude toward ratifying the Convention, as long as it acts more or less consistently with it, has very little to do with the factors that I just identified. The key question is widespread ratification. As Renate Platzoeder pointed out in Oslo,[5] Convention supporters should recognize that the current U.S. attitude toward the Convention presents them with an opportunity as well as a challenge. Bringing the Convention into force over

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4 Oxman, Customary International Law in the Absence of Widespread Ratification of the United Nations Convention on the Law of the Sea, in A. Koers and B. Oxman (eds.), The 1982 Law of the Sea Convention, 17 L. Sea Inst. Proc. 668 (1983).

5 Platzoeder, Who Will Ratify the Convention? in Koers and Oxman (eds.), id., 17 L. Sea Inst. Proc. 662 (1983).

United States objections can now be seen as an assertion of national pride and independence by the rest of the world and is a reminder to the United States--as an American I believe it is a healthy reminder--that however important the United States is, it should not run the risk of miscalculating the extent of its influence.

The two key areas in the world in which this negotiation was never really liked were South America and Western Europe. If you want the benefits of widespread ratification of this Convention, you have to deal with the problems in Western Europe and South America. I should point out that a treaty that is not ratified by Canada and major South American countries will be less attractive to the United States, no matter what Part XI says. Anyone who thinks that they have won the ratification battle in Canada ought to take a trip to Newfoundland.

These factors aside, the question is asked, "Who is likely to win the contest for customary law?" The answer will decide whether we will get a better rule under customary law or under the Convention.

I think that is really the wrong question. The problem is really the contest itself. The process of developing customary international law that Professor D'Amato described is itself damaging as it is developing in the oceans. Uncertainty in a system of known principles subject to adjudication, which is what Professor D'Amato described, is a far cry from uncertainty in a system of contested principles where there is no compulsory adjudication and frequent resort to self-help, violent or otherwise.

Deviations To Pressure U.S. May Weaken Convention

A major problem with addressing the issue of the Convention's rules versus customary law rules is that the world is your audience. If Professor Borgese tells Mr. Colson that he will get a worse rule without the Convention she is telling Peru or Papua New Guinea or some other state that it may get a better rule without the Convention. Conversely, if Professor D'Amato tells Professor Anand that Mr. Colson can have the same general rules without a Convention, he may encourage states that want the United States to ratify the Convention to deviate from the Convention rules and practice, so as to pressure the United States. Yet if they do that, chances are that they will commit themselves over time to the deviation and find it difficult to revert to the Convention rule.

I agree with Professor D'Amato that there is something like a Heisenberg uncertainty principle at work here, but it is a far more pernicious one than the

DISCUSSION

Westerners Must Be Pragmatic Too

Tommy Koh: I completely agree that the success or failure of the Convention will depend to a very large extent--I do not say altogether--on the work of the Preparatory Commission.

It will be important for the Preparatory Commission to work toward the evolution of a set of practical, businesslike regulations that the industry can operate under. Where I differ with you is that I would make the exhortation to subordinate ideology in favor of pragmatism to both sides. You make this exhortation only to the developing countries, but you forget that the Western countries have just as many ideological obsessions as the developing countries.

Is the Developing World Beating a Dead Horse?

Camillus Narokobi: Professor Oxman made some remarks that I would like to comment on. With great respect to our famous scholar, his argument is that the developing world is beating a dead horse. The horse, he states, is the Convention and not the United States as such. I think this is not the case. It is quite apparent from the vigorous efforts by many countries to claim an exclusive economic zone and implement domestic legislation in a way consistent with the Convention that the norms of the Convention are taking hold. There is no doubt at all in my mind that the Convention is growing very fast and can easily be regarded as representing emerging customary international law. So I do not think that the argument that we are beating the Convention into the ground holds.

Ambassador Djalal pointed out that it is only the United States that is isolated from everyone else. On the question of highly migratory species, the United States and Japan opposed coastal state jurisdiction over tuna. However, Japan is coming around and is now

quite readily accepting coastal state jurisdiction over highly migratory species. This is a classic example of the isolation of the United States.

Is the Preparatory Commission Functioning Properly?

Elisabeth Mann Borgese: I was very much taken by Bernie Oxman's remarks about the Preparatory Commission. Where I disagree with him is his assessment of where the Preparatory Commission stands now. I am far more optimistic. Bernie characterized Joseph Warioba as a radical, and he thinks that the presence of a radical in the presidency might detract from the credibility of the Commission. I think anyone who attended the first session of the Commission and followed what Warioba has done will agree that he has been the most moderate, most objective president we could have had. He has earned the confidence of all members and nonmember observers in the Commission. A number of the Western European members have come up and said, "We should strengthen Warioba's hand because we need him. He is doing a good job." Therefore, I think that Professor Oxman's first objection is not valid.

Professor Oxman's second objection is not valid either. He blamed us for not including experts in the drafting of a mining code. We have not even started drafting the code yet, and I am quite sure we will include them when we do.

The third criticism that he had was over the well-known, very powerful, and explosive address by the head of the Soviet delegation during the 1983 session of the Commission. Well, the Soviet delegate called a spade a spade. He did to the nonmember observers of the Commission what Bernie did to the Latin Americans. He pointed out certain problems and the motivations behind their tactics. I do not think truthfulness detracts from the credibility of the Commission or makes it an anti-Western organ.

Why Doesn't the United States Come to the Commission as an "Observer"?

Bernie very fruitfully distinguished between signing and ratifying of the Convention. He recommends that the United States sign although it need not ratify. I think this is a useful suggestion. I will take it even one step further back. The United States does not even need to eat the humble pie of signing at this moment. Why not join the Commission as an observer? The United States would not be lonely there; it would find the British, the West Germans, the Belgians, and the Italians. These observers, as a matter of fact, exercise a very strong influence in the group of "Western States and Others." The United

States could contribute to the drafting of the mining code. It could make its input, and it would not cost anything at all.

Jorge Vargas: What is the major danger that the United States will face if it does not support the Law of the Sea Convention? We are now dealing with a legal text. The text is a compromise that reflects the majority views of the participants in the Conference, and I think most of the text is reflective of customary international law. Countries now tend to follow and obey the Convention, feeling that it is the law at this moment. The Convention text was developed as a result of a negotiating process in which nations were using different diplomatic strategies to achieve their national goals. Nations that wanted the 200-nautical-mile zone as a territorial zone accepted this zone as an exclusive economic zone in order to achieve a consensus. If a significant number of nations now view the Convention as not obligatory, many nations are going to go back, to roll back a little bit, and try to reassert their nationalistic positions. The legal norm will turn into a political norm. This is a very serious danger, because it could lead to the erosion of the Convention.

Costs and Benefits from the U.S. Perspective

David Colson: Let me try to summarize the costs and benefits of the current U.S. policy of staying out of the Convention. The benefits to the United States are quite clearly that we are not going to be bound by the deep seabed mining provisions and that we have the opportunity to see if we can develop something in the alternative.

And as to the cost, there is a very real cost of dealing with a greater degree of uncertainty on the navigation and overflight provisions that were a very important part of our being involved in the Conference in the first place. I can make speeches about how transit passage is customary law, and somebody else can make a speech that it is not. That really does not resolve the issue. We have to come up with a means of managing the problem. The means that the United States has come up with is the Oceans Policy Statement in which the United States has said that it is prepared to act in accordance with the balance of interests reflected in the Convention.[1]

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[1] See Appendix A infra at 552, para. 6.

Cost: Lost Opportunity to Use Dispute Settlement Provisions

In this respect--Ambassador Koh alluded to this--the United States has missed an opportunity in not being able to have the influence that it might have had to keep state practice within the Convention under control with respect to this balance of interests.[2] I agree with Brian Hoyle about how we often feel alone on many of these issues because other states will not stand up and try to maintain a principle.[3] It is the United States that has to go around and be the world's policeman on many of these issues while things are getting out of hand. Were we within the Convention, we would have the dispute settlement provisions, but I bet that the United States would have been the only state that would have tried to use those dispute settlement provisions to enforce the navigation and overflight provisions of the text. I would have been very surprised if other states had come forward and run the political costs associated with taking another state to dispute settlement. We have missed that opportunity.

Weighing Need for Navigational Freedom vs. Concerns About Deep Seabed Regime

Jon Van Dyke: Brian, earlier in our discussions you expressed the concerns of the United States over the structure of the International Sea-Bed Authority and the possibility that it might serve as a model for other international organizations.[4] How would you weigh these concerns against the concern that the United States and other maritime powers have about navigational rights and the present uncertainty of the rules governing them?

Brian Hoyle: These concerns were both weighed in the review in 1981 and 1982 which resulted in the president's statement of January 29, 1982, that the United States would return to the Conference to seek to improve six areas in the Convention's text.[5] They were

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2 See page 300 supra.

3 See pages 272 supra and 524-30 infra.

4 See pages 263-69 supra.

5 President Reagan stated that most provisions in the draft Convention were acceptable, but some major elements of the deep seabed mining regime needed to be corrected to achieve a treaty that would (1) not deter development of seabed mineral resources, (2) assure national access and avoid monopolization of

(Footnote continued)

weighed once again prior to the president's decision of July 9, 1982, that we would not sign the Convention.[6] After weighing the issues, we determined that the navigational system could be made to work without our being a member of the 1982 Convention. The decision was made that seabed mining in Part XI could not be made to work whether the United States was in the Convention or not. The only way we could create a regime that would allow seabed mining to take place was to negotiate a regime outside of the Convention.

The Role of the Dispute Resolution Procedures in Ensuring the Balance Between Coastal State and Maritime Interests

Colson: One of the questions that has been asked is whether the compulsory dispute resolution provisions were essential to the acceptance by coastal states of reduced jurisdiction over environmental protection and navigation in their EEZs. I would turn that phrasing around and say the compulsory dispute resolution provisions were essential to the acceptance by the maritime states of the enhanced jurisdiction that the coastal states were given over marine pollution in their 200-mile zones.

One of the most important questions that the world community is going to face over the next five or ten years on the law of the sea is whether, if the treaty does not come into force, coastal states will exert greater jurisdiction within their 200-mile zones. From the U.S. perspective, we would not put it in terms of whether the Convention comes into force but in terms of whether a practice coalesces around the general framework and provisions of the Convention. If it does not, then it is quite clear that the coastal states will assert increasing jurisdiction within 200-mile zones.

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[5] (continued)
resources by the International Sea-Bed Authority, (3) provide decision making reflective of political and economic interests of states, (4) not allow amendments without states parties' approval, (5) not set undesirable precedents for international organizations, and (6) receive U.S. Senate consent by not requiring transfer of technology or permitting funding of national liberation movements. Statement of President Ronald Reagan, Jan. 29, 1982, reprinted in U.S. State Department Bureau of Public Affairs Current Policy No. 371.

[6] Statement of President Ronald Reagan, July 9, 1982, reprinted in U.S. State Department Bureau of Public Affairs Current Policy No. 416.

How Serious for the United States Is the Loss of the Dispute Resolution Procedures?

Van Dyke: David Colson has stated that the compulsory dispute resolution mechanisms were essential for the maritime nations, meaning the United States among others, to accept the expanded jurisdiction of the coastal states during the negotiations. What is the United States' view of the importance of the dispute resolution mechanisms now? By staying out of the Convention does the United States lose its ability to enforce its interests?

Mr. Colson also stated that the most important question that the ocean world will face over the next five to ten years is whether coastal nations will continue to claim greater and greater jurisdiction over their offshore waters. My question to him is: In view of the U.S. interests in freedom of navigation, is staying out of the Convention the best way of protecting these interests or are we weakening our ability to protect our interests by staying out of the Convention?

Colson: I think that it is fair to say that it is a minus for the United States to lose the dispute settlement provisions as they relate to Part XII. I would not contest that. Dr. Oxman has made a few proposals as to how we might move forward in this area--statements the United States might make concerning the dispute settlement procedures that we would be prepared to accept if other states were prepared to reciprocate. That is certainly something we will have to consider more carefully as time passes and as we more fully implement a United States ocean policy outside the terms of the Convention.

The other question Professor Van Dyke asked was really the most fundamental question--why is the United States staying out of the Convention if it sees its interests as not having international law erode over the years in respect to the extension of coastal states' jurisdiction into the ocean? I will not here defend that particular decision. Here I will only say that what we are trying to do to meet this problem is reflected in the Oceans Policy Statement. The United States has indicated its willingness to act fully in accordance with the Convention, except for the provisions on the deep seabed. At least from our perspective, the U.S. actions and attitudes will be consistent with the nonseabed provisions of the Convention, and coastal states will not have a reason to suggest that the United States is the state that is going beyond the provisions of the Convention in this respect.

Bernard Oxman: One of the benefits of the Convention that is clearly lost by the U.S. decision

not to join is the ability to assert our claims through the compulsory arbitration process. I completely agree with Mr. Colson that if a nation does not assert its rights when they are contested, the rights are going to be lost.

How often do these assertions have to be made? That depends on how effective you have been in persuading the coastal states to restrain themselves in the first place.

How expensive is the assertion? The compulsory arbitration process in the Convention is a very cheap option as opposed to confrontation with a coastal state. Only in those very rare instances like Libya or Cambodia, where the United States has no substantial interests in the coastal state that might be prejudiced, will a confrontation not compromise other interests.

One's ability and willingness to assert rights depends in part on how strong is one's own sense of being on firm ground. Here I submit there is a very critical problem. If customary law is, as Mr. Colson would imply, state practice, then the more adverse state practice becomes, the less a dissenting nation will be able and willing to resist. As time passes, your own sense that you are on firm ground is going to diminish.

The critical questions in talking about customary law are, therefore: How effective will the customary law be in discouraging the coastal state from making claims beyond those allowed by the Convention? How well will customary law reinforce the sense of the maritime states that they are on firm ground in enforcing their navigation rights as set forth in the provisions of the Convention? I am very doubtful on both of those points. Those who know my views on the law of the sea know that in general I would prefer to see it emerge no more coastally oriented than the Convention. I doubt whether that will happen as a matter of customary law.

Mini-Treaty

Rabbie Namaliu: With regard to the question of the mini-treaty, I wish to express the hope that the countries discussing the possibility of a mini-treaty could see their way to cooperating with the world community and could avoid a mini-treaty concluded outside the Law of the Sea Convention.[7] I agree entirely that the United States has a lot to gain from

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7 See pages 49, 55, 120-22, 182, 231, 250-51, 256-57, and 490-91 supra for discussion of the mini- treaty proposal.

joining the Convention, particularly as it relates to our part of the world. The United States will gain not only in terms of fisheries or seabed mining, but also in terms of the question of security, which is entwined with both issues.

B. THE "LONELINESS" OF THE UNITED STATES [1]

DISCUSSION

Joseph Morgan (Associate Professor of Geography, University of Hawaii): Why is the United States being singled out for such intense criticism for not signing the Convention when quite a few other nations have also not signed yet?

Anthony D'Amato: I agree that the United States is being unjustly singled out for criticism when the U.S. concerns about the deep seabed regime are ones that are likely to be held by all potential investors.

Reasons for U.S. Isolation

Tommy Koh: I think I have a duty to explain to our friends Professors Morgan and D'Amato why it is that, of all the states that have not yet signed the Convention, the criticism of the international community has focused on the United States. There are four reasons for this.

First, although thirty-odd countries have yet to sign the Convention, the United States is the one that has taken a definitive position that it will not sign the Convention. This differentiates it from countries that have not yet decided whether or not to sign.

Second, the United States, as far as I know, is the only country that has not only decided not to sign the Convention, but is actively seeking to establish an alternative legal regime to Part XI of the Convention. This effort is naturally viewed by the supporters of the Convention as an attempt to undermine the Convention.

The third reason is that the United States government is the only one that has sent abroad a special envoy of a very high status to lobby other governments

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[1] See the comment made by Brian Hoyle at page 272 supra.

not to sign the Convention. That also differentiates the United States from the other nonsignatories. The person who was sent abroad was Mr. Donald Rumsfeld.

Finally, your point, Tony, is that the United States' opposition to Part XI may not be unique to the United States, that perhaps the United States is speaking on behalf of a larger community of prospective investors in ocean mining. We do not know whether you are right or not at this point. We shall not know until the Preparatory Commission has completed its task of adopting a detailed mining code. At that point, the Convention package will be put to the test.

If, when the seabed mining package is completed, the French, the Japanese, the Germans, the Soviet Union, the Indians, and others feel that the system is unworkable, then we will have to change the system. But until then, we do not know. My presumption, which of course is based upon the personal bias of having contributed ten years of my life to it, is that it is probably workable.

Emergence of New Third World States and U.S. Isolation

R.P. Anand: I would like to comment about the United States' feeling of isolation. I am not going to go into historical detail, but we all must realize that we are living in a new world. Numerous countries have recently acquired new international personalities and independence. They have emerged as very active members of international society. Until now, they were merely objects of international law to whom things happened. Now that these countries have emerged, they are not satisfied with the international political structure.

They want changes, not only in international law, but also in other aspects of international relations. They have started asserting themselves through the United Nations and other international organizations. The Western countries, including the United States, are not used to this. They cannot adjust themselves to the demands of countries that until yesterday could not assert themselves.

A few years ago when the United Nations was controlled by the United States and other Western powers, it was considered to be a very good institution. As soon as the United States started losing its power in the United Nations, especially in the General Assembly, they started calling it a "bad body." They stated that the whole system of sovereign equality was wrong and unjust, that Article 2(1) of the UN Charter that asserted the sovereign equality of states should not be a principle of international law at all. They now argue that there should be weighted

voting, but they have never been able to decide what to weigh.[2]

The demands and influence of the new countries for change in international law are apparent in the new Convention on the Law of the Sea.

The new nations also demand a new international economic order. This is not just a call for a redistribution of wealth. It does not mean that at all. This call has come because the present international economic order, the whole of international trade, is biased against the developing countries. They have no control over prices at all. As a result of the present economic order, the prices of raw materials plummet, while the prices for manufactured goods go on rising. All of this has happened in a historical context. The present economic order is merely a continuation of the economic exploitation of the so-called developing countries since the time when they were colonies. Now they demand changes.

The new Convention of the Law of the Sea has already come into existence and has been adopted. It has now been signed by 132 countries. Whether the Western countries like it or not, it is going to become customary international law. There is no doubt about this. Even the United States itself now accepts that a large part of it has become customary international law.

Jorge Vargas: The "loneliness" question makes me think in terms of the equality of states. Some states are equal, but others are more equal. The attitude of the United States is politically characterized as an attitude of challenge against the international community, a defiant and arrogant attitude.

Typically American to "Share" Solutions

Bernard Oxman: I have to say something about this "loneliness" point. Those who know Elliott Richardson know that the furthest he ever goes in criticizing someone is to say that person "has the defects of his virtues." Most of our bad qualities and good qualities are really opposite sides of the same coin. The same streak of independence, the same belief in the perfectability of man for which Americans are admired, leads us to a perhaps arrogant belief that the answers we have chosen for ourselves at any given moment are the answers for the world. In the last decade. we believed in protecting the environment, and so we pressed the

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2 See pages 264-66 supra.

world to have an environmental program. In this decade we believe in free markets, and so we press the world to have a free market. I do not know what it will be in the next decade. This is a typically American phenomenon. If we think we have found a solution for ourselves, we want to share it. We do not desire to keep these things to ourselves. The national characteristics that led President Reagan to decide that we cannot sign this Convention are exactly the same as those that got us into this negotiation.

U.S. Difficulty with Western Allies

It is important to understand what the United States faced in this negotiation. Whatever internal difficulties the Group of 77 had did not compare with the problems of dealing with our Western allies. There was not one nation on the continent of Europe or immediately adjacent thereto that had the same degree of commitment to the underlying purpose of this negotiation that the United States had. There were a few delegations that seized every opportunity to win popularity and score points with the Third World at the expense of the United States. They did so on occasion even on questions of sensitive military interests of the United States that they knew about and that they knew we could not discuss at the Conference.

Of the large delegations at the Conference, some of them opposed us on very important issues for most of the early years. There were only a few with which we could work frankly and comfortably most of the time, even when we disagreed.

West Was Not Coordinated

This lack of coordination among the Western nations was the reality from our perspective. It was not credible to hear stories about the need for the rest of the world to unite and take extreme positions in order to negotiate against the complex plans and strategies that the United States and the West had worked out together.

For the future of multilateral diplomacy, it is important to understand the situation in which the United States thinks it finds itself at these kinds of conferences. Although the Third World believes that we dominate everything, and therefore the essence of multilateral diplomacy is a struggle against our domination, we tend to believe that our global interests can be vindicated only with great difficulty in a process of multilateral diplomacy that has been taken over by the Third World. I think this is what Mr. Hoyle meant. Something must be done to alter the perceptions on all sides.

Reasons for U.S. Isolation and Its Feeling of Loneliness

Koh: I would like to address the sense of increasing isolation on the part of the United States in the multilateral institutions of the world which Brian Hoyle mentioned. It is a self-imposed solitude, the "Lone Ranger" syndrome. I want to list three reasons why the United States, under this administration, feels increasingly isolated. And I would like to suggest how it could change the situation it finds itself in.

This administration is basically hostile to multilateral diplomacy and to multilateral institutions. It believes essentially that the foreign policies of the United States can best be transacted through bilateral diplomacy in which the United States has a greater leverage than in multilateral institutions. Hence, I do not think I am wrong in saying that the basic attitude of this administration towards multilateral diplomacy and institutions in general is a negative one.

If you analyze the 160-odd states of the world community, you will find most of them actually have a high degree of affinity of interests with the United States, and, by right, the United States and the overwhelming majority of the world community ought to be on the same side on most of the issues on the agenda of multilateral forums. How is it then, in the light of this demonstrable affinity of interest between the United States and the overwhelming majority of the states of the world community, that the United States finds itself so often alone and on the wrong side? I can suggest two reasons for this.

First, in some situations, the United States adopts a policy that is genuinely unpopular and therefore unsaleable to its own allies and friends. The law of the sea is one such situation, but I can give you other examples. It goes without saying that if the United States has a policy that is unpopular or unsaleable, then its own allies and friends will find it difficult, if not impossible, to be on the same side with the United States. In the United Nations, the U.S. policy towards Namibia and southern Africa in general is one area in which even your best friends have to part company with you.

Another reason is that this is an administration that has not made good use of the very talented professional people you have in your foreign service. In many of these multilateral institutions the United States does not have a skillful team of diplomats to do its work.

The combination of these factors has produced a sense of increasing isolation by the United States. In many of these multilateral institutions, by right, the United States ought to be, on most issues, leading a

coalition on the side of the majority, and if it is not, it is mostly its own fault.

Multilateral Agreements and the U.S.S.R.

Anatoly Kolodkin: During our discussion, we have seen that there are two general approaches to international law and to the international law of the sea. The philosophy that the U.S.S.R. supports is the multilateral view. The future of international law lies in multilateral agreements, multilateral organizations, international organizations.

I would like to emphasize that there are reflections of the multilateral approach in Soviet legislation. In 1977, we included in our Constitution several important principles. One of them is pacta sunt servanda (Article 130). The second is in Article 129, which states that if a conflict exists between an international treaty to which the Soviet Union is a party and our law or our legal order, then the international treaty prevails, because it has an impact on the international community as a whole.

Bilateral Agreements and the U.S.S.R.

Bilateral agreements are the result of negotiations between sovereign states. The U.S.S.R. has signed a number of bilateral agreements relating to fisheries, shipping, and other areas, but when we are dealing with global problems we prefer to deal through multinational agreements. The problems of exploration and exploitation of the world's ocean are problems of a global nature. They demand not only bilateral agreements, not only regional approaches, but also the multinational approach. The elaboration of a global, generally accepted international treaty like the 1982 UN Convention is required. The U.S.S.R. will be modifying some legislation in the near future to conform to the Convention. We will not use the method of "pick and choose."

The United States Is Involved in Other Multilateral Negotiations

David Colson: Ambassador Koh criticized the present administration as not inclined to engage in any multilateral negotiations. I think that is one of those "pick and choose" areas on Ambassador Koh's part. The United States is involved in many multilateral negotiations and is supporting them quite strongly.

The United States Should Help Strengthen International Organizations

Ved Nanda: Many of us in academia would prefer the United States to play a much more important role in multilateral negotiations and organizations. The United States should pay more attention to strengthen-

ing the existing multilateral institutions, because the United States as well as the world community would benefit from a more effective utilization of such institutions.

U.S. Role in Law of the Sea Convention Analyzed in Historical Perspective

Luke Lee: History has a tendency to repeat itself. You may recall President Woodrow Wilson's 14-point proposal, which included the League of Nations concept. The United States worked very hard to establish the League of Nations, but in the end the United States did not ratify the League's Covenant. Later, however, the United States did cooperate with the League in a number of ways. For example, during the Manchurian Incident, the United States coordinated its activities with those of the League. It participated in the Permanent Court of International Justice. It also joined with the International Labor Organization and took part in a number of other functional areas.

Remember also that although the original purpose of the United Nations was to promote peace and security, its main role today lies not in the area of peace and security, but rather in economic and social development through its many functional agencies.

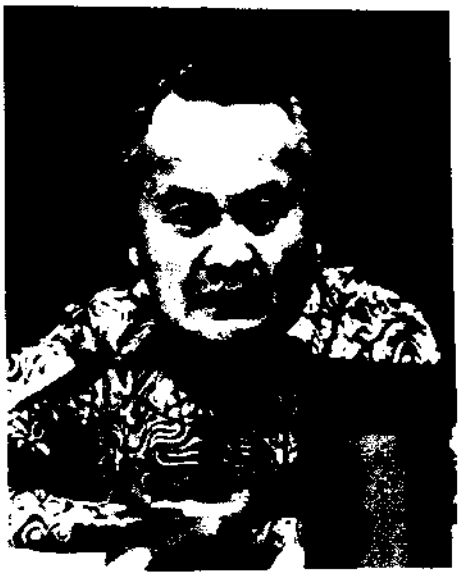
Can we draw some lesson from this? I am hoping that even if the United States does not formally join the Law of the Sea Convention, it will cooperate with other nations in fisheries, marine scientific research, and other areas that promote friendly relations.

C. FUTURE DEVELOPMENTS

DEVELOPMENTS IN THE LAW OF THE SEA DURING THE NEXT DECADE

by

Hasjim Djalal



During the next decade, there will be three major areas of development in the law of the sea--first, nationally; second, regionally; and third, internationally.

National Developments

Nationally, three things will happen in the next decade. First, the process of ratification and implementation of the Law of the Sea Convention will take place. For the next year or two, ratification will be slow, because of domestic requirements, of translating, convincing people, talking to departments, and so forth. After this groundwork is laid, the ratifications will become much more numerous.

Second, as a result of ratification, we will see nations adopt and adapt national legislation. Some countries may have to adopt national legislation before they ratify the Convention. Other countries will ratify the Convention first, adjust their national legislation later. Indonesia will probably ratify the Convention first and then immediately adjust our national legislation to the Convention.

Third, there will be increased study in each country on how to make use of the Convention for the purposes of economic and social development. In Indonesia, we have a continental shelf and an exclusive economic zone, but we do not quite know how to make use of them yet.

Regarding fisheries, for instance, we have a rough idea that there are enough resources in the economic zone. But we do not at this stage have a definite plan of what to do with these resources. Either we will exploit them ourselves or we will cooperate with our neighbors. It is the same with regard to the continental shelf. This uncertainty applies not only to the economic aspects but also to social, security, and political aspects. We do not know very clearly, for instance, our rights and responsibilities in the semi-enclosed seas. We are only beginning to develop ideas of what we can do at this moment.

Regional Developments

On the regional level, I see a lot of negotiation with regard to the maritime boundaries in the next decade. Some negotiation over territorial sea, economic zone, and continental shelf boundaries has already occurred. But an enormous number of maritime boundaries are still undecided, and they will require a lot of attention.

Secondly, a lot of arrangements will be worked out between neighbors. The Convention contains all kinds of provisions calling for regional arrangements and regional cooperation. Within the next decade, we will have to translate them into reality. Here I see in the Pacific Ocean the era of cooperation being born. All of the Law of the Sea Convention provisions dealing with cooperation will have to be implemented in the Pacific Ocean. This regional cooperation will involve resources, the environment, and many other areas.

The United States will see in the next decade that the law of the sea is important to the Pacific region, and that it opens new possibilities for regional cooperation and stability in the Pacific Ocean. I hope by the next decade or sooner, the U.S. government will see that it is in the interest of the United States to cooperate with the rest of Pacific area.

International Developments

The third area in which developments will occur will be internationally, on a global plain. Here the paramount development will be the effort to bring the Convention into force. This effort will take four to five years to succeed. In the meantime, the efforts to establish the International Sea-Bed Authority with all its organs and the International Tribunal will have to be intensified. This activity will probably be the major preoccupation of the world community in the next decade. There will be two competing perspectives here. On the one side, the United States would probably like to see the International Sea-Bed Authority not be established or at least not be workable. In fact, they want to see all of the organizations in the Convention

fail. But I see also that the community of nations that includes the developing countries will try to prove within the next several years that the International Sea-Bed Authority is workable.

Secondly, the international maritime disputes should within the next decade be adjusted or settled along the lines of the Convention. We have observed that much of the Convention is emerging as customary international law even though it is not yet in force. I would like to see a world guided by the spirit of peaceful dispute settlement and cooperation embodied in the Convention.

Thirdly, the law of this Convention will become a fact of life. It is there, and it is not possible to ask states to retract jurisdictional claims that have now been given recognition in the Law of the Sea Convention.

Fourthly, I see within the next decade that nonsignatories will be more isolated. They will not generate more support. They will not persuade signatories to betray the Convention. This feeling of isolation should in the end force nonsignatories to realize that joining the world community is much better than being alone in the world.

Preparatory Commission

After the initial difficulties of organizational matters are overcome, the Preparatory Commission will become one of the major instruments of making the Law of the Sea Convention workable. The Preparatory Commission is limited in its role, because it cannot do anything beyond what the Convention allows it to do. Nevertheless, I think the Preparatory Commission is realistic enough to understand that the International Sea-Bed Authority, the Enterprise, and the Law of the Sea Tribunal must all be workable. How to adjust the framework of the Preparatory Commission so it can create a workable International Sea-Bed Authority will certainly be a task that will generate occupations for all of us within the next several years.

DISCUSSION

Categories of Nonsignatories

John Craven: Would you distinguish between different types of nonsignatory nations? Is there a difference between nonsignatory nations who comply with or acquiesce with the full principles of the treaty and nonsignatory nations who have significant differences with the treaty? Do you think that the isolation will be different between these categories?

Hasjim Djalal: I guess so. I think the community of nations will have bad feelings if the nonsignatory takes actions contrary to the provisions of the Convention. But if the nonsignatory does not take any action contrary to the provisions of the Convention or if its actions do not undermine the Convention, then the problem would not be very significant.

Nobody talks about Turkey for not signing. Turkey is not undermining the basic provisions of the Convention. The attention is focused and directed to the United States, because the United States is taking the leading role in undermining the Convention.[1]

Future of the Convention and Decision Making in United Nations Agencies

Elisabeth Mann Borgese: I agree with what Ambassador Djalal has said. One topic that he has not stressed is the strengthening and restructuring of the United Nations agencies dealing with ocean affairs. The agencies must respond to the new challenges and fulfill the new tasks that are being imposed on them by

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1 See pages 524-25 *supra*.

the new Law of the Sea Convention--securing safety of navigation, training, resource management, environmental regulation, and brand new functions. The Convention in its provisions for dispute settlement through special arbitration processes also puts new demands on these agencies. In order to confront these new tasks, these agencies over the next ten years will have to be more operational than they have been in the past. These obligations will create new financial burdens, and there will have to be a new means of generating revenues. It is no secret that the World Bank and a number of development economists over these past few years have seriously looked into the possibility of international taxation.

United Nations Role in the Convention's Future

Satya Nandan: I was very interested in what Dr. Djalal said. I think his analysis of the future development of the law of the sea is very interesting and realistic. He outlined how he saw things will develop nationally, regionally, and internationally, and I agree on all the points he has raised in each of the categories of development. I wanted to add that so far as the United Nations is concerned, and I am sure this is also true of the specialized agencies of the United Nations, we will certainly give advice and assistance wherever it is necessary in the development of this process of implementing the Convention nationally and regionally. Of course, we will also help promote the Convention internationally.

Convention's Future in General

Professor Oxman has already touched upon the question of establishing some certainty in the law of the sea.[2] I hope that those who do not accept the Convention as it is will cooperate in promoting and bringing about certainty in those areas, at least, in which they agree. For the immediate future, as far as the Convention is concerned, we will certainly try to do everything to obtain more signatures as well as ratifications. Here I might mention that the last date for signature is December 9, 1984 (Article 305(2)), and thereafter nonsignatories will have to accede to the Convention (Article 307). The consequences are slightly different in terms of participation and in terms of the obligations that they will assume.

I agree entirely that the Preparatory Commission has to deal with the subjects and issues before it in such a manner as to remove some of the problems that exist. This can only be done within the framework of

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2 See pages 512-15 *supra*.

the Convention. Nations cannot influence the decision of any organization unless they participate in it. I think to that extent that the United States and others do not participate fully they will find themselves having a handicap.

Important to Maintain the Balances in the Convention

Anatoly Kolodkin: The future of the law of the sea is very difficult to predict. I remember a remark of my professor, who said that the international lawyer has to know everything about the past, something about the present, and nothing about the future. Even without the signature of the United States and other countries, we still have to preserve the balance of interests that we elaborated through discussion and negotiations for ten years. The Soviet point of view is that we blame the United States for threatening this balance because it ignored a Convention that has been adopted by the majority of members of the United Nations. We also express concern with regard to other aspects of the Convention's future.

A very dangerous situation could arise if we do not preserve the negotiated balance in this Convention and if the Convention starts to unravel, especially with regard to the balance of interests between coastal states and the international community, between coastal states and fishing countries or scientific researching countries. Examples of these balances are Articles 31 and 42(5), which carefully clarify the responsibility of flag states for damage caused by their warships to coastal regions.

HOW CAN THE UNITED STATES AND OTHER NATIONS PROMOTE ORDER FOR THE OCEANS?

by

Tommy T.B. Koh

What kind of developments should we encourage with respect to parts of the Convention other than Part XI and what role, if any, can a country like the United States play in these future developments?

First, I want to state the common belief that unifies those who have not signed or have rejected the Convention with those who have supported the Convention. Apart from Part XI, I believe that it is our common belief that the Convention reflects the progressive development of the customary law of the sea and that it contributes to international cooperation, to peace, and to justice. I believe that I am not wrong in saying that this point of view has been reflected in the Oceans Policy Statement of the United States government of March 10, 1983.[1] If that is the case, then let us ask ourselves what kind of future developments should be encouraged and what kind of role can the United States play in these future developments. I want to talk briefly about three themes: first, self-help; second, cooperation; and third, fidelity to the Convention.

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1 See Appendix A infra.

Fidelity to the Convention

I am going to begin with the third theme. I think it is very important for all of us, those of us who have signed the Convention and those of us who will not sign the Convention, to be faithful to the provisions of the Convention in our domestic law and in our national activities. I am sure David Colson will agree with me that this is absolutely essential so that the very delicately balanced compromises in the Convention will not be unraveled through unilateral state action.

I would therefore appeal to the United States to consider changing its attitude on the tuna issue. It is an economically insignificant matter to the United States, but it is an irritant in your important relations with the relatively poor and relatively small countries of the South Pacific.

Self-Help

In order to realize the fruits of this Convention, it is necessary for each coastal state to help itself. It has to help itself, first of all, by understanding the provisions of the Convention. Second, each coastal state must coordinate the various departments of the national government having to do with the sea to develop a coherent oceans policy. Third, we have to develop the scientific know-how and trained personnel to take advantage of the opportunities and benefits that the Convention offers us.

International Cooperation

My last theme is international cooperation. The law of the sea is one area where I see a new potential for fruitful international cooperation between developed and developing countries. Developing countries cannot really take full advantage of the benefits of the Convention unless they help themselves and unless the developed countries help them to help themselves. I do not think the fact that the United States has chosen not to become a party to the Convention prevents the United States from helping developing countries individually, subregionally, and regionally. The United States can help them acquire scientific know-how to train their personnel, encourage regional cooperation in respect to living resources, pollution, marine scientific research, the exploitation of the continental shelf, and so on. I see this as an area in which, although the United States has decided to stay out of the Convention, there are very clear and demonstrable areas in which cooperation between the United States and parties to the Convention can be mutually beneficial.

Finally, Mr. Chairman, if I may be so presumptuous as to say a few words on behalf of all the participants in this workshop. We have both enjoyed our stay here,

and, speaking for myself, I have enjoyed this intellectual experience a great deal. I think it is very good for us to be compelled to listen humbly and respectfully to colleagues whose views differ from our own. Although I have sometimes indulged in very sharp exchanges with David Colson, with Brian Hoyle, and others, I respect their different views. They may be right and I may be wrong. I think I have benefited a great deal from these intellectual exchanges.

I have also enjoyed meeting so many new friends, well known scholars such as Dr. Anand and Professor Burke, whose books I have read and whom I am meeting for the first time. May I finally on behalf of all the participants thank John and Dorothy Craven; Sherry Broder and Jon Van Dyke; Victor Li, the president of the East-West Center; Dean Richard Miller, the dean of the Richardson School of Law; Program Officer Glenn Yamashita; June Kuramoto; Carol Stimson; Fran Marquardt; and Young-sun Song, who have been most helpful to us during our stay here. I should also thank the chairmen of our meetings, who, in the aloha spirit of Hawaii, have governed our meetings with benign discipline. They are Richard Baker, John Bardach, Choon-ho Park, Maivan Lam, and Filipe Bole. I would also like to thank the rapporteurs--Chad Taniguchi, Dennis O'Connor, Robert O'Brien, Cori Lau, and Craig Harrison. Thanks also to our hosts for lunch, Dr. Toufiq Siddiqi from the East-West Center, Dr. Scott Allen from the Law of the Sea Institute, and Dr. Jack R. Davidson, director of the University of Hawaii Sea Grant College Program. Last but not least, our thanks are due to people whose names I do not know but who, nevertheless, have rendered an extremely important task and without whose help the meeting would not have been possible, such as the sound engineers who sit in the booth and the secretaries and typists. So may I, on behalf of all the participants, say to all of you, mahalo and aloha.

John Craven: I would also like to express my appreciation to all the participants at this Workshop for their visionary, purposeful, and tactful behavior. I must say from my own personal experience that this has been one of the most mature, thoughtful, and technically sophisticated workshops that it has been my privilege to be associated with.

D. CONCLUSIONS

The participants in this week-long workshop left as friends, having spent enjoyable informal hours together in addition to the more formal and sometimes intense discussion sessions. They did not, however, reach agreement on most of the issues raised during the week, and so the conclusions that can be drawn from the presentations and dialogues must emphasize the continuing disagreements on many important policy questions:

1. The U.S. Officials and the Diplomats Representing the Rest of the World All Feel Strongly About Their Respective Positions.

Although all the participants at this workshop felt that they had benefited by hearing the views of the other side presented with greater clarity, fundamental positions were not modified during the dialogues. The members of the Reagan administration have debated this subject over a long period of time, and therefore the officials from the U.S. State Department came to the workshop with a policy perspective on the Convention which they were able to explain in some detail and which they felt was sound in terms of the present needs of the United States. The diplomats from Asia and the Pacific nations who had played an active role in negotiating the Law of the Sea Convention felt just as strongly that the Convention is a sound document that accommodates the essential needs of all nations and constitutes an acceptable compromise balancing the conflicting viewpoints that were brought to the negotiating Conference.

Whether the present U.S. position will survive a change of administrations is a question that can only be answered once a new administration comes into office. Certainly many of the U.S. concerns about the deep seabed mining provisions have been voiced by Democrats as well as Republicans. Whether a Democratic

administration--or another Republican administration--would weigh the balance between the benefits to be gained in the navigation, environment, and dispute-resolution areas against the costs in the deep seabed mining area in the same scale as the Reagan administration is unanswerable at the present time.

The other question that cannot be answered at present is whether the rest of the world might be willing to reconsider some of the deep seabed provisions in the future to respond to the U.S. concerns. At the present time, the negotiators from the other nations are weary of the long negotiating process and wary of the true goals of the United States. Some time must pass before these issues can be reopened, a time during which the signatories to the Convention will try to make the Convention's approach to deep seabed mining work.

2. The Disagreements on the Deep Seabed Mining Provisions Involve Ideological Principles More Than Economic Matters.

A number of the participants asked why the United States had taken such a strong stand against the deep seabed mining provisions of the Convention, when the economics of minerals at the present time make it unlikely that the deep seabed nodules will be mined during the next decade or two, when the economic burdens in the Convention are not appreciably more onerous than regulations governing land-based mining in most countries, and when the Preparatory Commission has considerable leeway to promulgate regulations that can respond to the fears of the mining industry and ameliorate the burdens they are most concerned about. Brian Hoyle answered candidly that although the economic issues were significant, they were not decisive in the Reagan administration's conclusion that the Convention should be rejected. More important to this administration were issues concerning the structure of the International Sea-Bed Authority and the manner in which decisions would be made on granting access to the seabed minerals.

In addition to viewing this new international organization as inappropriate for the seabed resources, the Reagan decision makers were very concerned that its structure would serve as a model for other international organizations that may be established in the future. The nations most interested in gaining access to the seabed's resources have a relatively small percentage of the votes in the Council of the International Sea-Bed Authority and could perhaps be outvoted and outmaneuvered on some issues. The protections in Article 161--which were agreed upon by Elliot Richardson, chief negotiator under President Carter, and which include the requirement that many of the most important

decisions be adopted by a three-fourths majority or by "consensus"--were deemed by the Reagan administration to be insufficient to protect U.S. interests. The Reagan negotiators demanded some system of weighted voting, which would give those nations most interested in seabed mining enhanced votes, but this idea proved to be unacceptable to many of the other nations.

Some of the other concerns mentioned by President Reagan--the provisions on the transfer of technology and production limitations--are ones that most observers feel will have little practical impact on mining operations during the coming generation, but they too were viewed as setting undesirable precedents for future arrangements involving other resources.

Because these disagreements were seen by some as in the ideological arena, they proved to be particularly intractable, and the many compromise solutions suggested by U.S. allies during the spring 1982 negotiating session were not viewed as adequate by the Reagan negotiators. These ideological disagreements have also been seen in recent UN debates and in other multinational negotiations and have led to the United States experiencing a feeling, on the one hand, of loneliness and isolation, and, on the other, an internally directed independence and rectitude.

3. If the United States Does Authorize U.S. Companies to Mine the Resources of the Deep Seabed Outside the Regime Established by the Convention, the Legality of This Action Will Be Challenged in the International Court of Justice.

President Reagan asserted when he issued his Oceans Policy Statement on March 10, 1983, that "Deep seabed mining remains a lawful exercise of the freedom of high seas open to all nations."[1] Article 137(3) of the Law of the Sea Convention states categorically that no nation, person, or company "shall claim, acquire or exercise rights with respect to the minerals recovered from" the deep seabed except in accordance with the regime established by Part XI of the Convention. Ambassador Tommy Koh has said previously and repeated in strong terms at this workshop that he will ensure that a challenge is brought to the International Court of Justice should the United States attempt to exploit these resources outside the Convention's rules (see pages 232 and 253 supra). David Colson responded by saying that he thinks the United States would abide by such a ruling by the International Court if it is based on legal principles rather than political considerations (see pages 260-61 supra).

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1 See Appendix A infra at 553, para. 13.

The legal principles that would be raised by such a challenge have been examined extensively elsewhere,[2] and were reviewed by the participants here. The United States argues that mining can be viewed as a freedom of the high seas included by implication in Article 2 of the 1958 Convention on the High Seas. Most of the other nations argue in response that nobody thought about deep seabed mining one way or the other when the High Seas Convention was adopted, and that the world community has gone on record repeatedly since then as stating that the minerals of the deep seabed are part of the common heritage of humankind and can be exploited only in accordance with an agreed-upon international regime. The most significant document recording this understanding is the 1970 Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, which was adopted in the UN General Assembly by a vote of 108 to 0 (with 14 abstentions) with the United States voting affirmatively.[3] The

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2 See, e.g., Van Dyke and Yuen, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed? 19 San Diego L. Rev 493 (1982), and in E. Miles and S. Allen (eds.), The Law of the Sea and Ocean Development Issues in the Pacific Basin, 15 L. Sea Inst. Proc. 277 (1981); T. Kronmiller, The Lawfulness of Deep Seabed Mining (1980); Anand, The Legality of Interim Seabed Mining Regimes, 29 Foreign Aff. Rep. (New Delhi) 29 (1980); Auburn, Some Legal Problems of the Commercial Exploitation of Manganese Nodules in the Pacific Ocean, 1 Ocean Dev. & Int'l L. 185 (1973); Biggs, Deep Seabed Mining and Unilateral Legislation, 8 Ocean Dev. & Int'l L. 223 (1980); Burton, Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims, 29 Stan. L. Rev. 1135 (1977); Ely, The Laws Governing Exploitation of the Minerals Beneath the Sea, in Exploiting the Ocean 373 (1966); Goldie, A General International Law Doctrine for Seabed Regimes, 7 Int'l L. 796 (1973); Goldie, Customary International Law and Deep Seabed Mining, 6 Syracuse J. Int'l & Com. 173 (1979); Saffo, The Common Heritage of Mankind: Has the General Assembly Created a Law to Govern Seabed Mining?, 53 Tulane L. Rev. 493 (1979); Note, Deepsea Ventures: Exclusive Mining Rights to the Deep Seabed as a Freedom of the Seas, 28 Baylor L. Rev. 170 (1976); Ely, Mining Rights in the Deep Seabed (1975) (paper presented before the American Mining Congress, San Francisco).

3 See Appendix B infra.

participants at this workshop agreed that legal arguments could be made on both sides of this issue, but both the U.S. officials and the diplomats from the other Pacific nations felt strongly that their view would ultimately prevail.

4. If the Convention Is Not Universally Ratified, Navigational Rights Will Remain in Doubt; Customary Law Will Not Be Able to Provide the Level of Certainty Desired by the Maritime Powers in the Foreseeable Future.

The primary goal of the United States in participating in the Law of the Sea Conference was to protect and clarify the navigational rights of commercial and military vessels. The Convention's text adopts most of the views promoted by the maritime powers, clarifying the right of innocent passage, codifying the rights of transit passage through international straits and archipelagic straits passage, and protecting navigational rights in the exclusive economic zone. These provisions were adopted after long and hard negotiations, and many nations in the developing world feel they gave up important interests in agreeing to these provisions. They are now considering whether they should grant these rights to a nonsignatory nation like the United States, which refuses to accept the burdens in the Convention related to deep seabed mining.

Some navigational principles would be in dispute even if the Convention is universally ratified. The statement made by Brazil when it signed the Convention that it does not think the Convention permits certain military maneuvers in the exclusive economic zone without coastal state consent (see pages 304-05 supra) has been sharply criticized by the United States, and Tommy Koh stated at this workshop that he does not view the Brazilian statement as an accurate reflection of the intent of the Convention's drafters (see pages 303-04 supra). The Brazilian statement nonetheless reflects a widespread view that coastal states should have the power to require warships at least to notify the coastal state of their plans and perhaps in some instances to seek permission prior to passage. Camillus Narokobi stated that his nation and others decided to compromise their views on this issue in order to achieve a universally acceptable treaty, but they may reassert their views on this subject in light of the decision of the United States not to sign the Convention (see pages 302-03 supra).

The United States asserts that the navigational provisions in the Convention are now part of customary international law binding on all nations, but whether this view is correct will depend on the practice of nations during the coming years. Professor William Burke observed that the U.S. position is weakened

considerably by statements made by U.S. officials in the early 1970s that customary law was not adequate to protect transit rights through straits if the territorial sea expanded to 12 miles (see pages 294-96 supra).

The participants discussed in detail how customary international law develops, and they tended to agree that even an unratified treaty could have a profound influence on the customary law norms that are binding on nations, if the nations perceive the language of the treaty as codifying customary law. Some provisions in the 1982 Law of the Sea Convention clearly codify customary law and many articles repeat language used in the 1958 Conventions--but it is much harder to argue that the careful balances defining the exclusive economic zone and the detailed provisions defining innocent passage and transit passage have become binding customary law simply by virtue of their inclusion in the 1982 Convention. The participants disagreed on whether all nations were equal in their ability to influence the development of customary law or whether some nations are "more equal" than others. The maritime nations may be required to assert their view of customary law by using force, and the other nations will have to decide whether they want to charge a toll for or in any other way regulate the passage through straits and coastal zones by nonsignatories.

Professor Bernard Oxman observed that all the workshop participants were seeing customary law through a prism that reflected the particular interests of their nation. This ability to view customary law from different angles to achieve different results illustrates its elusive and unreliable qualities. In any event, the norms governing navigation are certain to remain in dispute for some time, if the Convention is not universally ratified.

5. Many Nations Feel That the United States Has Given the Appearance of Negotiating in Bad Faith by Refusing to Sign the Convention After Inducing the Other Nations to Agree to So Many Compromises Over Such a Long Period of Time.

The participants discussed at length whether there was a grand "package deal" that linked the navigational rights to the deep seabed regime. Although many of them had different views on how the negotiating process took place, they agreed that the negotiators saw the Convention as a unified whole throughout the Conference, and that the decision in Article 309 to prohibit reservations illustrates the idea that the Convention was to be viewed as unified whole. Indeed, the United States was among those that felt most strongly that no reservations should be allowed (see pages 62-63 supra). The United States favored the comprehensive approach

throughout the negotiations, because it feared a repetition of the experience with the four 1958 Conventions, where nations "picked and chose" among them, ratifying those that served their national interest and ignoring the others. The participants who had represented the United States agreed that the Conference always aimed for a single treaty that all nations would accept, but they also pointed out that each nation as an element of sovereignty has the right to evaluate the Convention and reject it if it is found not to be in its national interest.

Ambassadors Hasjim Djalal and Tommy Koh responded by asserting that the United States has taken a "pick and choose" approach in rejecting the deep seabed mining provisions while claiming that all nations are bound by the rest of the Convention by virtue of customary international law. These diplomats expressed a feeling of betrayal, that despite continuing efforts on their parts to accommodate the needs of the United States, the United States nonetheless rejected the Convention text. When Brian Hoyle expressed the view that the United States had a "feeling of loneliness" in international negotiations (see page 272 supra), Ambassadors Djalal and Koh responded by saying that this sense of isolation has occurred because the United States has not appreciated the efforts or attempted to understand the view of its allies and because the United States has taken positions fundamentally unacceptable to the rest of the world (see pages 301 and 524-30 supra). Despite their feeling that the United States may have acted in bad faith at these negotiations, these diplomats and the others at the workshop seemed sincerely to want the United States to return to the Convention framework, to participate with the rest of the world in refining the general provisions in the text, and to reassume its role of leadership in ocean and environmental affairs.

6. The U.S. Position on Tuna Is Another Major Issue Dividing the United States from the Other Nations of the World.

The United States argued throughout the Law of the Sea Conference that tuna should not be included in the 200-mile coastal state resource zones, because the tuna migrate throughout the oceans and effective management requires a regional approach. Virtually all other nations reject this view and claim the tuna along with all other living resources within their exclusive economic zones. This issue has become particularly divisive in the Pacific, because tuna is the most commercially important ocean resource for many of the island nations. David Colson stated that the U.S. position did present problems with regard to relations with our allies but asked for understanding to work out

these differences. Participants from the South Pacific responded that the United States had to understand their position too--and that their assertion of sovereign rights over the tuna was not something they were prepared to give up or compromise in any way.

The participants also discussed whether Article 64 requires the Pacific nations to create a regional organization, to help conserve and promote the optimum utilization of the tuna, that would include as members the distant-water fishing nations as well as the island nations. The participants from the Pacific islands felt that such an organization would not be practical until the United States changes its policy toward tuna. All the participants expressed a hope that accommodations could eventually be developed to resolve these differences.

7. The Environmental Provisions of the Convention Contain Many Significant Innovations, But They May Not Be Implemented Fully If the United States Does Not Ratify the Convention.

The environmental provisions of the Convention are innovative in bringing together norms from a number of different sources into one comprehensive treaty and in creating new procedural mechanisms for enforcing them. The United States has argued that these norms are binding on all nations as a matter of customary international law even if the Convention does not become universally ratified. The problem with this argument, however, is that the Convention frequently uses vague language, requiring interpretation on a case-by-case basis by nations interested in protecting the environment. If the United States does not ratify the Convention, many of these provisions may not be given the full meaning that the drafters intended.

8. A Major Loss to the United States in Rejecting the Convention Will Be the Inability to Use the Dispute Resolution Provisions of the Convention.

The U.S. negotiators worked hard during the Conference to incorporate into the Convention procedures for enforcing the provisions of the text. These compulsory dispute resolution procedures are particularly important with regard to navigational rights, which are carefully balanced against the resource and environmental rights of the coastal nations in their zones of expanded jurisdiction. In fact, David Colson referred to these dispute resolution procedures as "essential" to the willingness of the maritime nations to accept the expanded coastal state jurisdiction (see page 520 supra). Without the willingness and ability of the United States to enforce these navigational rights through the compulsory dispute resolution procedures, coastal nations may expand their jurisdictional claims,

and the law may become even more "coastal" than the Convention permits; this fear was expressed in strong terms by Professor Oxman, who felt that the extended jurisdictional claims of the coastal states were likely to become incorporated into customary international law, but the navigational rights of the maritime states were much less likely to achieve that status (see pages 138-61 and 164 supra).

9. Some of the Participants Felt That the Biggest Loss Is the Lost Opportunity to Promote Trust Among the Nations by Cooperating to Develop the Resources of the Deep Seabed for the Benefit of All.

The notion that the resources of the deep seabed are the "common heritage" of all humankind caught the imagination of many persons as a way to bridge the gap between the rich and the poor by bringing forth a new resource that could be used to expand the world's wealth especially for the benefit of the developing nations. Presidents Johnson and Nixon embraced this idea in the 1960s and early 1970s (see pages 81-82 and 228-29 supra), and the world community adopted this idea in a formal declaration in 1970 (see Appendix B infra). Today, in a less-idealistic time, the developed world looks skeptically at this idea and cites it as another example of governmental interference with the free market system.

The United States has ratified only a limited number of multilateral treaties (it has ratified very few human rights treaties, for instance), and it belongs to virtually no international organizations that have real decision-making power unless it retains an effective veto over the organization's actions. The U.S. decision to refrain from signing the Law of the Sea Convention cannot thus be seen as a total surprise, although it is certainly a disappointment to those who were looking forward to seeing whether the international community could cooperate constructively to exploit the resources of the seabed.

The participants all agreed that nations would continue to develop the resources of the oceans through national, regional, and global activities and that the Law of the Sea Convention would serve as a guide for such developments. The participants disagreed, however, on the role the United States might play in such developments.

The Council of the International Sea-Bed Authority requires different levels of enhanced-majorities (two-thirds, three-fourths) for different types of decisions, depending on their importance, with a "consensus" needed for the most important decisions (see Article 161). President Carter's chief negotiator, Elliot Richardson, accepted this approach as workable, and the United States was subsequently given

a virtually assured seat on the Council after complaints were raised by President Reagan's negotiators. Ultimately, however, the Reagan administration decided not to participate in this global experiment, apparently because they feared that this innovative structure might serve as a precedent for other organizations in the future.

Professor Oxman expressed surprise and regret that the United States did not at least sign the Convention. He could see nothing whatsoever to be lost in taking that step and much to be gained by being able to work within the Preparatory Commission to improve the seabed mining provisions and also to be able to assert the validity of the navigational and environmental provisions whenever conflicts arise (see pages 508-11 supra). The deadline for signing the Convention was set at December 9, 1984 (Article 305(2)), so the next U.S. president will not have the option of taking this intermediate step.

The next administration may, however, take another hard look at the Law of the Sea Convention and may determine that the order it brings to so many aspects of ocean affairs is a sufficient justification for the United States to ratify the treaty, despite lingering concerns that it may not be perfect in all respects. Such a decision would entail taking certain risks, of course, and would require a willingness to work with the other nations of the world to build an organization that works, in order to provide new benefits for all. It would require a belief that multinational cooperation in this divided world is beneficial for its own sake as a step toward developing trust and understanding among the peoples of the world.

Appendix A

U.S. Oceans Policy Statement and Exclusive Economic Zone Proclamation

PROCLAMATION BY PRESIDENT RONALD REAGAN, March 10, 1983; Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

[a] Whereas, the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;

[b] Whereas, international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and

[c] Whereas, the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and promote the protection of the marine environment, while not affecting other lawful uses of the zone, including the freedoms of navigation and overflight, by other States;

[d] NOW, THEREFORE, I RONALD REAGAN, by the authority vested in me as President by the Constitution and laws of the United States of America, do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an Exclusive Economic Zone, as described herein.

[e] The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the terri-

torial sea is measured. In cases where the maritime boundary with a neighboring State remains to be determined, the boundary of the Exclusive Economic Zone shall be determined by the United States and other State concerned in accordance with equitable principles.

[f] Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

[g] This Proclamation does not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction and require international agreements for effective management.

[h] The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law.

[i] Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.

[j] IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of March, in the year of our Lord nineteen hundred and eight-three, and of the Independence of the United States of America the two hundred and seventh.

STATEMENT BY PRESIDENT REAGAN, March 10, 1983

[1] The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.

[2] Last July I announced that the United States will not sign the UN Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.

[3] The United States does not stand alone in those concerns. Some important allies and friends have not signed the convention. Even some signatory states have raised concerns about these problems.

[4] However, the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.

[5] Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the convention and international law.

[6] First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans--such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

[7] Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

[8] Third, I am proclaiming today an exclusive economic zone in which the United States will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast. This will provide U.S. jurisdiction for mineral resources out to 200 nautical miles that are not on the Continental Shelf. Recently discovered deposits there could be an important future source of strategic minerals.

[9] Within this zone all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight. My proclamation does not change existing U.S. policies concerning the Continental Shelf

marine mammals, and fisheries, including highly migratory species of tuna which are not subject to U.S. jurisdiction. The United States will continue efforts to achieve international agreements for the effective management of these species. The proclamation also reinforces this government's policy of promoting the U.S. fishing industry.

[10] While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the U.S. interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will, nevertheless, recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised reasonably in a manner consistent with international law.

[11] The exclusive economic zone established today will also enable the United States to take limited additional steps to protect the marine environment. In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.

[12] The policy decisions I am announcing today will not affect the application of existing U.S. law concerning the high seas or existing authorities of any U.S. Government agency.

[13] In addition to the above policy steps, the United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.

[14] The Administration looks forward to working with the Congress on legislation to implement these new policies.

ADDRESS BY AMBASSADOR JAMES L. MALONE, assistant secretary for oceans and international environmental and scientific affairs and chair of the U.S. Delegation to the Third UN Conference on the Law of the Sea (1981-82), before the Mentor Group, Washington, D.C., March 10, 1983.

[15] In addition to welcoming you to this conference, I would like to take this opportunity to discuss the most recent development in U.S. oceans policy. As you are all well aware, the United States will not sign the Law of the Sea (LOS) Convention. However, the United States will continue in its efforts to develop a comprehensive national oceans policy, through which the United States will effectively protect and promote its ocean interest.

[16] An important component of U.S. oceans policy will be announced today. The exclusive economic zone (EEZ) to be proclaimed by President Reagan today will bring within U.S. jurisdiction resources that are rightfully ours to own under international law and economic activities that are properly ours to control. The proclamation of an EEZ will confirm U.S. sovereign rights and control over the natural resources--living and nonliving--of the seabed, subsoil, and superjacent waters within 200 nautical miles of our coast. We expect that the additional rights and jurisdictions we will assert in our EEZ will materially benefit our economy, national security, and international position. In addition, we believe that the President's proclamation of an EEZ will favorably influence the further development of international law and practice with respect to economic zones.

[17] It might be useful to review briefly the status of international law and current state practice regarding sovereign rights over natural resources lying beyond the territorial sea but within a zone extending to 200 nautical miles from the coast. The historical basis for such jurisdiction is President Truman's proclamation of jurisdiction and control over the natural resources of the adjacent Continental Shelf in 1945. In that proclamation, the United States asserted the right to jurisdiction and control over the resources of the Continental Shelf, while also preserving traditional high seas freedoms in the area. In 1976 the developing practice of states with respect to 200-mile zones of resource jurisdiction was given further impetus by the establishment of the U.S. Fishery Conservation Zone. Today, customary international law recognizes coastal state rights and jurisdiction over both the Continental Shelf and the 200-mile fisheries zone.

[18] The concept of the EEZ is widely regarded as lawful under customary international law. The concept

of the exclusive economic zone was extensively developed during negotiation of the LOS convention. Recently, both the International Court of Justice and the American Law Institute stated that the EEZ is now a part of customary international law. Indeed, there is already a considerable record of state practice supporting such a conclusion. Fifty-six nations presently claim 200-mile exclusive zones; and an additional 23, including the United States, claim 200-mile fisheries zones. Therefore, extensive state practice, noteworthy legal authority, and international consensus support the proclamation of an EEZ by the United States.

[19] The President's proclamation of an EEZ is not inconsistent with the EEZ provisions of the LOS convention. The LOS Convention provides for coastal state control over resource-related activities within 200 nautical miles of the coastal state, while maintaining the freedom of navigation and overflight and other lawful uses of the sea within the EEZ. Although the LOS provisions are detailed, they are not without significant ambiguities. Therefore, actual state practice--both within and outside the LOS Convention--will ultimately define the precise content of the EEZ in international law. As a major maritime power and large coastal state, the United States can contribute greatly to the development of international law in this regard.

[20] The establishment of an EEZ has several immediate benefits for the United States. First and foremost is the extended resource jurisdiction created by such a zone. Secondly, the President's proclamation is a timely and positive expression of national oceans policy that demonstrates to the American public and to the world that the United States is committed to developing and conserving important marine resources in an orderly manner. The proclamation of an EEZ and the simultaneous announcement of our new national oceans policy should also reassure the world community that the United States will continue to abide by the rules of customary international law.

[21] The United States is a leading maritime nation and unimpeded commercial navigation and military mobility are vital to our national interest. It is important that the United States act to ensure that traditional high seas freedoms are retained within the EEZ. Therefore, in the President's proclamation of an EEZ, the President will specifically indicate that the United States is limiting its claim of sovereign rights and jurisdiction and is expressly preserving the high seas freedoms of navigation, overflight, and other lawful uses of the EEZ. The United States believes that by carefully shaping the EEZ to permit maximum freedom of the seas consistent with U.S. rights to

resources and related jurisdiction, we may influence the behavior of other nations.

[22] Our rights to oil, gas, and hard rock mineral resources on the Continental Shelf were already well defined and recognized in exsisting customary and conventional international law. Recently, extremely interesting discoveries of strategic mineral deposits, including the polymetallic sulphides and cobalt/manganese crusts, have been made off our Continental Shelf but within 200 miles of our coasts. The proclamation of an EEZ will clearly establish U.S. jurisdiction and control over the seabed minerals contained in the area off the shelf but within 200 nautical miles. The EEZ should provide a more favorable investment climate for the exploration and development of these ocean mineral resources.

[23] Within the EEZ, activities aimed at harnessing energy from ocean thermal gradients, winds, waves, and tides will be placed under U.S. jurisdiction. While these energy sources might not be developed commercially for many years, we expect that management and development of such activities will be simplified under EEZ jurisdiction.

[24] I would note that the regulation of specific activities within the EEZ, such as ocean thermal energy conservation, exploitation of nonliving resources and expansion of marine pollution authority will require appropriate congressional action. The Administration is looking forward to working closely with the Congress in implementing our national oceans policy.

[25] The United States has always strongly supported freedom of scientific research and has consistently taken the position that marine science is a freedom of the high seas open to all nations beyond the territorial sea. However, this position was rejected by the LOS Conference and virtually all coastal states currently assert jurisdiction over marine scientific research within 200 miles of their coasts.

[26] The United States does not have an interest in asserting jurisdiction over marine scientific research within its EEZ. The United States does have an interest in preventing coastal states from using their jurisdiction over marine science to hamper useful investigation or to restrict traditional high seas freedoms. Therefore, to lead by example, the United States will not assert new jurisdiction over marine science within the EEZ. We will continue our effort to influence state practice in a favorable way by recognizing only those jurisdictional claims that are reasonable. We will work to facilitate the access of U.S. scientists to foreign EEZs under reasonable conditions.

[27] In establishing an EEZ, the United States will assert limited jurisdiction regarding preservation of the environment and will express our intention to act in a manner consistent with customary international law and those international agreements to which we are party. We believe that present domestic legislation and existing and anticipated international measures are probably sufficient to meet present and immediately foreseeable U.S. coastal needs in this area. However, the proclamation of an EEZ and the general assertion of jurisdiction for purposes of protecting the marine environment will enable us to take whatever future steps that may be necessary to protect the marine environment off our coasts. We will, of course, continue to work through appropriate international organizations to develop further needed international measures.

[28] Since 1976 the United States has exercised exclusive management and conservation authority over all fishery resources, except tuna, within 200 nautical miles of our coasts under the Magnuson Fishery Conservation and Management Act. The United States neither recognizes nor asserts jurisdiction over highly migratory species of tuna. Such species are best managed by international agreements with concerned countries. The proclamation of an EEZ will not materially affect this jurisdiction. However, we expect that it will enhance our negotiating position with foreign nations by clearly establishing our sovereign rights to the resource as opposed to the present "exclusive management authority." The establishment of an EEZ will not affect our present marine mammal management policies or the present U.S. policy of deferring to the International Whaling Commission with regard to the protection of whales.

[29] In summary, the President's proclamation of an exclusive economic zone is a positive, forward-looking element of U.S. oceans policy. The exclusive economic zone is a lawful claim of sovereign rights and jurisdiction under customary international law and brings within UN jurisdiction and control those natural resources which are rightfully ours while simultaneously preserving to the maximum extent the traditional high seas freedoms of navigation and overflight. The United States will continue to develop an oceans policy that promotes and protects its national interest but which also recognizes the legitimate rights and freedoms of the international community.

Appendix B

Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction

G.A. Res. 2749 (XXV), 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8028 (1970). This Declaration was passed unanimously by the UN General Assembly in 1970 by a vote of 108-0, with 14 nations from Eastern Europe including the Soviet Union abstaining. The United States voted in favor of the Declaration. Since the mid-1970s, the Soviet Union and the other Eastern European nations have endorsed this Declaration.

The General Assembly,

Recalling its resolutions 2340 (XXII) of 18 December 1967, 2467 (XXIII) of 21 December 1968 and 2574 (XXIV) of 15 December 1969, concerning the area to which the title of the item refers,

Affirming that there is an area of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined,

Recognizing that the existing legal regime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources,

Convinced that the area shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole,

Believing it essential that an international regime applying to the area and its resources and including appropriate international machinery should be established as soon as possible,

Bearing in mind that the development and use of the area and its resources shall be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects

caused by the fluctuation of prices or raw materials resulting from such activities.

Solemnly declares that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.

5. The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international regime to be established.

6. States shall act in the area in accordance with the applicable principles and rules of international law, including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.

8. The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been undertaken or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area. One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor, and the subsoil thereof from the arms race.

9. On the basis of the principles of this Declaration, an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The regime shall, **inter alia**, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.

[Paragraphs 10-15 have been omitted; they are not relevant to the present discussion.]

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This volume is the result of a cooperative effort between the University Sea Grant College Program, the Law of the Sea Institute, the Environment and Policy Institute of the East-West Center, and the Richardson School of Law of the University of Hawaii at Manoa.

The Law of the Sea Institute was founded in 1965 at the University of Rhode Island and relocated in 1976 to the University of Hawaii at Manoa. It serves as a forum for the exchange of knowledge and ideas concerning the uses of the sea and its resources. Each year the Institute holds an annual meeting in cooperation with another ocean-oriented institute to survey recent developments in ocean affairs and to provide an opportunity for new ideas to be voiced. The Institute also holds workshops periodically and publishes occasional papers. The Institute is governed by an 18-member Executive Board comprised of internationally recognized scholars and leaders in oceans law and policy.

The East-West Center is an educational institution established in Hawaii in 1960 by the United States Congress. The Center's mandate is "to promote better relations and understanding among the nations of Asia, the Pacific, and the United States through cooperative study, training, and research."

The Environment and Policy Institute is one of the four institutes at the Center established in October 1977 to increase understanding of the interrelationships among policies designed to meet a broad range of human and societal needs over time and the natural systems and resources on which these policies depend or impact. Through interdisciplinary and multinational programs of research, study, and training, the Institute seeks to develop and apply concepts and approaches useful in identifying alternatives available to decision makers and in assessing the implications of such choices. Progress and results of Institute programs are disseminated in the East-West Center region through research reports, books, workshop reports, working papers, newsletters, and other educational and informational materials.

The University of Hawaii Sea Grant College Program, in consonance with the National Sea Grant College Program, is concerned with the development and wise use of the ocean's resources. The Sea Grant College Program was created by the Congress as the ocean parallel of the land grant college concept. As such, the University of Hawaii Sea Grant College Program administers programs in research, education, and extension service. Annually, about 60 projects receive Sea Grant funding in four areas of research in

marine resources development, Pacific basin policy studies, marine technology, and marine environmental assessment in addition to ongoing programs in education and extension service.

The William S. Richardson School of Law at the University of Hawaii at Manoa was founded in 1973. It has a student body of 250 and offers the full range of courses leading to the J.D. degree. The school has developed a particular expertise in Pacific and Asian Legal Studies and has promoted a number of studies and workshops on topics of importance to the Pacific region, including ocean law, Asian comparative law, international trade, and law in traditional societies.

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