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The Law of the Sea: What Lies Ahead?

Edited by
Thomas A. Clingan, Jr.

The Law of the Sea: What Lies Ahead?

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OPENING CEREMONIES

Thomas A. Clingan: It is my great pleasure to call to order the Twentieth Annual Meeting of the Law of the Sea Institute, cosponsored this year, I'm proud to say, by the University of Miami and its Law School. I would first like to introduce to you President Edward T. Foote of the University of Miami.

Edward T. Foote: Good morning. I take particular pleasure in welcoming this conference to a great and fascinating international city. You come from some fifteen to twenty nations, I understand, and some of you may be here for the first time. I note that this is the twentieth conference and I suggest to you that in the twenty years that this conference has been in existence, this city where you now meet has changed from a sleepy, small resort village -- I'm exaggerating only slightly -- to an extraordinarily important international hub of commerce, trade, ideas, culture, not only between North and South America but for the entire world. I welcome you also on behalf of the University of Miami. We're celebrating our sixtieth anniversary this year. We are now the largest private research university in the southeastern United States and, we like to think, one of the best with 1400 full-time faculty members and 13,000 students from 107 countries all over the world. Of those 1400 faculty members approximately one-third are doing international work, including work with the oceans.

I deeply believe that the work that you are doing is of the utmost importance for the future of our planet. I'm a layman -- it's worse, I'm a lawyer -- but you don't have to be trained in the oceans to understand the immense significance of what brings us together. I hope you have an outstanding conference, and I hope very much that you enjoy our town and the hospitality of our university. Welcome again.

Thomas A. Clingan: Thank you very much, Mr. President. And now please meet Mary Doyle, my immediate boss, the dean of the Law School.

Mary Doyle: Imagine being Tom Clingan's immediate boss. I hadn't thought of myself like that before. It is a very special pleasure for me on behalf of the University of Miami School of Law to welcome you to the Twentieth Annual Conference of the Law of the Sea Institute. Our law school is honored to cohost this meeting, bringing together as it does so many distinguished lawyers, scholars, and public officials from across our country and from around the world. It is entirely appropriate for the Institute to convene in Miami, this beautiful and exciting international city located not so much by the sea as in the sea and, in some millenia, under the sea, I think. The University of Miami and its School of Law have established important programs for the study of the oceans, as you may know. The law school has for years provided a range of course offerings in maritime law, including the law of the sea, and we are one of the few law schools in America that offer a graduate degree in ocean and coastal law. Our faculty boasts the presence of Professors Tom Clingan and Bernard Oxman, internationally known through their scholarly work and by their years of important involvement in the negotiations toward adoption of a new Law of the Sea Convention. As you know, both Professors Oxman and Clingan serve on the Executive Board of the Law of the Sea Institute.

Speaking of Ambassador Clingan, I would like to take this chance, on behalf of all the participants in the conference, to commend him for his excellent work in putting together the program. The program covers a wide range of topics of both immediate and enduring interest from piracy -- always fascinating -- to pollution. It is certain to provide a lively and informative few days. I am also glad to note that two of our faculty, Professor Oxman and Professor Irwin Stotzky, will be delivering papers at the conference. And finally, I want to thank Ruth Martin, Executive Administrator of our Law Center, for her efforts in helping to organize this conference. Again, *bienvenidas a Miami*, have a wonderful time here, and a productive and enjoyable meeting.

Thomas Clingan: Thank you very much, Dean Doyle. Now I want to introduce executive director, John P. Craven.

John P. Craven: President Foote, Dean Doyle, Ambassador Clingan, we thank you very much and we're delighted to be in this splendid environment for this twentieth conference. As I look around, I believe that I've had the opportunity to be involved with you all over a period of twenty years, and you all look as young as you did twenty years ago. But each time we have met in a different ocean and a different world, and the reason we have done so is because we have believed, quite correctly, that although there's a unity to the ocean, there's a difference in each ocean of the world. In the past, when we have arrived at our destination, most of us have immediately gone down to the waterfront or to the beachfront to sample the nature of the ocean, to observe the surf. Or in San Francisco to observe the fog, or in Kiel to observe the *meer stille*, the still ocean. We have found that there is a difference in each ocean, and that difference is reflected in the use of each ocean and the problems associated with each ocean. We were tempted to name this conference "Miami Vice," but we changed it to "Miami Nice" because we recognize as we come down here that the problems of the Caribbean are different from the problems elsewhere. Instead of a poem you're going to get an epigram. It summarizes my feeling about the character of the ocean and its relation to the law of the sea.

The sound of the sea
El sonido del mar
Le bruit de la mer
Mira more del mare
Hov grussit
Umi no oto
The sound of the sea
Is the language of the sea
Es el language del mar
La lingua
Hov sprach
The lingo.
And the language of the sea
Is the law of the sea
Es el derecho del mar
Le droit, hov drecht
Il directo, el derecho
Umi no oto kai yoho
Umi no koto ba.

Thomas Clingan: Thank you very much, John. We look forward to this every year, as you know.

Now it's my pleasure to add my words of welcome in my capacity as program chairman as well as presiding officer of the Law of the Sea Institute. I want to say a word or two about both the program and the Institute.

We've tried to develop a program for you that has appeal from a number of different perspectives. Miami's location and its intimate relationship to the sea suggested certain of the topics that we have selected for discussion. In particular, the panels concerning the interdiction of drugs and aliens at sea and violence at sea have relevance to our community as well as to the broader international community. While piracy has in years past conjured up visions of Hollywood extravaganzas, more recent events have caused such issues to re-emerge and capture global attention. Terrorism at sea is no longer merely an historical phenomenon.

A different perspective is brought to bear in our discussion of issues related to the Southern Ocean and the Antarctic. This certainly may seem to be a rather strange topic for us to be discussing in our subtropical climate, but it is a topic of considerable timeliness and relevance for international resource management, and therefore we thought it was important to discuss it here. Interested nations are actively engaged in seeking resolutions to problems of mineral resource management in a manner that will preserve the beneficial aspects of the Antarctic Treaty, and we'll hear more of that later in the program.

Finally I would like to draw attention to the general theme of this meeting, "The Law of the Sea: What Lies Ahead?" In order to address that question, we will have to consider how well the existing legal regime is working and how well we can expect it to work in the future. To this end we will be considering issues related to self-defense in various contexts -- that is, the extent to which the rules of law of the sea affect mobility, naval and otherwise, and hence the balances of power. We will also discuss the managagement of transboundary resources and how well the concept of the exclusive economic zone seems to be evolving. These issues take on a special significance in the light of the legal and economic realities in the wake of the recently completed Third United Nations Law of the Sea Conference and the stark reality of the fact that several important countries, including the United States, are not signatories to the resulting Convention. Our final panel on dispute settlement with and among non-parties to the Convention is designed to focus on such problems. We shall examine what mechanisms, if any, are available to resolve disputes between states who become parties to the Treaty and those who do not.

In all, we feel that the program, while it is intensive, will provide, if not answers, at least the correct questions looming on the horizon that will need our attention in the coming years.

Now a word about the Law of the Sea Institute. As you know, this is the Institute's twentieth annual meeting. Similar meetings have been held in capitals and important cities in many parts of the world in an attempt to incorporate different regional views into our deliberations. The proceedings of this conference will join an imposing list of publications that are recognized as authoritative and stimulating. These meetings and their proceedings represent the major focus of the work of the Institute, to provide an open and varied forum for the elaboration of points of view. The Institute's meetings are inter- disciplinary in nature, as must be obvious from the varied backgrounds of our panel

speakers this week. We believe that this broadly based form of communication is essential to the formulation of workable rules for ocean usage. I hope that those of you for whom this is a first experience with the Institute will find it a valuable one and that you will wish to join us in future activities promoting world public order of the ocean.

In closing, let me also observe that Miami is indeed an appropriate setting for this year's meeting. Not only does southern Florida have a rich maritime tradition but it is a major home port for a number of substantial cruise lines as well as commercial vessels. I certainly must add, on the academic side, that I'm happy to note the University's leadership role. At the University of Miami we have one of the finest marine schools in the country, training marine scientists in a wide variety of disciplines. In addition, the Law School for years has trained lawyers with specialties in the law of the sea and coastal zone management. These are but two of the reasons why the University of Miami can truly hold claim to being a global university. It is thus a distinct pleasure for me to add these words of welcome, and I hope this will be a memorable meeting.

PART I:

INTERDICTION AT SEA

INTRODUCTION

Jonathan Charney
Faculty of Law
Vanderbilt University

Our subject this morning is interdiction at sea. It began in the very origins of the law between nations. Smuggling may not be the oldest profession, but it surely is one of the oldest, and nations and governments have always used interdiction at sea as an attempt to suppress it. The Greek city-states were concerned with piracy in the Mediterranean Sea and, as a result, they had to deal with the question of interdiction at sea. In this century, the United States' aggressive efforts to suppress the smuggling of liquor during Prohibition put it in direct conflict with a number of states. Resulting from these conflicts is a number of interesting cases, treaties, and statutes with which students of the law of the sea are familiar. Today, modern interdiction at sea arises in response to drug smuggling and illegal immigration, major industries in this geographical region.

This panel will discuss interdiction at sea from both the practical and legal perspectives, international and domestic. The desire to increase the effectiveness of interdiction at sea to suppress illegal activities conflicts with a desire to abide by the existing domestic and international law. The conflict between the two raises some interesting issues.

Our discussion this morning will focus on three considerations. One is the practical problem of identifying and interdicting at sea vessels that may be in violation of the law. If interdiction is to be made more effective, the enforcement agencies need much more information and access to the suspected vessels.

Another consideration is how interdiction at sea affects the maintenance of the international interests of states, how it may create some problems with respect to the protection and realization of the traditional freedoms of the seas so important to the United States and other states. How do we reconcile the interest in the freedom of the seas and the interest in suppressing illegal activities?

The third consideration is the interests of the individuals who are the targets of the enforcement actions. They have legitimate legal and personal interests that may be abused by enforcement agencies. May these individuals invoke human rights laws and the freedom of the seas as defenses in prosecutions resulting from interdiction at sea?

Another consideration we will address is the United States Constitution and its Bill of Rights which also protects individuals from various government activities. It may also place restrictions on the activities of government agents in the territory of the United States and outside of it, even when acting on the high seas against foreign vessels and foreign nationalities.

The overarching question to address is: how do we suppress these illegal activities and still conform to applicable domestic and international law? Are changes required, either in the law or in the practice of the enforcement agencies, to successfully meld these two goals?

Our first speaker is Commander Andrew Anderson, the commanding officer of the U.S. Coast Guard cutter *The Dauntless*. He combines practical experience as a Coast Guard officer with extensive field and administrative experience in the enforcement of U.S. law regarding drug

smuggling and illegal immigration. But he is also an attorney with training in the international law of the oceans. He is a graduate of the U.S. Coast Guard Academy and of the University of Miami Law School, where he is currently working on an L.L.M. in ocean and coastal law. He has been stationed on vessels that have shipped out of Hawaii, Florida, and the State of Washington. On the *Dauntless* he is at sea for almost 50 percent of the time and is heavily involved in Coast Guard interdiction efforts.

The remaining three speakers will really serve as commentators on the procedures he will lay out for us. How do those procedures conform to international and domestic law as the other speakers see it? Are changes required?

Our second speaker is Professor Stefan Riesenfeld. In 1940, he published *Protection of Fisheries Under International Law*, a book built upon his S.J.D. thesis at the University of California at Berkeley, so his entry into the law of the sea probably predates all of ours. He has been a professor at Berkeley since 1952 with stints at the State Department and many other law schools. He now divides his time among Berkeley, Hastings, and other institutions throughout the world. He is a major figure in international law, EEC law, and U.S. bankruptcy law. You can count on him to provide us with a novel insight into some very difficult issues.

Our next speaker, Professor Louis Sohn, has had a long and distinguished career in international law and relations at the United Nations, in the U.S. State Department, as Bemis Professor of International Law at Harvard, and now as Woodruff Professor of International Law at the University of Georgia. He was a long-time member of the U.S. delegation to the Third United Nations Conference on the Law of the Sea and provided invaluable service to the delegation and to the entire conference in that capacity. He has written many books and articles in the area of international law and on the law of the sea. I think it will become clear from Professor Sohn's presentation that the international law of the sea and human rights have direct application to the interdiction efforts of coastal states. Perhaps those traditional rules may require some attention in international agreements -- bilateral and multilateral. Surely the law of the sea interests could be dealt with successfully there. I wonder whether in the human rights field arguments as to *jus cogens* will allow the same solution with respect to those issues.

Professor Irwin Stotzky will discuss those issues in more detail from a domestic perspective. He received a law degree from the University of Chicago and is currently a member of the law faculty of the University of Miami. He may be a unique participant in this program today. As far as I know, he has had no prior experience in the law of the sea as such but in a related subject, the litigation arising out of the Haitian immigration into the United States. His perspective on the law applies to interdiction activities both within and without our territory and with regard to nationals and non-nationals. He is a scholar of the U.S. Constitution, particularly with a focus on the Bill of Rights. As you know, in any prosecution this is a critical matter to take into account. He will identify the characteristics of the U.S. Bill of Rights, particularly the Fourth Amendment, which place some restrictions on enforcement powers of the United States government. Those restrictions may also reflect the customary law of human rights and the constitutional requirements of other states.

IN THE WAKE OF THE *DAUNTLESS* THE BACKGROUND AND DEVELOPMENT OF MARITIME INTERDICTION OPERATIONS

Andrew W. Anderson*
Commander, U.S. Coast Guard
Commanding Officer
Coast Guard Cutter *Dauntless*

Since 1973, the government of the United States, aided increasingly by other nations of the Western Hemisphere, has been waging a battle against the flow of illicit drugs, principally marijuana and cocaine, across its borders. Because the vast majority of marijuana and a growing significant percentage of cocaine move by vessels of many different nationalities along the same routes as many legitimate commercial and recreational vessels, efforts to interdict this traffic have had a profound impact on pragmatic applications of the law of the sea. During the same time period, beginning with the 1973 Resolution of the United Nations General Assembly calling for the convening of the Third United Nations Conference on the Law of the Sea, the attention of the world was often focused on international diplomatic efforts to achieve international consensus on new principles for the Law of the Sea from the first session in Caracas in 1974 to the final session in Montego Bay in 1982. Between the events which have occurred on the high seas and in the courtrooms as a result of the interdiction effort and the events of the Third UN Conference on the Law of the Sea, the law of the sea has become an area of law with a new vitality, vibrancy and relevancy. Principles of the law of the sea, previously thought well settled or outdated to the point of mere historic interest, have moved from the area of academic and diplomatic discussion to the arena of the courtroom where they are determinative on issues on guilt or innocence, freedom or incarceration. Principles of the law of the sea such as the right of approach, hot pursuit, freedom of navigation, vessel nationality, law of the flag, and stateless vessels have become as familiar to defense lawyers, prosecutors, and trial judges as to legal scholars and law students. At the same time, these principles have been hotly debated in the halls of Congress in the formulation of new legislation and in the pages of numerous legal periodicals as various commentators have taken positions to contest or support the latest judicial interpretation of a principle of the law of the sea.

In order to fully understand both the principles and the debate, it is necessary to have some understanding of the factual background of the situation, how it developed, and how these principles are interpreted and applied on a day to day basis. The background and context of the various strategic issues of international straits, fisheries, scientific research, deep seabed mining and other areas which were the focus of the Third UN Conference have already been well examined. The background, context and development of high seas interdiction operations, on the other hand, are less well known. In addition to the interesting, often fascinating, frequently complex international legal issues which are involved, there is an element of drama and high adventure. Sudden gunfire erupts. Armed boarding parties swarm aboard vessels. To the prisoners who find themselves in chains on the deck of a vessel and bound for trial and imprisonment, it must often seem that

little has changed since the Caribbean was a highway for pirates, privateers, freebooters, slavers, and rumrunners.

The modern era of maritime interdiction operations may be traced to the first maritime seizure by the Coast Guard Cutter *Dauntless* of two U.S. vessels loaded with a ton and a half of Jamaican marijuana off the Bahamian island of Bimini in March 1973.[1]

One of the outgrowths of the social upheaval which dominated much of American life between the mid-sixties and mid-seventies was the widespread recreational use of marijuana and other controlled substances. In addition to expressing the rebelliousness of American youth and epitomizing their rejection of the mores and values of society, their consumption of marijuana, methaqualone, cocaine, and other drugs was to set events into motion that would profoundly effect the law of the sea as well as the societies of the western world.

Supplied initially by domestic growers, the consumption of marijuana soon exceeded their production capability. Mexico became the primary source of marijuana with the chief routes being by air or land directly over the border into the United States. As the result of tightened border security on both sides of the border coupled with a U.S. financed spraying program in the growing fields themselves, Mexico soon had to be replaced as the chief supplier of marijuana to the U.S. market. Efforts by Jamaican producers to attain this position were defeated by the lack of adequate acreage of remote growing fields coupled with a joint effort by Jamaican and U.S. authorities to quash the Jamaican marijuana production effort while still in its infancy. Today, both Mexico and Jamaica still produce marijuana for export to the American market. However, the percentage of overall market share is small. The chief smuggling routes are by air with some marijuana coming in by land from Mexico and some by small fishing or recreational vessels by sea from Jamaica. Small quantities of marijuana are also imported, typically by air or in small yachts, from other sources such as Hawaii, Thailand, or Belize.

As the result of a number of factors, Colombia has emerged as the principle source of marijuana which is smuggled into the United States. While the criminal organizations of Mexico and Jamaica were reeling from the wholesale destruction of clandestine airfields and crops by joint operations of the Mexican, Jamaican, and American governments, the Colombian producers were enjoying the benefits of a production area which was vast and remote from the control of a government which, at this point, did not fully appreciate the problem as one which had long-range detrimental impact on Colombian society. The mountainous and sparsely populated region of the Guajira Peninsula in northeastern Colombia offered an ideal base of operations. The climate is very conducive to cultivation of marijuana offering a short spring growing season and harvest followed by a longer summer growing season and early fall harvest for an advantageous two crops a year. The rugged mountains and remote beaches had been used for generations to shield the smuggling of consumer goods and other illicit commodities from the authorities. With few paved roads of modern facilities, the "Guajiros" had evolved into a close-knit society motivated to assist marijuana smugglers by the twin factors of extreme poverty and isolation from the authority of the central government.

In addition to an ideal locale for marijuana production and smuggling operations, geography also favored the evolution of the Guajira into the premier source of American marijuana. Miami, with a major international and domestic airport, a major Latin American financial

and business center, a tourist center in which foreign, Spanish-speaking visitors could move about with ease, was little more than a thousand miles by air from the numerous, remote airstrips of the Guajira. With long-range tanks or refueling at one of the numerous islands along the way, an aircraft with a multi-ton load of marijuana could make the trip easily. By sea, it was only a little further to Florida with its 8,400 miles of coastline dotted with secluded coves and cays, riddled with a vast network of residential canals giving easy access to offload points and highways for distribution throughout the United States. Given the many advantages which they enjoyed, it became inevitable that the Colombian underworld, sophisticated enough to be able to conduct complex international financial transactions and smuggling operations, yet ruthless enough to gain a reputation for violence which deterred potential competitors, would gain pre-eminence in illicit marijuana production and distribution. The Guajira soon became the source of the vast majority of marijuana for American domestic consumption and the southeastern United States, especially Florida, the ultimate destination.

The scope of marijuana production and distribution operations is difficult to appreciate. In the Guajira, there are over 21,000 acres under marijuana cultivation with some fields stretching from horizon to horizon like Kansas wheatfields.[2] Like any other agricultural commodity, marijuana harvests are heavily dependent on environmental factors such as rainfall, sunshine, drying conditions, and soil moisture. Although average yield is about one-half metric ton per acre, the harvest varies with the time of the year. The spring crop, harvested in April and May, is usually, due to the shorter growing season, one-quarter to one-half of the fall crop which is harvested in October and November.[3] This represents an annual average harvest of approximately 13,800 metric tons or about thirty million pounds of marijuana. The harvest occurs just after the end of the seasonal rains allows entry into the mountain fields. The marijuana plants are cut, dried, and tied into bundles for transport by pack animal to the *caletas* or processing areas. Here the marijuana is further dried and the stalks and stems removed. When the processing is completed, the result is baled, utilizing either industrial trash compactors or specially modified agricultural bailing machines imported from the United States. The result is wrapped several times in plastic with an outer layer of burlap often marked "Product of Colombia." The bales, weighing anywhere from forty to eighty pounds or more, are taken down the mountainside by pack animal to waiting trucks for transport to either remote airfields or beaches for transfer to a waiting aircraft or vessel [4].

At the height of maritime smuggling operations in the late seventies, the loading sites on the coast of the Guajira evoked images of the beaches of Normandy during World War II. It was not uncommon to see dozens of vessels lined up side by side loading across the beaches from large trucks manned by several hundred stevadores. At the same time, air smuggling operations were proceeding on a similar scale. A survey of just one "airdrop" site in the southwest Bahamas in 1980 revealed the wreckage of thirteen C-47 and C-54 multi-engine former military transport planes as well as numerous light single-engined planes. Nightly, an "airlift" of aircraft of all types rose from the airfields of Mexico, Jamaica, and the Guajira carrying tons of marijuana to the United States. Amazingly, the capacity of this airlift was not sufficient to meet the ever-increasing demand for marijuana in the United States.

In order to meet this demand, it was necessary to increasingly rely upon vessels for transport of bulk marijuana to the United States. Despite their relative slowness, the enormous cargo-carrying capacity of vessels meant great profitability. While the costs of buying a seaworthy vessel, outfitting it with electronic navigation and communications equipment, hiring a master, engineer, and crew could be as high as a million dollars, there were enormous profits to be made on one successful "drug run." On a sixty-five foot "shrimper"-type vessel, a cargo averaging twelve tons and costing only about a million dollars export wholesale in Colombia, or about forty dollars a pound, could easily be resold at import wholesale in the United States at four hundred dollars a pound, meaning a profit of about ten million dollars. Even for crew members without an interest in the cargo, the wages which they received were far in excess of what they could hope to see as fishermen or poor peasant farmers. Moreover, crew members received their money whether the run was successful or not. Should they be caught, they were guaranteed their legal expenses and the care of their families while they were in jail. In the case of a poor peasant from Latin America, the standard of living for him and his family was sometimes better when he was in jail in the United States for drug smuggling than when attempting to eke out an existence on his farm. With such tremendous economic incentives to smuggle marijuana, it is readily apparent that the suppression of such traffic would require significant dis-incentives in the form of a high probability of apprehension followed by an undesirable punishment in order to deter smugglers. This was not to be the case for some time.

The evolution of maritime smugging and interdiction operations can be divided into three distinct phases identified by the type and amount of individuals and resources involved on both sides. The first phase, lasting from 1973 through 1977, was characterized by amateurism and a lack of organization. The typical smuggler was not always a professional criminal. More often than not, he was a college student, amateur yachtsman, or entrepreneur adventurer attempting to make a quick fortune. Lured by the potential for vast profits, he would frequently choose drug smugging as a way to gain the capital necessary for the establishment of legitimate enterprises rather than as a way of life. Instead of groups or "organized" criminals, there were a number of small *ad hoc* groups without any connections to organized crime or to each other. Often, their only bond was a need for a large sum of money to solve a financial problem or to avoid foreclosure on a boat after a bad fishing season. Such groups often found lawyers and airline pilots working with fishermen and farmers. As quickly as they came together for one or two quick "drug runs," they disbanded and returned to their normal lives. There were no formal supply arrangements. The actual pickup trip was often preceded by a trip to purchase the cargo and arrange for the onload. Since the amateur smugglers frequently had no idea how to proceed with arranging for a load, they sometimes lost their money, and their lives, to swindlers. The vessel, once the marijuana was loaded, would simply head back to the United States. Typically, the vessel was a small sailing yacht, cabin cruiser, or fishing vessel which could easily mix with other, legitimate, vessels of the same time upon arrival and slip into port.

The amateurism and lack of organization of the smugglers was not a major handicap to them since the forces of the United States government were in little better condition. The Drug Enforcement Administration, charged with primary responsibility for drug interdiction and enforce-

ment, was organized primarily for land operations. Although they had functioned very well in joint eradication operations with Mexico and Jamaica, their primary concern was for the large quantities of heroin and other "dangerous" drugs coming into the Northeast. They were neither equipped nor trained to deal with high seas interdiction. The Customs Service had few people and small boats assigned to coastal patrol work but lacked the equipment, training, and jurisdiction to conduct high seas interdiction patrols outside Customs Waters. The United States Coast Guard was originally founded in 1790 as an anti-smuggling law enforcement organization and had functioned as such throughout most of the 19th century and during prohibition. For almost forty years, however, the Coast Guard had focused its attention on its duties in World War II, Korea, and Vietnam as an armed force and on the mission of search and rescue. Aside from infrequent fisheries violations and the checking of recreational boats for safety equipment, the Coast Guard had done no real law enforcement in decades. Its personnel were untrained in such work and its resources neither designed nor deployed for the mission. The statutory authority was still there, however, dating back to the very first Congress, and the Coast Guard soon found itself back in the law enforcement business.

Throughout the years 1973 through 1977, the Coast Guard conducted random law enforcement patrols with the inadequate resources which were available. Results for the period were meager with just 74 vessels, and 1.2 million pounds of marijuana seized with 447 arrests. The majority of vessels seized were U.S. (44) with only Panama (10) and Honduras (5) accounting for a significant number of vessels seized.[5] For the first three years of interdiction operations, 1973 through 1975, all vessels seized and virtually all persons arrested were of United States nationality.[6] With an average load of about eight tons and an average crew of six, the seizures of this period were characteristic of the small, enterpreneurial groups of the period. While the Coast Guard was unable to seize sufficient vessels to deter the trade, the inefficiencies inherent in their *ad hoc* smuggling techniques and limited objectives served as a self-limiting factor.

The second phase of the evolution of interdiction operations saw, during the years 1978 through early 1980, a change in the nature of smuggling techniques. Although largely ineffective, the efforts of the Coast Guard had succeeded in disrupting some of the amateur drug smuggling groups and interrupting their cash flow. At the same time, more professional criminal organizations both in the United States and Colombia learned to appreciate both the tremendous profits to be made in large scale marijuana smuggling and the practical and legal difficulties faced by the Coast Guard in attempting to stop them. Increasingly, the amateur adventurers were displaced by highly organized criminal enterprises with larger vessels, sophisticated electronic equipment for navigation and communications, and long-term supply, offload, and distribution setups that rivalled those of the Prohibition era. The Americans who had dominated the smuggling and distribution of marijuana suddenly found themselves competing with Cuban-Americans based in the Southeast. The Colombians who had been raising marijuana and supplying it to others for transportation and introduction also decided to extend their participation and get into transportation and distribution. As a result of the additional competition and expertise, the smugglers significantly increased the sophistication of their operations. Larger vessels such as coastal freighters in the 125- to 225-

foot range became common, and full size ocean-going vessels of 300 feet and upward began to appear.

The impetus for this major increase in scale and participation in smuggling operations was two-fold. First, as mentioned previously, career criminals came to appreciate that marijuana usage was not a passing fad but was a long-term industry with the potential for enormous profits. By properly organizing smuggling as an ongoing criminal enterprise, hiring crews and middlemen and establishing permanent marijuana supply and distribution networks, these profits could be made even greater. With the inherent inefficiencies of the *ad hoc* systems and the damage which they had suffered through enforcement efforts, there was little difficulty in displacing them from a pre-eminent role in the market place. The second impetus behind the surge in smuggling activity was the seeming inability of the government of the United States to effectively deter the smugglers. Even when the Coast Guard managed to seize a smuggling vessel and its load of marijuana, the prospects of getting a prosecution and conviction were slim. These problems could be traced directly to some glaring deficiencies in the state of the law with regard to high seas smuggling. It was discovered that the legislation originally intended to toughen the U.S. stance on drug abuse, the Comprehensive Drug Abuse, Prevention and Control Act of 1970,[7] had inadvertently repealed the provision[8] which made it illegal to unlawfully possess marijuana and other controlled substances aboard vessels of the United States on the high seas. The only crime that anyone could be charged with, regardless of their nationality or the nationality of the vessel, was conspiracy with intent to import a controlled substance into the United States. Not only was the Department of Justice expected to establish beyond a reasonable doubt the knowing and willful participation of the individuals in a conspiracy to smuggle marijuana, but they also had to establish that the participants knew that the destination of the marijuana was the United States. All too often, the evidence, with the exception of the multi-ton load of marijuana, was missing on both counts. While it might strain the credulity of judges today, many crew members simply stated that they believed that the marijuana was destined for the Bahamas and were found innocent. The results were often uneven. If the individuals were unfortunate enough to fall afoul of an undercover DEA agent, his testimony was usually sufficient to convict. This became increasingly rare, however, as smugglers became very leery of anyone not well known to them. In other cases, such as the 1974 seizure of the sailing vessel *Wind's Will* by the cutter *Dauntless*, the evidence and law were found insufficient to convict the crew members but more than adequate to support the forfeiture of the vessel to the United States as well as uphold the statutory authority of the Coast Guard to board and seize the vessel in the first place.[9] With all the attendant difficulties, it should come as no surprise that it was not until the 1975 seizure of the sailing vessel *Royono* [10] by the cutter *Dauntless* that there was a successful prosecution for conspiracy to import marijuana into the United States in the absence of a DEA undercover agent or confession.[11] The case required extensive investigation and use of subpoenaed credit card and long-distance telephone records. The prosecution was also aided by the feeling of the jury that it was difficult to believe that a group of Americans on an American vessel who did all their planning and arranging in the United States were going to all that trouble to smuggle marijuana into the Bahamas where there was little demand for the stuff. While the case was a breakthrough which led to the success-

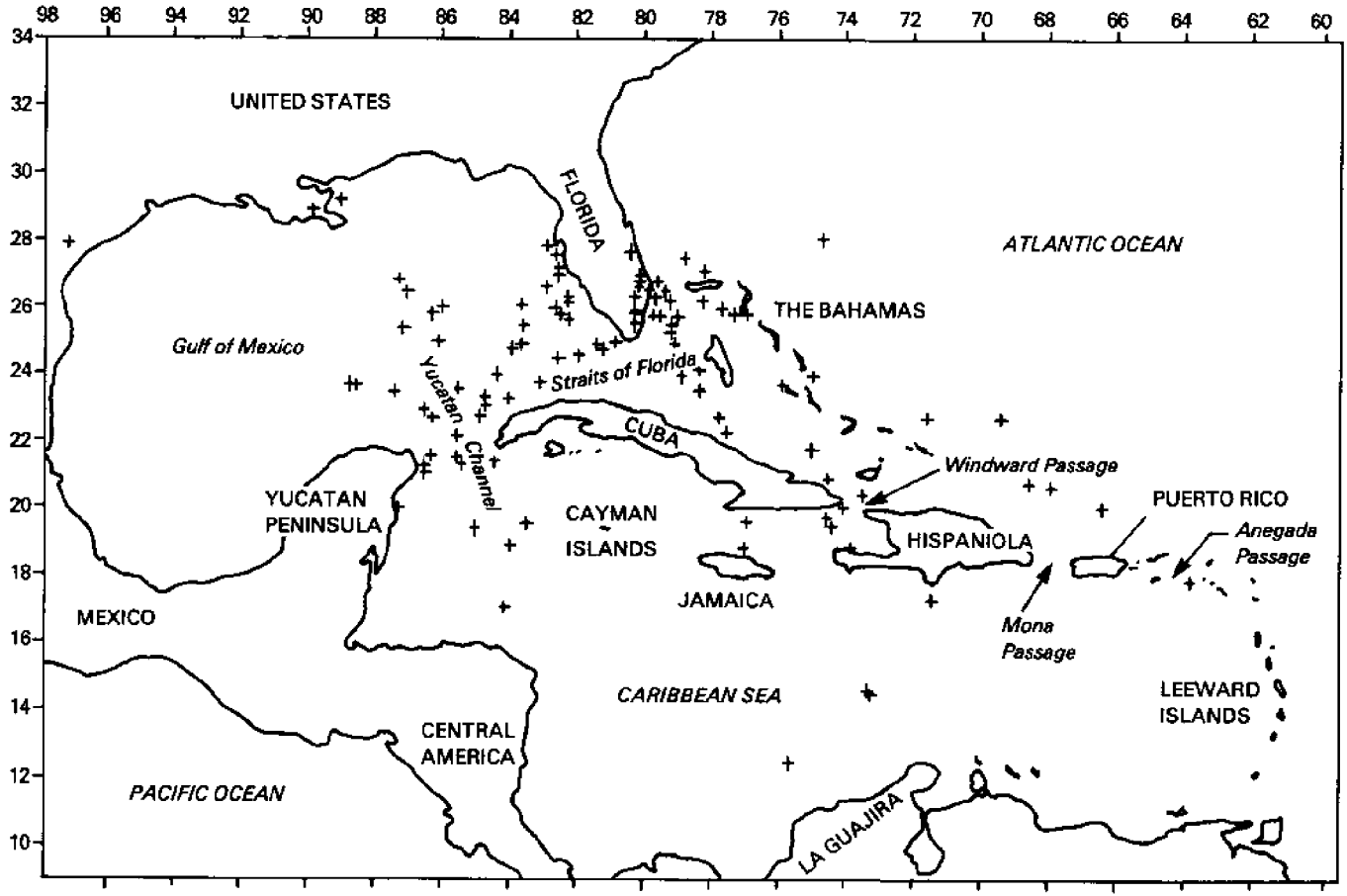
ful prosecution of more Americans on American vessels,[12] drug smugglers were quick to realize their vulnerability. Therefore, 1976 saw for the first time a significant increase in the use of foreign vessels and foreign citizens in maritime smuggling operations.[13] Finding it very difficult to obtain the American Express charges and long-distance telephone records of an Honduran peasant, prosecutors also found juries more than willing to believe that the same peasant could have believed that the Bahamas was the destination of the marijuana. As a result, conspiracy convictions once again became a rare occurrence.

Spurred by the opportunity for enormous profits for the leaders of the criminal enterprises and the prospect of guaranteed wages of ten, twenty, thirty thousand dollars or more for crew members, engineers and masters on the one hand, and facing very little prospect of a successful prosecution and imprisonment, it came as little surprise to officials to see a significant increase in marijuana smuggling, especially by foreign vessels with foreign crews. In 1977, for the first time, more foreign vessels were seized than U.S. vessels which soon became the majority only in seizures of shore contact vessels and other small boat seizures near the coasts.[14] In many cases, the foreign crew members were simply deported without any effort to try them on smuggling charges. Rarely, in cases such as the record-breaking seizure of over fifty tons of marijuana aboard the 300-foot freighter *Night Train* by *Dauntless* in 1977 could a doctrine such as constructive presence through shore contact vessels be used to overcome the necessity to establish a conspiracy and smuggling convictions obtained.[15] More frequent were cases such as the Panamanian freighter *Don Emilio* which was found hovering off the east coast of the United States just outside Customs Waters, hundreds of miles from any other nation and loaded with over thirty-five tons of marijuana. Prosecution was declined for lack of proof of intent of the twenty-four foreign crew members to introduce the marijuana into the United States.[16] In other cases, judges expressed doubts about subject matter jurisdiction over wholly foreign crews aboard foreign or stateless vessels and granted motions to dismiss the case against them for lack of jurisdiction.[17] As a result, the percentage of cases accepted for prosecution declined to less than 50 per cent, with a poor conviction rate even when prosecution was accepted.[18]

Ironically, the increasing problems in obtaining successful prosecutions came at a time when the Coast Guard was enjoying some success in interdicting vessels on the high seas. In 1978, vessel seizures were almost double what they had been for the entire previous five years combined. From the beginning of the second interdiction phase in 1978 through its end in September 1980, the Coast Guard seized some 316 vessels, made over 1,500 arrests, and seized some 6,657,437 pounds of marijuana worth over two billion dollars [19]. New records seem to be made each month for seizures whether by total "bag" or individual vessel. Interestingly, about 15 percent of the vessels seized were found to be "stateless" either in fact or law.[20] While the former was a condition long thought to be impossible by many commentators,[21] the latter was the result of an increasing willingness of some countries to cooperate in the boarding of their vessels. Whenever possible, the Coast Guard sought to verify the claimed nationality of vessels and, in appropriate cases, obtain the consent of the flag state to a boarding.[22] Lying about the true nationality of the vessel not only caused delays and confusion but the attainment of a "stateless" status through the use of one or more nationalities according to convenience was a

desirable outcome in most cases in view of the uncertainty on the part of many judges as to whether subject matter jurisdiction existed in such cases. Although under both international treaty[23] and custom the loss of protection of your flag state was supposed to be a calamitous event to be much avoided, the clouding of jurisdictional issues far outweighed any theoretical disadvantage. By forestalling proper identification of the vessel and interfering with the proper diplomatic procedures to obtain permission to board, delays were created which sometimes took days to sort out, frequently allowing the vessels the opportunity to jettison their cargoes and sometimes escape altogether.

The increased success of the Coast Guard was attributable to two factors. First, they had made significant gains in training and experience of their personnel. After Coast Guard personnel were given specialized courses in maritime law enforcement and a much better idea of what they were looking for, the percentage of smuggling vessels detected and boarded increased significantly. Secondly, new tactics and strategy employed the still limited Coast Guard resources in a manner which greatly increased their efficiency and the probability of an intercept. A vessel loaded with marijuana in Colombia, or Jamaica for that matter, and desiring to make a successful run to the United States finds his problem of evading patrolling cutters compounded by the same geography which had such powerful influence on the history of the Caribbean. As can easily be seen by examining *Map 1*, a geographic plot of Coast Guard vessel seizures in calendar year 1985, a vessel attempting to reach the coast of Florida, the southeastern United States, or the Gulf of Mexico has a limited number of options with regard to vessel routing. The only direct routes are through the Yucatan Channel, between the western tip of Cuba and Mexico's Yucatan Peninsula, the Windward Passage between the eastern tip of Cuba and the island of Hispaniola, and the Mona Passage between eastern Hispaniola and Puerto Rico. The Virgin Passage and the Anegada Passage to the east of the Virgin Islands as well as the passages of the Leeward Islands offer egress from the Caribbean but also add many, often perilous, miles to the journey and lack the numerous banks and cays along the way for refuge and re-supply offered by the more direct routes. The direct routes, and to a lesser extent the indirect routes, require smuggling vessels to transit the passages between the islands which make them vulnerable to interdiction efforts. No matter what evasive maneuvers they employ above or below the "passes," their routes are funnelled through these natural "chokepoints" allowing the Coast Guard to concentrate its limited resources where they can be the most effective. Smuggling vessels are more easily detected in these passages and can be intercepted either in the passage or, as can be seen in *Map 1*, above the passage after detection. The "chokepoint strategy" has additional benefits as well. *Map 1* illustrates the large number of seizures which occur off the coast of southeast Florida. Most of these vessels are small, fast, and carry only a small amount of marijuana which they have received from a larger vessel or a cache in the Bahamas of the cargo of a larger vessel. The interdiction efforts in the chokepoints are far more likely to intercept a "mothership" which is loaded with a large quantity of marijuana, in the twelve to thirty-five ton range, thus taking it all out of circulation at once while it is still far from our coasts. This is far more efficient from both a resource and tactical point of view than trying to intercept the same load after it has been loaded into fifteen or more small, fast vessels which have only a short run into the coast before they can mingle with legitimate fishing and



Map 1: U.S. Coast Guard Vessel Seizures - Calendar Year 1985

recreational traffic and slip into a harbor. Given the finite resources possessed by both the Coast Guard and the Customs Service to deal with maritime smuggling, the only way that they can hope to intercept a significant percentage of smuggled marijuana is by a strategy of high seas interdiction in and around the chokepoints and other natural barriers of the region.

Despite the tremendous increase in the success rate of the Coast Guard in interdicting the marijuana smuggling vessels,[24] the effort had little impact on smuggling patterns overall. Without a major deterrent to their activities, such as a long prision term, the smugglers viewed the loss of a cargo and vessel and detention while awaiting deportation as a minor inconvenience. Such losses were just a cost of doing business which were well within the economic capacity of the smugglers, with their vast profits, to absorb. The inability to successfully prosecute the smugglers often meant that they were flying back to their native countries to pick up another load of marijuana before the Coast Guard vessel which seized them had finished re-fueling and returned to their patrol area. There were numerous instances of crew members on smuggling vessels and Coast Guard cutters recognizing each other on sight from their frequent encounters. Some arrested smugglers were even heard to comment on the relative merits of the food served and detention facilities on the various cutters by which they had been arrested. It was painfully obvious to the Coast Guard and other enforcement agencies that some improvement was urgently required.

In April 1980, events were set into motion that would mark the end of the second phase of the evolution of maritime smuggling and interdiction operations and the beginning of a new phase which would see solutions for many of the problems which had been plaguing the interdiction efforts. During that month, tens of thousands of Cubans began pouring across the Straits of Florida from Mariel to Florida. Jammed into overcrowded fishing vessels, packed into leaking and unseaworthy vessels of all types, they fled Cuba for the often treacherous waters of the Florida Straits. The Coast Guard diverted all the air and surface resources deployed for smuggling interdiction operations to the assistance of the "Marielitos." Additional resources from all over the country rushed to assist in the largest peacetime search and rescue operation in the history of the nation. Through April and into the summer, seizure rates plummeted as interdiction operations came to a virtual standstill.[25] Despite the greatest concentration of Coast Guard resources since World War II, the desperate plight of thousands of refugees prevented any effective effort to interdict the marijuana traffic. It is unknown to what extent the traffic was continuing despite the lack of interdiction patrols. Certainly, hundreds of the shrimp and lobster fishing boats and other vessels known to be used for marijuana smuggling were found to have been diverted to trafficking in refugees. By the end of September, the Mariel Boatlift had virtually ceased, although the large concentration of Coast Guard resources in the Straits of Florida continued.

On 15 September 1980, the Marijuana on the High Seas Act,[26] also known as the Biaggi Act for its principal sponsor and author, went into effect. The legislation was specifically drafted to correct many of the deficiencies and uncertainties which had previously plagued law enforcement efforts. The possession of a controlled substance in the territorial waters, customs waters, or on the high seas by an American citizen on any vessel, by anyone on a vessel of the United States or on a vessel subject to the jurisdiction of the United States, was ex-

pressly prohibited.[27] The statute contains no requirement of proof that the destination of the controlled substance is the United States. Possession with intent to distribute, discernible from the quantity involved, is all that is required. A broad prohibition was also included against possession of a controlled substance intending or knowing that it will be unlawfully imported into the United States by any person, wherever located, including aboard foreign vessels on the high seas.[28] The term "vessel subject to the jurisdiction of the United States" was defined as including ". . . a vessel without nationality, in accordance with paragraph (2) of Article 6 of the Convention on the High seas, 1958".[29] The judicial problems with regard to jurisdictional questions involving stateless and foreign vessels were specifically intended to be solved by this legislation by giving it explicit extra-territorial effect and the maximum jurisdictional application permitted under international law.[30]

Armed with this new legislation, the Coast Guard released the large resources involved in the Mariel Boatlift to the pursuit of maritime drug smugglers. In the remainder of 1980, these forces interdicted some 102 cargoes and 2,102,721 pounds of marijuana in one of the most concentrated periods of seizures in interdiction history.[31] While seizures continued at a record pace, prosecution and conviction rates were also increasing with a prosecution rate of 75 percent and conviction rate of 91 percent in 1980. In 1981, seizures continued at near record levels with both prosecution and conviction rates at over 95 percent.[32] These high success rates continued into the eighties. At last, it appeared that the large scale commitment of resources combined with criminal penalties that made a long prison term a probability were having an impact on smuggling operations. Crew members who had been routinely deported just a few months previously were now being prosecuted, convicted, and sent to prison. Suddenly, many smugglers who had been relatively immune to enforcement efforts began to have second thoughts about alternative careers and being able to enjoy their illicit profits. The availability of crews, particularly the highly sought, experienced Americans, dropped markedly even as the asking price by those willing to run the gauntlet jumped sharply upward. As a result, the demographics of the trade changed again with even more non-U.S. crew members and foreign vessels coming into the industry.

Encouraged by these results, the Coast Guard decided to maintain a high level of resource commitment to high seas interdiction patrols in the Caribbean. The Department of Justice assigned extra prosecutors to handle the increased prosecutions, and some Federal agents began to see headway being made against the flow of drugs.

At the same time as progress was being made against marijuana smuggling on one front, the situation on other fronts in the "Drug Wars" was becoming desperate. Events in Miami were building to an intolerable level. For some time, the streets of Miami had increasingly become the battleground for rival criminal groups. Conflicts between American, Cuban-American, and Colombian criminal elements erupted into car bombings, running gun battles between speeding vehicles, the gunning down by automatic weapons of rival leaders, ritualistic executions, and other scenes reminiscent of Hollywood's version of the gangland wars of Prohibition. The arrival, in 1980 and 1981, of a significant number of hardened criminals direct from the prisons of Fidel Castro as a collateral result of the Mariel Boatlift only served to increase the carnage in Miami. Crimes of all types skyrocketed. At the root of these problems was a problem which had been growing for

some time. It was a problem which was significantly greater than marijuana. The ultimate objective of the urban combat in the streets of Miami was to determine who would control the wealth and power of the lucrative and growing cocaine smuggling industry.

The rapid development of cocaine as the drug of preference for many affluent Americans can be traced to the same rebellious college students and "flower children" of the sixties who popularized the recreational use of marijuana. As they became the successful young professionals, engineers, and enterpreneurs of the late seventies and early eighties, they sought new ways of expressing their attitudes which would combine their new-found affluence and status consciousness with basic anti-establishment behavior. Cocaine, touted as "consciousness expanding and completely safe and non habit-forming" soon became a status symbol among those who wanted to announce that they had "made it" and were "living life in the fast lane." The open possession and consumption of cocaine at parties and discoes, together with 24-karat "cokespoons" and other cocaine paraphernalia, soon became commonplace. Unfortunately, behind the recreational "snorting" [33] of the beautiful people lies a trail of violence, corruption, and death.

Cocaine is extracted from the leaves of the cocoa plant. These leaves have been chewed or brewed into tea by the Indians of the Andes for centuries for nutrition, energy, depression of the appetite, and as a remedy for high-altitude sickness. In concentrated doses, it produces an intoxicating "rush" coupled with a tremendous sense of exhilaration and well being followed by an intense depression. The desire to overcome the depression and to regain the feeling of exhilaration typically results in another ingestion of cocaine. Many people rapidly fall into a pattern of obsessive and habitual use. Doctors, lawyers, judges, airline pilots, and people from all walks of life have fallen prey to the drug. The desire for cocaine often becomes the central theme of life to the exclusion of family, career, and health. One famous television serial actress lost her family, her career, and over eight million dollars through cocaine abuse. Other figures in both the entertainment and professional sports industries have lost not only their fortunes and careers but their lives. Many who do not fall victim to the intoxicating effect of the drug itself are corrupted by the vast sums of money involved. Federal law enforcement officers, local police, judges, bankers, investment advisors, and other people who form the very fabric of society have been corrupted by the enormous sums of money involved in cocaine trafficking.

Originally grown in the Tinga Maria regions of Peru and Bolivia, widespread cultivation of the cocoa plant was also introduced into the jungle regions of southeastern Colombia in the early eighties in order to meet the burgeoning demand for cocaine in the United States. The current acreage under cultivation for production of cocoa leaves is unknown. Many leaves are still grown on in small jungle clearings by Indians or peasant farmers. Others are grown on large "plantations" under the direct control of smuggling rings. The only thing that can be said with certainty is that there has been a tremendous increase in production over the last six or seven years. As cocoa trees planted in the late seventies and early eighties in anticipation of the sustained demand for cocaine have matured and come into production, the quantities of cocaine in the "pipeline" to the United States have become enormous.

The path taken by the cocaine, also known as "snow" or "flake," is a long and complex one. If many of those who are so fond of the white,

crystalline powder fully appreciated what a hash of toxic substances and noxious chemicals was contained therein, perhaps they would not be so anxious to ingest it. Typically, the cocoa leaves are harvested by the Indians or peasant farmers and sold to a middleman who carries out initial processing of the leaves and sells the resultant paste to a cocaine syndicate. Each acre of cocoa trees produces about 400 grams,[34] or just under a pound, of processed cocoa paste. In a typical sale, a farmer will sell 500 kilos of raw cocoa leaves to a middleman for about a dollar a kilo. The leaves are then taken by pack animal to a jungle processing lab which often consists of little more than a pit dug in the jungle floor and lined with plastic. The cocoa leaves are dumped into the pit and mixed with water, kerosene and potassium carbonate. This mixture is then covered and left to sit for one to four days. The extract of this solution is then drained off and mixed with sulphuric acid to form a precipitate. This, in turn, is mixed with potassium permanganate, filtered, mixed with ammonia, and sun dried. The end result of this incredible chemical cocktail is a cocoa paste which is about 20 percent cocaine and the remainder noxious chemicals. The original 500 kilos of cocoa leaves sold by the grower for five hundred dollars have now been processed into about two and a half kilos of cocoa paste worth, depending on market conditions, about two thousand dollars. In some cases, the cocoa paste itself may be smuggled into the United States, but more frequently it is processed by the smuggling syndicate prior to export. Cocoa paste is processed by mixing the paste with ether or acetone. It is then filtered several times, mixed with ethanol, and dried. The result of so processing the two and a half kilos of paste derived from the five hundred kilos of leaves would be about a kilo of pure cocaine. Sold in Colombia to an individual or syndicate for smuggling into the United States, the kilo is worth about $10,000 dollars. After arrival in South Florida, the same kilo will wholesale for $35,000. When cut ten to twenty times and sold at retail in small lots, the kilo will fetch as much as eight hundred thousand dollars. Incredible as it might seem, this means that a standard suitcase full of pure cocaine could be worth approximately forty million dollars in street value.

It is the logistics of procuring and storing the large quantities of volatile chemicals necessary for the various processing stages of making cocaine that often cause serious problems for the drug producers. Availability is often difficult and the chemicals are relatively easy for law enforcement agencies to detect and trace. Nevertheless, spurred by the unrelenting demand for cocaine and the staggering profits to be made, cocaine producers have gone into production on a massive scale. In 1984, for example, the news media reported several raids by Colombian Special Anti-Narcotics Unit (SANU) troops on sophisticated processing labs in the jungles of southeastern Colombia. These facilities featured improved runways capable of handling large cargo planes, sophisticated communications and computer equipment, an electrical generating plant, air-conditioned barracks, and recreation facilities. These raids netted an incredible twenty metric tons of cocaine, an amount equal to half the world's total production just a few years before the raids. Despite heavy losses in these and other raids, cocaine availability was not only unaffected but prices remained low as the result of a long term oversupply! So great was the demand for cocaine and so great the supply that delivery logistics become a problem. The previous methods of smuggling whereby one or two kilos were moved at a time concealed on the bodies or in the luggage of "mules,"

or couriers, traveling by commercial airline were inadequate. Even loading light planes with duffle bags full of cocaine was inadequate. Eventually, the airlift could not keep up with the demand and vessels had to be employed. This came to the attention of the Coast Guard somewhat abruptly in April 1984 when a boarding party from the Cutter *Gallatin* discovered a ton of cocaine hidden in a secret compartment aboard a Canadian sailboat in the Windward Passage. Soon, cocaine seizures in multi-hundred pound lots from vessels of all types became common.

The flood of cocaine, money, corruption, violence, and crime in South Florida attracted national headlines and created a realization amongst the citizenry that prompt action was required. It had become clear that the United States had lost control of its borders and was unable, with the resources available, to seriously impact the flow of marijuana and cocaine into our nation. Any solution to the problem would require the full resources of the federal as well as state and local governments.

Finally, after countless editorials, letters to Congress, and a visit to the White House by a delegation of prominent Miami citizens, things began to happen. Vice President George Bush was appointed to head a special task force to marshal the resources of the federal government to deal with the crisis. Recognizing that the Coast Guard forces assigned to the area were insufficient to deal with the number of smuggling vessels, additional cutters were transferred to Florida ports from other parts of the country. Several older vessels, suitable for use by the Coast Guard, were transferred from the Navy and placed into commission as Coast Guard cutters assigned to the areas as well. Additional personnel were transferred to Florida units. Additional resources and personnel were also brought in to augment the local forces of the U.S. Customs Service and Drug Enforcement Administration. Special emphasis was placed on efforts to share intelligence and coordinate operations among federal agencies and with state and local law enforcement agencies. Recognizing the tremendous potential represented by the vast resources of the Department of Defense, steps were taken to introduce legislation to change obstacles raised by the Posse Comitatus Act[35] to the use of these resources to assist drug interdiction and enforcement operations. Within a short period of time, sophisticated radar and communications equipment were moving from Army and Air Force warehouses into the hands of the Customs Service and DEA. Army and Air Force helicopters provided Customs and DEA personnel with an increased ability to intercept airborne drug shipments. Pilots and aircraft from the Marine Corps and Navy began flying reconnaissance missions to detect smuggling vessels. Specially-formed Coast Guard law enforcement detachments were found aboard every type of Navy vessel from guided missile frigates to battleships and nuclear aircraft carriers criss-crossing the Caribbean to board and seize smuggling vessels.

As a result of the additional intelligence and resources as well as coordinated efforts, major gains were made in seizures of drug smuggling vessels. Although major increases in the seizure rates had been seen in 1978 after the adoption of the "chokepoint" strategy and in 1980 and 1981 following the implementation of increased resource commitments in the wake of the Marijuana on the High Seas Act,[36] following the creation of the Vice President's South Florida Task Force in 1982 and the Posse Comitatus amendments drug seizures again increased significantly. As can be seen from *Table 1*, maritime marijuana seizures of all types in calendar years 1982 through 1985 rose an average of

Table 1

Monthly Summary of Marijuana Seized with Any USCG Involvement Pounds of Marijuana and Number of Seizures

Month	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	Total
Jan	0	0	90,000	15,021	193,265	253,554	249,415	195,051	433,680	218,888	294,662	155,167	36,863	2,135,566
	0	0	6	5	10	9	21	13	36	21	42	26	17	206
Feb	0	0	32,000	344,000	155,234	72,702	141,270	584,625	273,981	64,675	293,470	232,373	110,734	2,305,064
	0	2	2	2	11	4	14	10	27	4	38	32	23	167
Mar	901	7,500	6,013	5,000	202,263	101,861	94,094	318,840	451,347	140,125	378,641	148,872	55,560	1,911,017
	3	2	3	1	19	9	13	21	23	20	41	27	2	184
Apr	1,075	0	8,600	9,450	395,584	178,077	4,358	91,091	379,538	152,770	161,025	144,885	0	1,526,453
	3	0	4	3	12	14	4	13	25	22	34	37	0	171
May	0	0	30,000	89,042	323,962	241,682	88,380	107,611	479,911	118,235	303,697	222,659	0	2,005,179
	0	0	1	8	14	12	2	18	25	17	31	23	0	151
Jun	10,000	0	2,000	34,368	301,152	419,318	30,180	74,933	287,855	348,710	206,080	78,777	0	1,793,373
	1	0	1	8	23	19	3	14	19	25	39	30	0	182
Jul	0	45	9,500	76,500	406,600	178,271	21,640	299,570	301,953	302,397	81,560	111,636	0	1,789,672
	0	1	1	5	21	16	2	21	22	23	27	36	0	175
Aug	15,501	86,280	0	46,000	620,072	838,385	42,323	202,067	207,972	157,904	272,715	310,139	0	2,799,358
	4	1	0	3	19	6	8	18	16	30	27	36	0	168
Sep	2,000	0	12,701	114,046	194,897	66,847	128,196	156,710	163,504	157,863	120,935	218,528	0	1,336,227
	1	1	4	6	15	10	9	11	19	20	24	19	0	139
Oct	14,000	753	91,493	20,400	366,495	7,500	505,113	300,487	116,281	149,473	129,700	351,587	0	2,053,282
	3	2	2	3	15	3	26	22	16	38	34	23	0	187
Nov	0	100	0	94,180	210,462	169,407	588,376	101,981	416,837	391,664	475,284	267,732	0	2,716,023
	0	1	1	5	12	10	31	10	18	40	34	30	0	192
Dec	0	0	65,267	364,140	277,878	508,932	881,036	394,067	206,989	338,224	53,253	147,355	50	3,237,141
	0	0	9	16	7	23	36	24	20	28	46	18	1	228
Tot	43,477	94,678	347,574	1,212,147	3,647,864	3,036,536	2,774,381	2,827,033	3,719,848	2,540,928	2,771,022	2,389,710	203,207	25,608,405
	15	8	34	65	178	135	169	195	266	288	417	337	43	2,150

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55 percent over the average of the three highest previous years. As can be seen from *Table 2*, arrests were also up. One of the greatest increases was in the area of non-vessel seizures such as jettisoned cargoes which indicates that a number of vessel skippers, intimidated by the prospect of arrest and imprisonment, chose to simply dump their cargo at the first prospect of capture and run for it.

It is, of course, extremely difficult to gauge the effectiveness of interdiction efforts simply by using seizure statistics. In the first place, there are no accurate figures as to the tonnage of marijuana or number of vessels which actually are involved in smuggling operations. Although reasonable estimates are available as to the number of acres under cultivation and the approximate yield thereof, a number of factors make this figure unreliable. As is the case with any agricultural commodity, a certain percentage of the crop is lost through spoilage and processing losses. Another quantity is lost to local consumption and local law enforcement seizures. Again, the figures available are unreliable at best. A significant percentage of the Colombian and Jamaican crops, estimated by some authorities to be as high as 30 percent, is diverted to the lucrative markets which also exist in Europe. Again, accurate figures are unavailable. The percentage of marijuana lost to the perils of the sea, such as storms, vessel sinkings, fires, etc. is also unknown, although smuggling vessels are known to have a high incidence of unseaworthiness and frequent breakdowns and casualties. Neither are there any accurate figures available as to the tonnage which is deliberately jettisoned to prevent capture. Without any reasonably accurate estimates as to the quantities available for capture, there is no way that any success rate can be calculated in terms of percentage captured. Similarly, rise and falls in seizure rates must be examined carefully. Does an increase in the number of vessels seized signify an increased efficiency by patrolling units or merely an increase in smuggling traffic? Does a decrease in seizures signify a loss of effectiveness or a significant increase to the point that smuggling traffic is being deterred and actually decreasing? The lack of any accurate statistical base quickly leads to the conclusion that one must view the statistics carefully. Only when all factors, such as level of patrol effort, time of year, geographic area, and other pertinent factors are considered, do the figures have any real significance.

In an attempt to develop a measure of interdiction effectiveness which is not wholly dependent on accurate statistics, some Coast Guard officials have adopted the "economic" theory of measuring interdiction effectiveness. Based on the concept that smugglers are motivated by economic incentives, the theory postulates that smugglers will tend to maintain the *status quo* in terms of tactics, techniques, and methodology in spite of losses to seizure until such time as the losses mount to the point that costs of changing their techniques are outweighed by the losses. In other words, the best measure of interdiction effectiveness is the reaction of the smugglers. If, despite high seizure rates, smugglers maintain business as usual and there are no changes in the price or availability of marijuana, then interdiction efforts are not having the desired effect. If, on the other hand, no matter what the seizure statistics, smugglers are adopting new and costly evasion measures, enduring the disruption costs of changing operating locations and techniques, spending funds for counter-surveillance and intelligence not previously expended and the price or availability of marijuana is affected, then the interdiction efforts are being effective.

Table 2

General Law Enforcement Contraband Seizures by Calendar Year

		73-74	78	79	80	81	82	83	84	85	TOTAL
Seizures by Coast Guard	Cases:	83	146	110	149	173	232	262	366	292	1,813
	Vsls:	74	141	101	134	146	173	170	217	163	1,319
Seizures by Other Agencies w/ CG Assistance	C:	46	32	25	20	22	34	26	51	40	296
	V:	41	32	23	17	21	28	21	38	29	250
Marijuana (lbs) by Coast Guard	C:	1,354,003	3,321,035	2,682,586	2,494,774	2,643,043	3,525,775	2,448,940	2,505,356	2,141,509	23,117,021
	V:	2,232,627	3,281,365	2,576,216	2,451,459	2,558,466	3,460,795	2,374,988	2,445,454	2,039,177	22,420,537
Marijuana (lbs) by Other Agencies w/ CG Assistance	C:	364,173	326,829	353,950	279,607	183,990	194,073	91,988	265,666	177,877	2,238,153
	V:	345,098	326,829	353,900	227,446	183,890	165,173	81,944	258,021	168,012	2,110,313
Cocaine (lbs) by CG		64.00	0.01	0.01	0.00	40.00	9.36	46.20	1,966.92	6,511.67	8,638.17
Cocaine (lbs) by Other Agencies w/ CG Assistance		4.40	0.01	0.00	10.01	96.10	828.01	1,000.01	75.00	735.70	2,749.24
Hashish (lbs) by CG		3,700	0	43,550	564	34,580	0	29,962	1	29,962	113,456
Hashish (lbs) by Other Agencies w/ CG Assistance		6,139	1,100	1	168	0	18	0	0	0	7,426
Hashish Oil (gal) CG or Assist		0	0	0	5	7	0	10	18	1	41
Thai Sticks (lbs) by CG		27,315	0	0	12,623	0	0	0	1	0	39,939
Thais Sticks (lbs) by Other Agencies w/ CG Assistance		0	5,500	251	0	0	0	0	16,000	0	21,751
Dangerous Drugs (doses) by CG		200	500,000	4,186,060	514,584	5,961,009	61,628	100	0	1	11,223,582
Arrests	Total:	591	904	572	728	803	1,076	881	1,038	789	7,382
	CG:	447	776	463	649	737	988	835	922	711	6,528
Value of Contraband $Millions	Total:	659.79	1,354.04	1,916.23	1,992.75	1,802.25	1,536.76	1,235.98	1,601.50	2,844.85	14,935.15
	CG:	526.38	1,207.54	1,701.93	1,793.90	1,663.08	1,236.96	923.78	1,429.92	2,576.60	13,060.09

By any measure of effectiveness, interdiction efforts have been steadily increasing in effectiveness since 1980 and especially since 1982. In addition to significant gains in the raw seizure statistics, the "economic" theory of effectiveness has also shown significant gains. One indication of the increased effectiveness of interdiction operations coupled with the impact of increased probability of incarceration has been the increased tendency of smugglers to resist boardings by the Coast Guard. Thus far, maritime smugglers have not attempted to shoot it out with heavily armed cutters. They have fired at Coast Guard helicopters as well as some state and local maritime enforcement patrols. On the high seas, resistance has taken the form of outright refusal to communicate or stop and there have been several instances of large smuggling vessels attempting to ram Coast Guard cutters, in some cases with resultant damage to the cutter. As a result of this resistance, and after seven years and several hundred seizures without the necessity to do so, the Coast Guard has found it increasingly necessary to use gunfire to stop vessels suspected of smuggling. Significantly, the first necessity for the peacetime use of disabling fire against a vessel on the high seas since Prohibition occurred in October 1980 during the widespread seizures in the wake of the Marijuana on the High Seas Act [37]. To date, the Coast Guard, and in one instance a Navy vessel with a Coast Guard boarding team aboard, has found it necessary to actually fire into a vessel on the high seas to stop it on thirteen occasions. Five of the vessels fired upon were vessel of the United States, four stateless, two Colombian, and one each from the Cayman Islands and the Turks and Caicos.[38] The use of less drastic techniques to stop vessels such as firing warning shots across the bow, dousing the other vessel with a high-pressure water hose, and similar tactics have occurred so frequently that they are not considered unusual and no statistics of such instances are maintained. To date, no one on either side has been killed during these confrontations and only one man injured, a crewman aboard a Colombian vessel injured slightly by shrapnel when his vessel was fired upon as it tried to ran a Coast Guard cutter for the second time. Any use of force is still rare, however, involving only about 1 percent of all vessel seizures and a miniscule percentage of all vessel boardings.

Another indication of the increased effectiveness of interdiction operations has been seen in the drastic change in smuggling techniques. Where smuggling vessels of yesteryear were often characterized by rusty and poorly maintained appearance, many vessels "in the trade" have gone to great lengths to keep their hulls free of rust, their paintwork bright and everything shipshape in Bristol fashion even to the point where some smugglers have taken to wearing the uniforms of merchant marine officers and men. In many cases, where the previous practice was to jam every bale into a vessel that she would take, vessels are found to be carrying smaller loads to reduce losses in the event of a seizure. One of the most significant developments of the past several years has been the widespread use of hidden compartments by smuggling vessels. Utilizing false docks, false bulkheads and overheads, phony sounding tubes and fuel tanks, hidden entrances and concealed access, these hidden compartments have made the job of detecting marijuana and cocaine extremely difficult. The ingenuity sometimes displayed in constructing these hidden compartments has been nothing less than remarkable. No expense has been spared in elaborate and costly conversions of fuel and water tanks and other spaces to the role of hidden compartment. Many of the hidden compartments rival the ingenious tunnels and

other contrivances devised by World War II POW's in their complexity. In the case of the *Xyphias*, a sixty-foot U.S. longliner, a false bilge was built complete with a functioning auxiliary generator, piping, and other appurtenances. Only after the vessel was seized for residue and placed into storage was the hidden compartment discovered when the smugglers attempted to remove the cargo which was still on board! The generator could be lifted up while still running, giving access to the compartment below! In another case, the multi-ton hidden cargo of the eighty-five foot Panamanian tug *Laura Rosa* was discovered by sounding a false fuel tank and then drilling into it to reveal the presence of marijuana. However, it took the Coast Guardsmen three days to find the cleverly concealed entrance to the compartment!

As trying and frustrating as hidden compartments and vessels which refuse to stop until fired upon may be to Coast Guardsmen on interdiction patrols, they are also direct evidence of the increasing effectiveness of the interdiction efforts combined with meaningful penalties for those apprehended.

The success of the Vice Presidential Task Force in mobilizing resources, coordinating efforts, and centralizing intelligence collection in Florida served as a model for a national system. In 1983, the National Narcotics Border Interdiction System (NNBIS), under the Office of the Vice President, came into existence.

NNBIS maintains a series of centers covering all the borders of the United States which are staffed by representatives of the Coast Guard, Customs Service, DEA, Department of Defense, FBI, and national intelligence community as well as by representatives of state law enforcement agencies. These centers coordinate intelligence with regard to smuggling operations, coordinate resource availability, act as a clearing house for coordination of operations, and facilitate joint operations and the exchange of information. Those regional centers which have an area of operation which is primarily maritime are headed by a Coast Guard Flag Officer with a Customs Service Deputy. The others are headed by a Customs Officer with a Coast Guard Deputy. The DEA plays a major role in the staffing, operations, and intelligence collection efforts of all the centers.

In addition to the increased shore-based support from NNBIS and other agencies, the maritime enforcement posture of the Coast Guard has been significantly enhanced by additional assets. A new class of flight-deck-equipped, medium-endurance cutters for high seas patrols is coming into service, and a new class of high-speed coastal patrol boats has joined the inventory. Within the next few months, fast coastal interceptors to combat the small, fast, contact vessels will also be coming on the line. The old, propeller-driven patrol planes have been replaced by jets armed with a variety of sophisticated cameras and airborne sensor systems. New, faster, longer-range helicopters patrol the high seas from the flight decks of cutters on a more frequent basis. Coast Guard communications and intelligence systems are rapidly being brought into the modern era as well. Innovative applications of advanced technology are being brought to bear on the problem, including ultrasonic devices to detect hidden compartments and chemical sensors to detect marijuana and cocaine. Highly advanced radar systems have been mounted on tethered balloons, or aerostats, along the coast and from support vessels, in the chokepoints to detect both air and surface smugglers. New strategies and tactics have also been introduced. In addition to a combination of chokepoint patrols and random patrols of other areas, the Coast Guard has planned, coordinated, and conducted

several massive, multi-unit operations utilizing a maximum effort by not only Coast Guard resources but Navy, Air Force, Army, Marine Corps, Customs, DEA, state, and local resources to saturate smuggling routes or to establish barrier patrols off the coast of Colombia or in the Straits of Florida.

The struggle between drug smugglers and drug interdictors has evolved into a constant competition by each side to counteract the latest tactical, technical, or strategic innovation of the other. The smugglers, despite the geographic limitation imposed on their vessel routing and the resource gains made by the forces assigned to interdiction over the past few years, continue to hold the upper hand. The resources allotted to interdiction and enforcement efforts have been determined by the levels necessary to respond to political pressure rather than the level necessary to attain an effective interdiction level. This paucity of resources has been the result of ongoing efforts by the Office of Management and Budget to curtail spending in light of growing federal deficits. The advent of Gramm-Rudman-Hollings has further hampered effective interdiction by requiring the tying up of new resources due to a cut in funds for fuel or repairs and maintenance. The smugglers also retain the initiative in most cases by knowing the who, what, when, where, and how of smuggling operations while the Coast Guard, DEA, and Customs are forced to spread their resources all over possible smuggling routes. The successes of the past several years, however, have made it clear that, given adequate resource levels, interdiction operations can be sufficiently effective to raise the cost of doing business above the price that most smugglers are willing to pay. Effective interdiction on the high seas, at the land borders, and in the air coupled with other strategic elements of the anti-drug campaign such as user education, crop replacement and eradication, and abuse prevention can put up the smugglers out of business.

To the mariner who has been transiting the Caribbean on a regular basis over the past several years, the impact of drug interdiction operations on vessel traffic of all types is very noticeable. It is not unusual, for example, to encounter vessels at night which are displaying either false navigation lights or no navigation lights at all. These vessels may be smugglers or they may be patrolling cutters. Ships are routinely overflown by Coast Guard, Navy, Customs, and DEA reconnaissance patrols as well as by counter-surveillance flights of smuggling syndicates. Both night and day, it has become a regular occurrence for vessels of all types to be approached by a patrolling cutter. In the past decade, the enforcement and interdiction missions assigned to patrolling cutters have expanded significantly. In addition to the interdiction of drugs ranging from marijuana and cocaine to hashish, hashish oil, thai sticks, methaqualone and heroin, cutters are involved in the enforcement of the 200-mile Fisheries Conservation Zone,[39] have interdicted armed expeditions directed against Cuba and Haiti, have recovered stolen boats, and discovered wanted fugitives among crews. Since the fall of 1981, the Coast Guard has been also heavily involved in the interdiction of illegal migrants bound for the United States. As can be seen in *Table 3*, these migrants came from Asia, Latin America, and the Caribbean littoral, with Haiti as the primary country of origin. These aliens were all interdicted within customs waters or on the high seas on U.S. vessels or Haitian vessels boarded with the consent of the Haitian government.

Because of the wide variety of enforcement and interdiction missions carried out by Coast Guard cutters in addition to their safety

Table 3

Illegal Migrants Interdicted by the Coast Guard by Migrant Nationality

Nationality	1981	1982	1983	1984	1985	Total
Bahamas				6	9	15
Bangladesh			25	23	14	62
Bermuda			1			1
Chile					7	7
China					12	12
Colombia			12		7	19
Cuba			47	19	43	109
Dominican Republic			76	146	132	354
Guyana				1		1
Haiti	187	193	762	2942	2411	6495
India			64	56	2	122
Iran			2			2
Jamaica	5		10	18	6	39
Mexico		(To be added later)				
Pakistan			12	2	2	16
Peru			1			1
Sri Lanka					13	13
United Kingdom			1			1
Uruguay			1			1
Venezuela			1			1
Total:	192	193	1015	3213	2658	7271

Illegal Haitian Migrants Interdicted by the Coast Guard by Month

Month	1981	1982	1983	1984	1985	Total
January		129	0	25	104	258
February		0	5	318	34	357
March		21	17	84	37	159
April		0	145	75	750	970
May		13	41	134	197	385
June		0	158	191	25	374
July		8	90	43	0	141
August		0	8	58	288	354
September		0	25	380	652	1057
October	169	0	140	141	44	494
November	18	0	55	953	32	1058
December	0	22	78	540	248	888
Total:	187	193	762	2942	2411	6495

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and documentation inspections of vessels of the United States, Coast Guard cutters find it necessary to approach and identify a significant number of the vessels which they encounter. Dozens of times each day, Coast Guard cutters exercise the right of a warship under customary international law to approach and identify a vessel on the high seas for the purpose of establishing its identity and nationality.[40] While the vessel is approached closely enough for a detailed visual scrutiny, care is taken not to impede the passage or safety of the other vessel. The cutter is maneuvered in such a manner as to allow the other vessel to maintain its course and speed and to eliminate any risk of collision. Frequently, after visually determining the route, identity, homeport, vessel type, and nationality of the other vessel, the cutter will break off and return to patrol. It is not unusual, however, for the cutter to establish radio communications with the other vessel to obtain additional information such as the last port of call, next port of call, cargo, official number, and other pertinent information as to the voyage of the other vessel. This procedure is viewed as a reasonable extension of the right of approach although foreign vessels are under no compulsion to answer under customary international law beyond their identity and nationality. The vast majority of vessels do so voluntarily, however, to the point that masters who regularly transit waters patrolled by the Coast Guard know the routine as well as the Coast Guard and reel off the desired information after the first question without further prompting. While the requirement under international law for a vessel to do more than show her flag is questionable, failure to communicate and provide information would be such a departure from the norm as to be a proper factor for inclusion in a determination as to whether reasonable suspicion exists that a vessel is engaged in illicit activity.[41]

If, following the obtaining of additional information, the cutter's commanding officer should desire to board the other vessel, his course of action is governed by the nationality of the other vessel. If the other vessel is U.S., it has long been the position of the Coast Guard, well supported by the courts except in rare instances,[42] that vessels of the United States are subject to the jurisdiction of the Coast Guard at any location and may be boarded without suspicion to enforce applicable federal laws.[43] Therefore, if the other vessel is a vessel of the United States, the Coast Guard will simply order it to heave to and prepare to be boarded. It is not a request but a command. If, on the other hand, the other vessel is not a vessel of the United States, then the cutter must proceed in accordance with international law. The first step is to attempt to obtain the consent of the master of the other vessel to a boarding. It is the position of the Coast Guard that such a boarding is not violative of international law since the master may voluntarily waive his right to proceed without interference and allow the Coast Guard to come aboard. The scope of such a consensual boarding by the Coast Guard is limited only by the extent to which the master permits the examination of his vessel documents, holds, and other parts of the vessel.[44] In practice, the vast majority of masters readily consent to such a boarding, sometimes placing conditions on the boarding such as continuing to proceed on their voyage while the boarding is in progress. So rare is refusal to allow a consensual boarding that a cogent argument can be made that failure to consent could be a factor in determining whether reasonable suspicion exists that the vessel is engaged in illicit activity. In reality, however, such refusal rarely occurs even when the vessel is engaged in

smuggling. It is not unusual for a master of a smuggling vessel to agree to a consensual boarding, permit the opening of his holds, the sounding of tanks, and other detailed search procedures which ultimately result in the discovery of marijuana or cocaine. The ready consent becomes part of his defense by buttressing his argument that he did not know the drugs were aboard, otherwise, why would he have consented?

Should, however, the master refuse to allow a consensual boarding of his vessel or refuse to respond to efforts to communicate, the captain of the cutter must decide whether to pursue the matter any further. Should he decide to continue his efforts to board, the almost inevitable result, especially in cases of refusal to communicate, he must communicate with his headquarters, providing them with the details of the situation, the description of the vessel and its full particulars, his observations, and the reasons why he desires to board the vessel. As the request works its way up the chain of command, it is reviewed at each level. Frequently, the cutter is contacted and asked for additional information. In Washington, D.C., the request is reviewed, in accordance with Presidential Directive 27, with representatives from the Departments of Justice and State. Upon agreement that the circumstances warrant pursuing the matter, the State Department forwards, via the appropriate American Embassy, a request to the government under which the vessel claimed registry for a verification of the nationality of the vessel and a request to board the vessel.[45] Typically, the response of the flag-state either confirms the registry of the vessel and grants permission to board or denies the registry of a vessel as claimed. Rarely, if the flag state is unable to quickly access its records, permission to board may be given without confirmation or denial of registry on the basis that the permission is valid if the vessel is registered as claimed and unnecessary if it is not.[46]

If the flag-state confirms the registry of the vessel and grants permission to board, the cutter so informs the master and may board the vessel without violation of international law.[47] If the other nation denies the registry of the vessel as claimed, it is declared stateless without any further effort to ascertain its true nationality, if any, and boarded as a vessel subject to the jurisdiction of the United States under U.S. law.[48]

Should the other vessel, after proper grounds for a boarding are established, refuse to heave to for a boarding, procedures are initiated to stop the vessel by the use of fire hoses and other uses of non-deadly force, the firing of shots across the bow and, if necessary, to fire into the vessel to disable it. These procedures are designed to ensure full compliance with international law and to minimize the risk of injury to any person on board the other vessel.

Once aboard a foreign vessel, the boarding proceeds within the scope of the consent given. Nations typically grant broad permission to examine the vessel and take appropriate action based upon what is found. As discussed *supra*, masters also routinely grant broad permission to examine the vessel. If marijuana, cocaine, or other violations of U.S. law are discovered aboard the foreign vessel, additional procedures and communications are initiated, especially in the case of a consensual boarding where the PD 27 process has not been utilized, prior to the seizure of the vessel and the arrest of those on board in order to ensure compliance with international law. Ultimately, the prisoners are removed to the Coast Guard cutter and transported to the United States for trial.

Since the beginning of interdiction operations, the law of the sea and international law have been as important to the outcome of maritime drug smuggling prosecutions as constitutional law and criminal procedure. Often the issues of domestic and international law have been so intertwined as to be indistinguishable either as the result of Congress incorporating international legal definitions into U.S. criminal statutes[49] or where it is necessary to interpret an international treaty or customary international law to determine their impact on domestic legal issues.[50] Judges have found themselves analyzing the right of approach and the elements of hot pursuit,[51] determining whether *Dauntless* violated United States or international law by seizing a U.S. vessel in Haitian waters,[52] or whether a vessel registered in both the United States and Panama is a vessel of the United States or a Panamanian vessel.[53] The Marijuana on the High Seas Act generated a series of cases dealing with such issues as extra-territorial jurisidiction over non-U.S. vessels on the high seas.[54] Prior to the adoption of current boarding procedures and the advent of international cooperation, high seas boardings of foreign vessels resulted in cases finding that Article 22 of the Convention on the High Seas was not enforceable where the vessel boarded was registered in a country which had not ratified the treaty,[55] was not applicable to stateless vessels[56] and was not self-executing and gave no rights to individuals even when the flag-state had ratified the treaty.[57] Some concepts, previously thought to have been only of historic interest, such as a "hovering" vessel[58] and constructive presence by shore contact[59] were also dusted off and given a new validity.

There can be little doubt that the future will continue to see the law of the sea playing a major role in the case law arising from maritime smuggling prosecutions. There is also a growing trend that, rather than merely interpreting existing treaties and customary international law, these cases will have a strong influence on the development of the law of the sea itself. A number of opinions have put forth persuasive arguments that maritime drug smuggling is a threat to the national security of the United States.[60] The Reagan administration, citing the use of drug trafficking by Colombia's M-19 guerrillas as a means of purchasing arms and assistance to drug traffickers by Cuba and Nicaragua in hope of destabilizing American society, has declared drug smuggling a threat to our national security.[61] This may well result in efforts to further expand the extra-territorial jurisdiction of the United States to combat maritime drug smuggling. The influence of maritime smuggling problems can be clearly seen in the United Nations Convention on the Law of the Sea (UNCLOS).[62] Various provisions of UNCLOS specifically address smuggling such as declaring it inconsistent with the exercise of innocent passage,[63] and specifically requiring all states to cooperate in the suppression of maritime trafficking and implicitly ratifying the current practice of the United States in obtaining permission of the flag-state to board its vessels suspected of smuggling.[64] The permissible acts of interference with a vessel on the high seas by a warship have also been broadened to include suspicion that the other vessel is without nationality.[65]

A clear example of an innovative application of international law resulting from interdiction operations can be seen in *United States* v. *Romero-Galue*.[66] Holding that the PD 27 process described *supra* of obtaining the permission of the flag-state to board a vessel is a "special arrangement" within the meaning Title 19, U.S. Code, Sections 1401(j) and 1709(c), the Eleventh Circuit further held that such a

special arrangement triggered the definition of "customs waters" within those sections. The result of this interpretation was that the foreign crew members aboard the Panamanian vessel *El Don* could be prosecuted under Title 21, U.S. Code, Section 955a(c) for possession of marijuana within the customs waters of the United States rather than the more difficult proof standard of intent to import or knowing that it would be imported into the United States otherwise required when a foreign vessel is involved.[67] This undoubtedly came as a surprise to the crew members since, at the time of their arrest, they were on the Misteriosa Bank many hundreds of miles from the United States. Needless to say, this concept has gained a lot of popularity with both Coast Guard boarding officers and federal prosecutors and it is being increasingly used in maritime smuggling prosecutions.[68] Based on the concept that "nothing in international law prohibits two nations from entering into a treaty ... to extend the customs waters and the reach of the domestic law of one of the nations into the high seas,"[69] if the concept is adopted by the other circuits, it should become one of the mainstays of the enforcement process. Interestingly, in *dictum* in this same case, the Eleventh Circuit also indicated that it would support the extension of jurisdiction over foreign vessels based on the concept of the protective principle and narcotics trafficking as a threat to the national security of the United States.[70]

The problem of maritime drug smuggling has had a profound impact on jurisdictional concepts. Coupled with the jurisdictional developments driven by the global terrorist situation, it seems probable that maritime smuggling will cause major revisions to the traditional concepts of universal jurisdiction. Indeed, it seems likely that maritime smuggling itself will become a crime of universal jurisdiction within the next few years. While "crimes of universal interest" have traditionally been limited to piracy and slavery, the basis of such universal jurisdiction is stated as "the common interest of all states in protecting commerce and navigation on the high seas".[71] Although international narcotics trafficking is often described as "almost" of universal interest, it is typically found to be just shy of customary international law or universal participation in international agreement thought to be necessary for universal jurisdiction.[72] Traditional concepts may no longer be valid, however. Universal jurisdiction is, after all, only a concept which allows any nation to assert jurisdiction over a crime once the nation obtains personal jurisdiction over the perpetrator.[73] In fact, such jurisdiction may be said to exist in the case of aircraft hijackers as the result of multilateral treaties dealing with this problem.[74] The United States has asserted jurisdiction by law in cases of taking U.S. citizens hostage no matter where such acts occur[75] and has claimed virtual universal jurisdiction against acts of sabotage against any civil aircraft (including foreign aircraft outside the United States) occurring anywhere if the offender is later found in the United States.[76] In asserting jurisdiction of hostage crimes where the victim is an American, the United States abandoned its long standing rejection of the passive personality theory of extra-territorial jurisdiction.[77]

In holding that "international law permits any nation to subject stateless vessels on the high seas to its jurisdiction,"[78] the Eleventh Circuit has certainly found that universal jurisdiction exists with regard to maritime drug smuggling at least in the case of stateless vessels. It would also appear that Article 36(iv) (2) of the Single Convention on Narcotics[79] which provides for prosecution of drug of-

fenders by nations in whose territory they are found when extradition is not possible creates a type of universal jurisdiction for maritime drug smuggling in some cases as well. While the Single Convention has not been the subject of "universal" participation, it is one of the most widely adopted treaties in the world with 136 countries which have ratified it.[80] Given the more flexible approach to universal jurisdiction being adopted by the nations of the world in response to global terrorism, the growing trend to treat maritime smuggling as a threat to national security and widespread, virtually universal, ratification of international agreements calling for all states to cooperate in the suppression of illicit traffic in narcotic and psychotropic drugs, a cogent argument may be made that universal jurisdiction already exists.

While many of the various decisions of the federal courts which have dealt with the law of the sea have been criticized by academicians and commentators as violative of international law, it is interesting to note that the various claims of the United States to jurisdiction over vessels on the high seas have not met resistance from other nations. To the contrary, one of the most heartening developments in the past several years has been a growing international cooperative effort to combat maritime drug smuggling. Many of the early problems and criticisms have been rendered moot by this cooperative effort. No nation has objected to the extension of United States jurisdiction to stateless vessels on the high seas, to the trial of their nationals in the courts of the United States for maritime smuggling when arrested on foreign or stateless vessels on the high seas, nor to the interrogation and consensual boarding of its vessels by patrolling cutters.[81] Indeed, many nations actively cooperate with U.S. efforts to interdict maritime smuggling. The list of nations which have permitted Coast Guard cutters to board their vessels on the high seas for the purposes of conducting drug interdictions includes the Bahamas, Colombia, Haiti, Panama, France, Spain, Jamaica, Denmark, the Netherlands, Venezuela, Honduras, and Canada.[82] The United Kingdom has done even more by granting the United States broad permission to board its flag vessels, including those of such nations as Grand Cayman, Turks and Caicos, etc. for whose international relations the United Kingdom is responsible.[83] Based on the anti-liquor smuggling treaties of the Prohibition era, any British flag vessel within the Caribbean Sea or within 150 miles of the Atlantic coast of the United States may be boarded without the specific permission of the British government when there is reason to believe that the vessel is engaged in smuggling.[84] As illustrated in *Table 4*, to date some thirty-two vessels have been seized under this agreement. Similar agreements with Panama, Honduras, the Bahamas, Venezuela and Colombia would greatly facilitate interdiction operations. With 70 percent of all vessels seized being American vessels and another 10 percent being stateless, these five nations, together with the United Kingdom, account for 90 percent of all foreign vessels seized for maritime smuggling.[85]

Even without such agreements, international cooperation is at an all time high. All six of the major flag-states of drug smuggling vessels actively assist United States interdiction efforts. Registry checks and permission to board are granted routinely. No objections to U.S. interdiction efforts or prosecution have been voiced. In addition, there has been close cooperation between the various nations. The U.S. Coast Guard has conducted joint interdiction operations on a regular basis with the Bahamas, Jamaica, Colombia, Venezuela, the Netherlands, Antilles, Haiti, and other nations of the Caribbean littoral. The

Table 4

Vessel Seizures Under the US/UK Agreement

Vessel Name	Flag	Date Seized	MJ Pounds	Arrests	Seizing Cutter
MISTERIOSO	UK	1/04/82	32,000	9	CGC DEPENDABLE
JIM HAWKINS	CJ	1/13/82	14,270	4	CGC TAMAROA
TIBERON	UK	1/31/82	19,900	6	CGC CAPE GULL
OUR WAY	UK	3/06/82	1,400	1	CG GROUP CAPE HATTERAS
DAMOCLES	CJ	3/18/82	56,000	22	CGC COURAGEOUS
MISFIT	UK	4/01/82	70,000	4	CGC INGHAM
FIESTA	UK	8/09/82	12,000	2	CGC CAPE FAIRWEATHER
LAGO IZABAL	CJ	11/28/82	32,080	9	CGC CAPE UPRIGHT
MY LORD	UK	12/02/82	10,000	8	CGC ESCAPE
AFCO VI	UK	5/13/83	28,850	7	CGC DURABLE
OCEAN OVERTURE	UK	6/22/83	5,050	2	GCG POINT JACKSON
HETTY	UK	11/02/83	29,961 (hashish)	4	CGC VIGOROUS
NARWAL	UK	11/04/83	29,900	16	CGC DALLAS
MAXIMA	UK	11/24/83	3,400	3	CGC CAPE KNOX
MARIO E	UK	12/11/83	32,760	15	CGC VIGILANT
NEPTUNE	CJ	12/22/83	85,500	11	CGC UTE
VERA	UK	2/07/84	30,000	7	CGC DECISIVE
ELIZABETH	UK	2/27/84	21,700	14	CGC ALERT
MRS WHITE	UK	6/03/84	33,750	8	CGC LIPAN
STECARIKA	CJ	6/19/84	24,430	15	CGC DALLAS
CRAMAY	TK	6/19/84	35,080	4	CGC DAUNTLESS
MIRIAM C	UK	8/18/84	30,000	16	CGC COURAGEOUS
MARGIE	UK	9/25/84	8,175	3	CGC EVERGREEN
YEMAYA	UK	9/28/84	3,060	3	CGC UTE
CAPTAIN JOE	TK	11/10/84	20,000	4	CGC BIBB
MAR ANTIL	UK	11/23/84	70,950	13	LEDET/USS HERCULES
PRINCESS	UK	11/27/84	34,900	2	CGC GENTIAN
EMANUEL II	CJ	1/28/85	659 (coke)	9	CGC VIGILANT
CRUZ DEL SUR	CJ	3/03/85	3	16	CGC MESQUITE
CHATA ONE	CJ	3/09/85	38,290	11	CGC UTE
MACVIE	UK	8/20/85	51,280	9	CGC PT SAL
ISLAND VENTURER	CJ	8/20/85(seized with MACVIE)			CGANT VENICE
Total cases: 32	Total pounds:		834,728 marijuana 29,961 hashish 659 cocaine		Total arrests: 257

G-OLE
Data thru: 31 Dec 85
Revised: 29 Jan 86

exchange of information, intelligence, training, logistical support, and liaison officers is occurring on a regular basis. Over the next several years, these cooperative efforts are expected to grow into a closely knit international system to combat all types of illicit traffic in narcotics and psychotropic drugs.

In the years since 1973, great progress has been made. While there still remains much to do, the United States is no longer struggling alone. The international community is coming together to deal with the problem. With some additional resources, the continued expansion of jurisdictional concepts, and a continued international cooperative effort, the Caribbean drug smuggler may soon fade into oblivion much as the rogues and freebooters of history who preceded him.

NOTES

* The opinions and comments contained herein are those of the author and are not to be construed as those of the U.S. Coast Guard or any other agency of the United States Government.

1. For the facts and legal issues involved in that case, *see*, United States v. Winter, 509 F.2d 957 (5th Cir. 1975).
2. Figures supplied by the Seventh Coast Guard District Intelligence and Law Enforcement Branch.
3. *Ibid.*
4. *Ibid.*
5. United States Coast Guard, *General Law Enforcement Interdiction Statistics* (1986). (hereinafter cited as *Statistics*).
6. *Ibid.*
7. P.L. 91-513, 84 Stat. 1236 (1970); *See*, 21 U.S.C. Sec. 801 *et. seq.*
8. 21 U.S.C. Sec. 184.
9. United States v. One 43 Foot Sailing Vessel "Wind's Will," 405 F. Supp. 879 (S.D. Fla. 1975).
10. United States v. Hillstrom, 533 F.2d 209 (5th Cir. 1976).
11. *See*, *e.g.*, United States v. Odom, 526 F.2d 339 (5th Cir. 1976).
12. *See*, *e.g.*, United States v. Warren, 578 F.2d 1058 (5th Cir. 1978).
13. *See generally*, *Statistics*, note 5, *supra.*
14. *Ibid.*
15. *See*, United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978).
16. *Hearings Before the Subcommittee on Coast Guard and Navigation of the Committee on Merchant Marine and Fisheries*, House of Representatives, 96th Congress, 1st Sess., pm H.R. 2538 at 64 (hereinafter cited as *Hearings*).
17. *See*, *e.g.*, United States v. Cortes, 588 F.2d 106 (5th Cir. 1979).
18. *Hearings*, note 16, *supra*, at 65.
19. *Statistics*, note 5, *supra*, at 4.
20. Some vessels simply are unregistered. Other lose the protection of their flag-state by falsely claiming another nationality. *See*, Article 6, Convention on the High Seas, 13 U.S.T. 2312, TIAS 5520, 450 U.N.T.S. 82 (hereinafter cited as COHS).
21. *See*, *e.g.*, P. De Tremont, De La Nationalite Des Navires 11 (1907).
22. United States v. Rubies, 612 F.2d 397 (9th Cir. 1979).
23. *See*, note 20, *supra.*
24. *Statistics*, note 5, *supra*, at 4.
25. *See*, Figure 2.
26. P.L. 96-356, 94 Stat. 1159 (1980), 21 U.S.C. Sec. 955a.

27. 21 U.S.C. Secs. 955a(a), 955a(b), 955a(c).
28. 21 U.S.C. Sec. 955a(d).
29. 21 U.S.C. Sec. 955a(2)(d).
30. *See, e.g.*, S. Rep. No. 96-855, 96th Cong., 2d Sess. 2, 1980 U.S. Code, Cong. and Admin. News 5214.
31. *See*, Figure 2.
32. Figures supplied by Seventh Coast Guard District Legal Office.
33. The term "snorting" is derived from one of the most common methods of ingesting cocaine by inhaling it into a nostril.
34. A gram is one-thousandth of a kilogram or about .0022046 pounds. Thus, about one hundred grams is about 3.5 ounces.
35. P.L. 97-86, 18 U.S.C. Sec. 1385 (1982).
36. 21 U.S.C. Para. 955a.
37. On 10 October 1980, the United States fishing vessel *Thomas E.* was fired on by the Coast Guard Cutter *Point Francis* after refusing to stop near the Bahamas. After being hit repeatedly by .50 caliber machine gun fire, the vessel stopped. A boarding revealed the presence of several tons of marijuana.
38. *Statistics*, note 5, *supra*, at 14.
39. *See*, Magnuson Fisheries Conservation and Management Act, 16 U.S.C. secs. 1801, 1811 (1976).
40. *See, e.g.*, H.A. Smith, *The Law and Custom of the Sea*, 64-65 (1959); *See also*, United States v. Rubies, note 22, *supra*, at 402-403.
41. *See, e.g.*, C. Colombos, *The International Law of the Sea* 32 (1967).
42. *See, e.g.*, United States v. Piner, 608 F.2d 358 (9th Cir. 1979).
43. *See, e.g.*, United States v. Hilton, 619 F.2d 927 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980); United States v. Hillstrom, 533 F.2d 209 (5th Cir.), *cert. denied*, 429 U.S. 1035 (1977).
44. *See, e.g.*, United States v. Williams, 617 F.2d 1063, 1090 (5th Cir. 1980).
45. For a description of this process, *See, Hearings*, note 16, *supra*, at 37.
46. *See, e.g.*, United States v. Crews, 605 F. Supp. 730 (S.D. Fla. 1985).
47. *See*, Sohn, *Interdiction on Vessels on the High Seas*, 18 Int. Law 411, 418 (1984).
48. 21 U.S.C. Sec 955a(@)(d); *See also*, United States v. Marino-Garcia, 679 F.2d 1373, 1383 (11th Cir. 1982).
49. *See*, 21 U.S.C. Sec. 955a(@)(d).
50. *See, e.g.*, United States v. Postal, 589 F.2d 862, 869-873 (5th Cir. 1979) interpreting the Convention on the high seas and assessing the impact of a violation of Article 22 of the Convention on a domestic criminal prosecution.
51. *Ibid.*
52. United States v. Conroy, 589 F.2d 1258 (5th Cir.) *cert. denied*, 444 U.S. 831 (1979).
53. United States v. Correa, 757 F.2d 1677 (11th Cir. 1985).
54. For a discussion of these issues, *See*, United States v. Marino-Garcia, note 48, *supra*; Anderson, *Jurisdiction Over Stateless Vessels on the High Seas; An Appraisal Under Domestic and International Law*, 13 J. Maritime Law and Commerce 323 (1982), Blakesly, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. Crim. Law & Criminology 1109 (1982).
55. United States v. Cadena, note 15, *supra.*
56. United States v. Cortes, note 17, *supra.*
57. United States v. Postal, note 50, *supra.*

58. *See, e.g.*, United States v. Rubies, note 22, *supra.*
59. United States v. Cadena, note 15, *supra.*
60. *See, e.g.*, United States v. Egan, 507 F. Supp. 1252, 1258 (S.D. Fla. 1981).
61. Miami Herald, 8 June 1986 at 6A, col. 1.
62. 22 Int. Leg. Mat. 1261 (1982).
63. Article 19.2(g), Article 27.1(d).
64. Article 108.
65. Article 110.
66. 757 F.2d 1147, 1154 (11th Cir. 1985).
67. 21 U.S.C. Sec. 955a(d).
68. See also , United States v. Gonzalez, 776 F.2d 931 (11th Cir. 1985).
69. 757 F.2d at 1154.
70. *Ibid.*
71. Restatement (Second) of the Foreign Relations Law of the United States Sec. 34 (1985), *See also*, Reporter's Note 2 and Comment a.
72. See, Blakesly, note 54, *supra*, at 1141.
73. *Ibid.* at 1139.
74. *See, e.g.*, Tokyo Convention on Hijacking of Civil Aircraft, 14 September 1963, 20 U.S.T. 2941, TIAS 6768; The Hague Convention, 16 December 1970, 22 U.S.T. 1641, TIAS 7192.
75. P.L. 98-473, 98 Stat. 2186 (1984), 18 U.S.C. Sec. 1203.
76. P.L. 98-473, 98 Stat. 2187 (1984), 18 U.S.C. Sec. 32.
77. Restatement (Second), note 71, *supra*, at Sec.# 30(2), Comment e.
78. United States v. Marino-Garcia, note 48, *supra*, at 1383.
79. Single Convention on Narcotic Drugs, 1961. 30 March 1961 18 U.S.T. 1407, TIAS 6298.
80. Department of State, *Treaties in Force* 271-275 (1985).
81. Interview with Russell Wilson, U.S. Department of State.
82. Data provided by U.S. Coast Guard, Office of Operations, Operational Law Enforcement Division.
83. See, Letters to the United States Concerning Measures to Suppress the Unlawful Importation of Narcotic Drugs into the United States, 21 Int. Leg. Mat. 439 (1983).
84. *Ibid.*
85. Note 82, *supra.*

HIGH SEAS AND NAVIGATIONAL RIGHTS: WHAT ARE THEY AND WHO MAY ASSERT THEM IN U.S. COURTS?

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Nature and History

The freedom of the seas was once and to a large extent still is one of the cardinal principles of international law. It is one of the major tenets of the contemporary international legal system based on the notions of equality of nations and sovereignty. This freedom comprehended any type of use, especially navigation and fishing.

Of course, it is a well-known fact that in the course of time maritime zones became recognized in which the freedom was subject to serious restrictions or total abolition. I do not propose to retrace that evolution but I would like to merely mention the maritime zones where freedom no longer governs: territorial waters, straits, contiguous zone, continental shelf, and exclusive economic zone. The freedom of the *sea* has become the freedom of the *high seas* and even there the freedom has been dismembered into freedoms and some of them are subject to particular rules.[1] While the freedoms included in the freedom of the high seas are also "enjoyed" in the exclusive economic zone,[2] this enjoyment is qualified by the requirement of compatibility with the regime of the exclusive economic zone and with the interests of the coastal state.[3] Even greater restrictions on navigational rights exist in the contiguous zone.[4] Although the creation of the exclusive economic zone was an innovation of the UN Conference on the Law of the Sea, its general features have become customary international law. The International Court of Justice has twice recognized this new encroachment on the high seas as having become part of customary international law.[5] Fifty-odd nations have unilaterally asserted claims to their exclusive economic zone,[6] sometimes exceeding the rights accorded by the Convention.[7] It is worth noting that according to the *Gulf of Maine* judgment the so-called package deal thesis has not prevented that evolution. Said the Chamber:

> These provisions [relating to the EEZ], even if in some respects they bear the mark of the compromise regarding their adoption, may nevertheless be regarded as consonant at present with general international law on the question.[8]

The UN Convention on the Law of the Sea reserves the high seas for peaceful purposes.[9] But it has been said correctly that this vague mandate does not *exclude* military uses otherwise in conformity with customary or conventional international law, such as uses made in the exercise of the right of self-defense, or naval maneuvers or showing of military presence in an area of troubles.[10]

Navigational rights in territorial waters of other nations, of course, are traditionally limited by the rules governing innocent passage as developed by customary international law and codified by the respective provisions in UNCLOS III.[11]

Military and Enforcement Actions

The rules recognizing special maritime zones and authorizing the coastal states to exercise certain coercive powers have been an essential ingredient in the law of the sea from the days when the freedom of the sea was first recognized. We forget or like to forget that Grotius' *mare liberum* was actually only one chapter in his manuscript,[12] otherwise unpublished in his lifetime, entitled *De Jure Praedae commentarius*, a dissertation which constituted a lawyer's memorial written to justify the capture of a Portuguese merchant vessel by a Dutch privateer as a measure taken in a just war.[13]

The doctrine of territorial waters owes its recognition to a large extent to the need for a restriction of the freedom of the sea in the interest of neutrality and the emergence of legally recognized rights and duties of neutrals. Without attempting to trace the importance of the law of neutrality on the law of the sea, it may be recalled that the recognition of the cannon-shot rule, fixed at three nautical miles, as a measure of the breadth of the territorial sea owes its origin to the ideas of the Abbe Galiani and the acceptance of these views by President Jefferson in 1793,[14] and the U.S. Neutrality Act of 1794.[15]

Naval warfare and naval military actions as well as measures in the name of self-defense have subjected and continue to subject the navigational rights of other nations to various other restrictions.[16] Perhaps the best-known recent examples are the "quarantine of Cuba"[17] and the various zones established by the U.K. during the recapture of the Falkland Islands by a naval task force.[18] In the terse language of a government paper ((Cmnd.) 8758, par. 103, 104) the events are recounted in the following manner:

> On 12 April we imposed a maritime exclusion zone of 200 miles around the Falklands against Argentine naval ships. On 23 April we warned that any approach by Argentine forces which could amount to a threat to interfere with the mission of British forces in the South Atlantic would be dealt with appropriately. On 25 April the task force repossessed South Georgia. On 29 April we warned that all Argentine vessels shadowing the task force would be liable to attack. On 30 April a total exclusion zone was imposed and on 7 May we warned that any Argentine warship or military aircraft over 12 miles from the Argentine coast would be treated as hostile.

Thus a total exclusion zone barring navigational uses of the waters and the air space around the Falkland Islands at a distance of 200 miles by any vessel entering the zone without British authorization was imposed, provoking serious protest by Argentina. It was greeted with silence by other nations, except for protests by Panama, the USSR, and by the Organ of Consultation of the Inter-American Treaty of Reciprocal Assistance.[19] The letter objected in particular to the extension of the hostility zone up to the territorial waters (twelve miles) of Argentina.

Even after the recapture of the islands, the U.K. maintained a protection zone of 150 miles' width.[20]

Special enforcement zones in peacetime are recognized by customary and conventional international law under the name of contiguous zone which permits prevention of impingement of the laws of coastal states relating to customs, fiscal, immigration, and sanitary matters not exceeding twenty-four miles from the baseline.[21] Other broader zones may be established with the consent of other nations.

The Haitian Interdiction

On 23 September 1981 the exodus of numerous inhabitants of Haiti to the United States without observation of the United States immigration laws reached proportions which prompted the governments of Haiti and the U.S. to cooperate in an effort to stop the flood by means of a program of interdiction and selective return to Haiti of Haitian migrants and vessels involved in the illegal transport of persons coming from Haiti. This program contained the authorization of the United States Coast Guard to board and detain vessels flying the Haitian flag reasonably suspected of irregular carriage and to permit return to Haitian ports of U.S. flag vessels engaged in illegal trafficking. The agreement was effected by exchange of notes signed on the indicated date.[22]

On 29 September 1981 the program was implemented by Executive Order 19324 and Proclamation 4865.[23]

Invoking his authority under the Constitution and statutes, including Section 212(4) and 215(a)(1) of the Immigration and Nationality Act, as amended, the President instructed the Secretary of State to enter into cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by Sea and the Secretary of the Department in which the Coast Guard is operating to issue appropriate instructions to enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens, viz.:

1. Vessels of the United States documented under U.S. laws or numbered as provided by the Federal Boat Safety Act.
2. Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958.
3. Vessels of foreign nations with whom the U.S. has entered arrangements authorizing to stop and board such vessels.

The interdiction included the boarding, examination of passengers, and, if warranted, return of the passengers and vessels to the port of departure.

Such action was authorized only outside the territorial waters of the U.S.

The constitutionality and legality of the interdiction of visaless aliens on the high seas was challenged by an action brought by the *Haitian Refugee Center, Inc.* v. *Gracey*, Commandant of the U.S. Coast Guard.[24] The court, speaking through Judge Richey, held that the President possessed constitutional and statutory authority to establish the interdiction program and that neither the Convention Relating to the Status of Refugees nor the Protocol Relating to the Status of Refugees of 1967 provided rights directly enforceable in U.S. courts. The complaint did not challenge the interdiction as a violation of the freedom of navigation.

International Aspects

Navigational rights are, of course, primarily rights of *nations* derived from customary international law and treaties. Immunities or rights accorded to *individuals* by customary international law are recognized only in special instances, such as the immunities of fishing people during naval warfare[25] or the rights to redress in domestic courts of victims of cruel and inhuman interference with life and limb,

such as torture, terroristic action, and, perhaps, mass extermination.[26]

On the other hand, treaties may provide for immunities or other rights directly invocable by private parties in domestic courts. It is customary in such cases to speak of "self-executing treaties." International law does not compel the recognition of this type of treaties, but leaves the method of providing cognizability in domestic courts of rights attributed to nationals of the parties to treaties to the constitutional systems of the nations. The principle of *pacta sunt servanda*[27] compels neither self-executability nor results in the invalidity of a subsequent inconsistent statute even in a country which recognizes the supremacy of customary law.[28]

The Convention on the High Seas of 29 April 1958,[29] to which the United States is a party, contains several provisions governing the freedom of navigation established by Article 2, especially Articles 6 and 22. Article 6 provides:

1. Ships shall sail under the flag of one State only and save in exceptional circumstances expressly provided for in international treaties or in the articles, shall be subject to its exclusive jurisdiction on the high seas.
2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other state, and may be assimilated to a ship without nationality.

Article 22 provides:

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: . . .
(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 subparagraphs (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.

The meaning and effect of these provisions have been the subject of a number of judgments of U.S. courts in connection with vessels carrying goods and substances whose possession and importation infringes U.S. laws.

Generally speaking these cases involve two questions, one involving the scope and the exercise of the prescriptive or legislative jurisdiction of the United States and the other the scope of its enforcement jurisdiction. Actually, the Convention on the High Seas is primarily concerned with the enforcement jurisdiction of the parties and leaves the prescriptive jurisdiction to customary international law as determined in the case of the *Lotus*.[30] Even Article 11 which overturns the result of the *Lotus* deals with enforcement jurisdiction rather than the jurisdiction to prescribe. Usually the distinction between legislative and enforcement jurisdiction is of importance only

if the offender is found within the territorial jurisdiction of the nation whose criminal laws are sought to be enforced, although the act was committed elsewhere. Otherwise legislative and enforcement jurisdiction must coexist, and not infrequently legislative and enforcement jurisdiction are made subject to the same tests. A good example for this congruence is 21 U.S.C. Section 955a(c) as enacted by the so-called Marijuana on the High Seas Act of 1980[31] which provides:

> It is unlawful for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute a controlled substance.

Customs waters in turn are defined[32] as meaning:

> in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement.

This definition originated in the Anti-Smuggling Act of 1935.[33] One of the purposes of that Act was to remedy the restrictions in the enforcement of the laws against smuggling of liquor by vessels flying the flag of the sixteen nations (so-called treaty nations) with which the United States had concluded the so-called liquor treaties. These treaties permitted the exercise of enforcement jurisdiction of the United States only within a hour's sailing distance. Since these treaties had been held to be self-executing,[34] legislation was required to permit seizure of vessels carrying liquor and hovering just outside the treaty distance. The remedy sought was the authority given to the Executive to make special arrangements with the treaty-nations permitting the boarding of such vessels. The statute provided explicitly:

> nothing contained in this section or in any other provision of law respecting the revenue shall be construed to authorize or require any officer of the United States to enforce any law thereof upon the high seas upon a foreign vessel in contravention of any treaty with a foreign government enabling or permitting the authorities of the United States to board, examine, search, seize or otherwise enforce upon such vessel on the high seas the laws of the United States except as such authorities are or may otherwise be enabled or permitted under special arrangement with such foreign government.[35]

A similar clause was inserted into the Tariff Act of 1930.[36]

These limitations should apply also to the enforcement powers of the Coast Guard upon the high seas derived from 14 U.S.C. Section 89 (a). It would be inconsistent with statutory construction to grant to the Coast Guard broader powers under 14 U.S.C. Section 89(a) than those granted under 19 U.S.C. Sections 1401(j), 1581(a) and (k) and 1701(b) and 1709(c)[37].

Until the ratification and the entry into force for the United States of the Convention on the High Seas and the other conventions relating to the territorial waters and the contiguous zone and to the continental shelf,[38] the liquor treaties were the main treaties limiting the jurisdiction of the United States over maritime zones. Otherwise customary international law governed these matters.

The Convention on the High Seas codified the rules of customary international law for the parties to the convention and specified the principle of the freedom of navigation and the exceptions thereto (Articles 6 and 22 quoted above). Although the U.S. Courts of Appeals for the Fifth[39] and the Eleventh[40] Circuits have denied the self-executing character of Articles 6 and 22, I firmly believe that this view is supported neither by the language of the respective articles nor the general tests applicable to the determination of that issue.[41] It is, moveover, obviated by much of the legislation relating to the enforcement of U.S. laws on the high seas, which is designed to respect international rules under treaties.[42]

As a result it must be concluded that the Convention on the High Seas in conjunction with domestic legislation protects the ship and its crew against the exercise of jurisdiction without a special arrangement with the flag state, if the flag state is a party to the Convention. If the flag state is not a party to the Convention, the question arises whether U.S. legislation gives the ship and the crew enforceable rights in domestic courts. In *United States* v. *Bent-Santana*[43] a vessel was boarded with the consent of Panama, a non-convention nation. Panama gave consent to the boarding through its Office of Consular and Maritime Affairs in Panama. Defendant claimed that this authorization was ineffective since an intergovernmental understanding between the U.S. and Panama required authorization from the New York office of that agency. The court rejected the pertinency of this discrepancy for the jurisdiction of the court on the ground that the purported intergovernmental agreement was not self-executing and therefore gave the defendant no standing to object.[44] Again I find this reason inconclusive and questionable. Executive agreements may be self-executing. Nevertheless it would not preclude Panama from waiving its rights in a particular case. Such waiver would constitute a "special" arrangement within the meaning of 19 U.S.C. Sections 1581(h) and 1701(b), effective to qualify as terms of an arrangement under 19 U.S.C. Section 1401(j). In my opinion the array of provisions delineating the powers to board and search vessels on the high seas evinces Congressional intent to eliminate the applicability of the Ker-Frisbie doctrine with respect to seizures on the high seas of vessels flying a foreign flag, both with respect to parties to the Convention on the High Seas and to other nations, especially if they cooperate in the enforcement of the U.S. laws relating to trafficking in controlled substances.

Conclusion

In my opinion Congressional legislation since 1935 endeavors to honor the freedom of navigation founded in customary international law and codified in the Convention on the High Seas.

Boarding and searching on the high seas is permitted only within the limits of Article 22 or by consent, albeit an informal one, by the flag state.

Violation of these rules by the Coast Guard is not authorized by applicable legislation and may be vindicated by the owners of the

vessel and the members of the crew by challenges of the jurisdiction of the U.S. courts.

The application of the interdiction of illegal aliens to vessels listed in E. O. 12324 especially in (b) (2) and (3) conform both to customary international law and the Convention on the High Seas.

NOTES

1. U.N. Convention on the Law of the Sea, Art. 87 (1) and (2).
2. UNCLOS, Art. 58 (1).
3. UNCLOS, Art. 58 (1), (2) and (3) and Art. 59.
4. UNCLOS, Art. 33.
5. See I.C.J. Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya), Judgment of 24.2.1982, par. 100, 1982 I.C.J.R. 74. "While it may be that Tunisia's historic rights and titles are more nearly related to the concept of the exclusive economic zone, which may be regarded as part of modern international law, Tunisia has not chosen to base its claim upon that concept."; I.C.J., Case Concerning Delimitation of the Maritime Boundary on the Gulf of Maine Area (Canada/United States of America), Judgment of 12.10.1984 given by the Chamber Constituted by the Court, par. 94, 1984 I.C.J.R. 294, quoted in the text prior to call to ftn. 8.
6. According to a reply made by the Minister of State, Foreign and Commonwealth Office on 4 March 1983, forty-nine nations listed in that reply had made declarations claiming an exclusive economic zone of 200 miles, UKMIL, 54 Brit YbIL 361, at 507 (1983). These nations are Antigua, Bangladesh, Barbados, Burma, Cambodia, Canada, Colombia, Comoros, Congo, Costa Rica, Cuba, Dominican Republic, Fiji, France, Gabon, Grenada, Guatemala, Haiti, Iceland, India, Ivory Coast, Kenya, Malaysia, Maldives, Mauritius, Mexico, Morocco, Mozambique, Nauru, New Zealand, Norway, Oman, Pakistan, Papua New Guinea, Philippines, Portugal, Seychelles, Solomon Islands, Spain, Sri Lanka, Thailand, Togo, UAE, USA, Vanuatu, Venezuela, Vietnam, Western Samoa, Yemen P.D.R. In addition forty-five other nations claim an exclusive fishery zone of 200 miles; see the list given in the same reply, 54 Brit YbIL 506. R.R. Churchill and A.V. Lowe, The Law of the Sea (1983) at p. 137 speak of "about fifty-five as of 1982" and mention some states not included in the list furnished by the U.K. Foreign and Commonwealth Office.
7. See Churchill and Lowe, The Law of the Sea (1983), at 137.
8. Judgment of 12.10.1984 par. 94. The U.K. has not claimed an EEZ but has declared to recognize foreign contiguous, fishery and exclusive economic zones to the extent that the limits and the jurisdiction claimed must conform with the rules of international law, 54 Brit YbIL 361, at 509.
9. Art. 88.
10. Churchill and Lowe, The Law of the Sea (1983) pp. 154 ftn. 1, 270-277.
11. UNCLOS III, Arts. 17-32.
12. The manuscript was re-discovered in 1864 and published in 1868 by H.C. Hamaker, cf. E. Reibstein Völkerrecht; Eine Geschichte Seiner Ideen in Lehre und Praxis, Vol I p. 402-412. A reproduction and English translation of Grotius' manuscript was published in 1950 in the Classics of International Law. See also Nussbaum, A Concise History of the Law of Nations (1947) at p. 97.

13. See Reibstein and Nussbaum, cit. supra note 12.
14. Doveri dei principi neutrali verso principi guerreggianti e di questi verso i neutrali (1782), See Nussbaum, op. cit. p. 137.
15. See the references in D.P. O'Connell, The International Law of the Sea (1982) p. 131 and Raymond and Frischholz, Lawyers who established international law in the United States, 1776-1914, 76 A.J.I.L. 802, at 806 (1982).
16. For a discussion of the contemporary law of naval warfare and neutrality see C.J. Colombos, The International Law of the Sea, pp. 435-807 (5. ed. 1962).
17. See Chayes, The Cuban Missile Crisis (1974).
18. See Falkland Islands Campaign: The Lessons, [Cmnd. 8758] (1983); Churchill and Lowe, The Law of the Sea, 271 (1983), G. Venturini, Jus in bello nel conflitto anglo-argentino, in N. Ronzitti (ed.), La Questione della Falkland-Malvinas nel Diritto Internazionale (1984) pp 187-268, Ch. Rousseau, Chronique des faits internationaux: Argentine et Grande-Brentagne, 86 Revue générale de droit international public, 724-773.
19. U.N. Docs S/14987, S/15068, S/15143.
20. See Br. Yb. Int.L. 1984 p. 589.
21. UNCLOS, Art. 33.
22. TIAS 10241.
23. Proclamation 4865, 46 F.R. 48107; E.O. 12324 46 F.R. 48109.
24. 600 F. Supp. 1396 (D.DC. 1985).
25. The Paquete Habana, 175 U.S. 677, 20 S. Ct. 290, 44 L Ed 320.
26. Filartiga v. Pena-Trala, 630 F.2d 876 (2.Cir.1980).
27. Vienna Convention on the Law of Treaties, Art. 26.
28. As e.g., Federal Republic of Germany, Bonn Organic Law Art. 25. See Riesenfeld, Review of Fontes Juris Gentium, 74 A.J.I.L. 473 (1980).
29. 13 U.S.T. 2312, 450 UNTS 82.
30. CIJ Ser. A. No. 10 (1927).
31. 94 Stat. 1159.
32. 21 U.S.C. Section 955b(a) in conjunction with 19 U.S.C. 1401(j). In 1986, after the delivery of this paper, Congress enacted the Anti-Drug Abuse Act of 1986, P.L. 99-570. Sec. 3202 of that act amended the Marijuana on the High Seas Act of 1980 by renaming it Maritime Drug Law Enforcement Act and substituting new provisions for for mer 21 U.S.C. Secs. 955a-955d. Sec. 3202 of the new act prohibits *inter alia*, to knowingly or intentionally manufacture or distri bute or to possess with intent to manufacture a controlled substance on board a vessel of the United States or on board a vessel subject to the jurisdiction of the United States. Vessels subject to the jurisdiction of the United States include "a vessel located within the customs waters of the United States" and "a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States, codified as 46 U.S.C. **1901, 1903(a) and 1903(c)(1)(D) and (C). Former 21 U.S.C. Sec. 955b(a) and its specific reference to 19 U.S.C. Sec. 1401(j) is omitted. Nevertheless customs waters within the meaning of 46 U.S.C. Sec. 1903(c)(1) still refers to the waters defined in 19 U.S.C. Sec. 1401(j) and 1709(c) in conjunction with 46 U.S.C. Sec. 1903(c), last sentence. As before, the overlapping definition of the new statute defines both the scope of the pro scription and of the Coast Guard's enforcement jurisdiction. Non-observance of these limitations deprive the court of jurisdiction. 46 U.S.C. Sec.1903(d) which specifies that a failure to comply with

international law does not divest a court of jurisdiction under this chapter, does not cure a failure to comply with the statutory prerequisites.

33. 49 Stat 517.
34. United States v. Cook, 288 U.S. 102 (1933). The Court, speaking through Mr. Justice Brandeis, held expressly that the treaty with Great Britain was self-executing, thus foreclosing the applicability of the so-called Ker-Frisbie doctrine, and intimating that the same effect was attributable to the treaties with the fifteen other countries, see 288 U.S. at 109 ftn. 3, and 119. It is incomprehensible that Judge Tjoflat in *United States v. Romero-Galue*, 757 F.2d 1147, at 1152 (11.Cir. 1985) stated that the liquor treaties were not self-executing and that the U.S. lacked power to apply its penal laws to a treaty nation's vessel located outside the twelve-mile limit, yet within one hour's sailing distance. Actually the need for legislation was created by slow vessels hovering within the twelve miles, as the Congressional Reports cited by Judge Tjoflat confirm. Equally incomprehensible is the fact that Judge Kravitch cited Judge Tjoflat's erroneous passage with approval, United States v. Gonzales, 776 F.2d 931, 935 (11.Cir. 1985).
35. 19 U.S.C. Section 1701(b).
36. 19 U.S.C. Section 1581(h).
37. Cf. United States v. Green, 671 F.2d 46 (1.Cir. 1982) but see United States v. Williams, 617 F.2d 1063 (5.Cir. en banc 1980); United States v. Postal, 589 F.2d 862 (5.Cir. 1979). United States v. Williams recognizes 19 U.S.C. Section 1581(a) as a second source of authority without reference to 19 U.S.C. Section 1581(h).
38. The Convention on the High Seas entered into force for the United States on 30 September 1962; the Convention on the territorial sea and the contiguous zone on 10 September 1964; and the Convention on the Continental Shelf on 10 June 1964.
39. The self-executing character of Article 6 of the Convention on the High Seas was first denied by Judge Tjoflat, writing for the panel, in United States v. Postal, 589 F.2d 862 at 875-884 in a case involving the boarding of a vessel flying the flag of the Cayman Islands, a party to the convention. It was gratuitously repeated by the majority opinion (12 out of 22 judges) in United States v. Williams 617 F.2d 1063, at 1082 and 1089. Four judges dissented on that issue in an opinion written by Judge Rubin and concurred in by Judge Kravitch, 617 F.2d at 1094 Art. 2. The inconsistency of Judge Tjoflat's position is well illustrated by the sentence in his majority opinion in U.S. v. Williams: "We agree with the *Cortes* panel that a boarding of a vessel pursuant to subsection (c) [of Art. 22 of the High Seas Convention] is constitutional despite the fact that the source of the Coast Guard's authority is a non-self-executing treaty rather than a statute" (id. p. 1082). How can a non-self-executing provision of a treaty by the source of authority of a governmental agency? In Williams the vessel was registered in Panama, a nation that was not a party to the High Seas Convention and, in addition, had consented to the boarding.
40. See United States v. Gonzales, 776 F.2d 931, 938 (11.Cir.1985). In that case the vessel boarded on the high seas flew the flag of Honduras, likewise a non-convention state. Honduras had given its consent to the boarding. Nevertheless, Judge Kravitch quoting Postal stressed the fact that Art. 6 is not self-executing and that the United States' ratification did not "incorporate the restric-

tive language of article 6, which limits the permissible exercise of jurisdiction to those permitted by treaty into its domestic law and make it available as a defense to the jurisdiction of its courts," 776 F.2d 931, at 938 (11.Cir. 1985). Apparently the judge had forgotten that in U.S. v. Williams he had joined the concurring opinion of Judge Rubin which rejected the view of the majority on that very issue.

41. Riesenfeld, The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price, 74 Am. J. Int. L. 892 (1980). It should be noted that Art. 6(2) speaks of claims of the ships, not claims of the flag state.
42. In the Marijuana on the High Seas Act Congress took pains to restrict the scope of its legislation with respect to vessels flying foreign flags to vessels within the customs waters of the United States, the term "customs waters" being subject to the defi nition in 19 U.S.C. Paragraph 1401(j). Although the genesis of 19 U.S.C. Sections 1401(j), 1581(h) and 1701(b) is the protection of the treaty rights of the other nations and their ships under the liquor treaties it would seem that Congress meant to protect also the treaty rights under the High Seas Convention: No boarding without consent of the flag state or under the conditions of Art. 22. The Convention provides expressly for derogation by international agreement, Cf. United States v. Green, 671 F.2d 46 (1.Cir.1982), holding that consent to boarding by a party to the convention on the high seas (in the instant case the U.K.) furnished authority for the boarding of the vessel pursuant to 19 U.S. 1581(h), regardless of self-executing or executory character of Art. 6.
43. 774 F.2d 1545 (11.Cir.1985).
44. Id. at 1550.

INTERNATIONAL LAW OF THE SEA AND HUMAN RIGHTS ISSUES

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One of the greatest accomplishments of mankind in the last forty years has been the humanizing of international law. It is no longer a law of nations only; through an interconnected network of global, regional, and specialized international agreements, the rights of individuals have been recognized as being of international concern, entitled to the protection of international law and institutions.[1] More than fifty far-reaching instruments for the international protection of human rights have been promulgated by the United Nations alone, and some of them have been ratified by more than one hundred countries.[2] The Universal Declaration of Human rights, adopted in 1948,[3] had by 1968 been generally accepted as part of customary international law that all nations are obligated to follow.[4] The United States, which was originally responsible for this development, has ratified very few of these instruments, perhaps because of the mistaken belief that human rights are adequately protected by our Constitution. Even if this is true on land, it is not true at sea, as some federal courts refuse to apply to persons arrested at sea the safeguards provided for by international law and the United States Constitution.

In this year of rededication of the Statue of Liberty in New York Harbor, we have heard a lot about the United States as a land of liberty, dedicated to the lofty words of the Declaration of Independence holding "these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness." We have heard also many times the ringing words of Emma Lazarus, welcoming to America's shores all those yearning to be free, the tired, the poor, the homeless and the "tempest-tost." If they have succeeded in crossing the tempest-tost seas and have landed legally in the United States, these promises are usually fulfilled and all the blessings of liberty are bestowed upon them. Not all of them are, however, so lucky; those that first meet the majesty of the United States Constitution among the tempest-tost waves, discover soon that not all men are equal and that some of them are not entitled to the inalienable rights that the Constitution meant to protect.

One more preliminary remark I would like to make, in case somebody should accuse me of getting lost in the mists of history. I would like to make clear that the United States is still, in principle, dedicated to the idea that all men are entitled to certain internationally recognized human rights, not too different from the "inalienable" rights of our ancestors. Thus, the Congress of the United States has for a dozen years included in foreign assistance legislation[5] a provision cutting off aid to "the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights."[6] Among these rights, the statute lists not only "torture or cruel, inhuman, or degrading treatment or punishment,"[7] a generally recognized crime against humanity, but also "prolonged detention without charges . . . or other flagrant denial of the right to life,

liberty, and the security of person."[8] To enable Congress to monitor the compliance with this legislation, the Congress also imposed on the Secretary of State the obligation to present annually a report regarding the status of internationally recognized human rights both in countries receiving assistance under this act and in other foreign countries which are members of the United Nations, altogether some 160 countries.[9] In the introduction to each of these voluminous reports, each Administration states its human rights philosophy. Current reports list among the rights to be considered as internationally recognized human rights, the right to be free from governmental violations of the integrity of the person -- violations such as torture, cruel, inhuman, or degrading treatment or punishment; arbitrary arrest or imprisonment; denial of fair public trial; and invasion of the home. These reports also emphasize the right to travel freely within and outside one's own country.[10]

The reports trace these rights to the words of the Declaration of Independence quoted previously, and point out that "the cause of human rights exists throughout the world and expresses the longings and convictions of millions of men and women."[11] As President Reagan said in 1981, the people of the United States yearn for the day when all mankind will share the blessings of America, and, as far as they are concerned, there is never an excuse "for the violation of the fundamental rights of man -- not at any time or in any place, not in rich countries or poor, not under any social, economic or political system."[12]

While these words still ring in our ears, it is necessary to see how in practice the United States Government complies with the human rights standards, which it accepts as internationally recognized, in its application of other generally accepted international rules or standards, those of the law of the sea.[13] Time allows me only to deal with one of the many problems that have emerged at this juncture of two international law areas -- law of the sea and human rights. I have chosen for this purpose the issues involved in search and seizure on the high seas of foreign vessels suspected of violating United States laws, especially those relating to smuggling of narcotics.

As far as the illicit traffic in narcotic drugs is concerned, the law of the sea contains express provisions on the subject, which the United States accepted by ratifying the 1958 Conventions on the law of the sea,[14] and by accepting in 1983 that the navigation provisions of these Conventions, as clarified and developed by the 1982 Convention on the Law of the Sea, have become a part of customary international law binding on all states.[15] In particular, the 1958 Convention on the Territorial Sea and the Contiguous Zone provides that a coastal state may exercise its criminal jurisdiction on board a foreign ship passing through the territorial sea to conduct an investigation or to arrest a person, if "it is necessary for the suppression of illicit traffic in narcotic drugs."[16] But this provision can be invoked by the coastal state only in connection with any crime committed on board and ship during its passage. A coastal state is not allowed to conduct an investigation or arrest any person "in connection with any crime committed before the ship entered the territorial sea."[17]

In turn, this restriction applies only "if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters,"[18] *i.e.*, the ship is proceeding from one foreign port to another, passing along the coast, without any intention to enter the internal waters, or ports, of the coastal state. It may be

noted that the draft prepared for the 1958 Conference by the International Law Commission contained no provision on illicit traffic in narcotic drugs, but the report of the Commission pointed out that an arrest for the purpose of suppressing such traffic may be justifiable, if the consequences of the crime extend beyond the ship.[19] Although Norway objected to adding a provision on this subject, the Conference approved it by a large majority.[20] This expansion of coastal jurisdiction is restricted, however, by the fact that it applies only when the crime was actually committed during the passage through the territorial sea.[21]

The 1982 Convention on the Law of the Sea made only one substantive change in the 1958 provisions -- it extended them to "psychotropic substances."[22]

The 1958 Conventions contained no other provisions on the subject, but in the 1982 Convention a provision has been added, by which all states accepted the obligation "to co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions."[23] This obligation depends on the content of several other conventions relating to narcotic drugs or psychotropic substances adopted since 1912.[24] These conventions developed a system of co-operative arrangements for the suppression of illicit traffic in narcotic drugs and psychotropic substances through control of manufacture and of export and import of such drugs and substances, exchange of information on illicit activities, and punishment or extradition of offenders.

All the previous conventions on the subject were replaced in 1961 by the Single Convention on Narcotic Drugs,[25] which in turn was amended by a 1972 Protocol.[26] This Convention improved the system of international control through strict limitation of manufacture, exports and imports of an increasing list of drugs. The States Parties to the Convention agreed to co-operate closely in a coordinated campaign against the illicit traffic in narcotic drugs and to assist each other in that campaign;[27] they agreed also to punish adequately the persons involved in such traffic, including those found guilty of intentional participation in, conspiracy to commit, and attempts to commit the offenses (listed in the Convention) that were connected with such traffic.[28] It may be noted, however, that no mention is made of any special cooperation with respect to any activities at sea, although a large proportion of illicit traffic uses ships for smuggling the drugs. The 1972 Protocol strengthened the extradition provisions of the 1961 Convention, but again is silent on facilitating action against vessels engaged in illicit traffic.[29] Similarly, the parallel provisions of the 1971 Convention on Psychotropic Substances do not mention enforcement at sea.[30]

This was not an accidental omission, as the fundamental principle of the law of the sea since the time of Grotius has been that "no nation can exercise a right of visitation on the high seas except in time of war or by special agreement."[31] This principle was strongly defended by the United States in the early years of its independence, when the British Navy started boarding American ships on the high seas in order to arrest alleged deserters from that Navy, and in some instances even used force to accomplish this objective.[32] These actions stimulated strong anti-British feelings and were mentioned specifically by President Madison in his message to Congress as one of the reasons for declaring war on Great Britain in 1812.[33] When the Permanent Court of Justice faced this issue in 1927, it declared in the *Lotus* case

"that -- apart from some special cases which are defined by international law -- vessels on the high seas are subject to no authority except that of the State whose flag they fly," and that "[i]n virtue of the principle of the freedom of the seas, ... no State may exercise any kind of jurisdiction over foreign vessels upon them."[34]

Contemporaneously, the 1926 League of Nations' Conference on Slavery refused to adopt a British proposal to treat slave-carrying ships on the high seas as pirates and to allow their boarding and inspection, freeing of slaves, and delivering the persons engaged in slave trade to the flag state for punishment.[35] Similarly the 1956 United Nations Conference on the subject did not agree to include such provisions in the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery,[36] as a number of delegations to that Conference "regarded any provisions which would enable naval vessels of other States to search vessels flying their flag an anathema," and "in conflict with the principle of national sovereignty."[37]

It is not surprising, therefore, that Professor Francois, in preparing his first report on the high seas for the International Law Commission, stated that the "only police measure allowed in time of peace is the right of approach, that is to say the right to ascertain the identity and nationality of the vessel, but not the right to check nationality by examination of ship's papers, and not, *a fortiori*, the right of search."[38] In his second report, Professor Francois stuck to his position with respect to the main principle but added three clarifications: acts of interference may be allowed by a treaty; boarding and further action may be justified, if "there is a reasonable ground for suspecting that the vessel is engaged in piracy"; and if suspicion of piracy should "prove to be unfounded and should the stopped vessel not have given by unjustified acts any ground for suspicion, the vessel shall be compensated for any loss due to stoppage."[39] The Commission decided in 1951 to extend the right of approach to ships engaged in the slave trade "on the same footing as in the case of piracy."[40] In 1955, the Commission extended the right to visit also to the situation where there is reasonable ground for suspecting that "while flying a foreign flag or refusing to show its flag, the vessel is in reality of the same nationality as the warship." The Commission explained that in this case "it can be presumed that the vessel has committed unlawful acts and the warship should be at liberty to verify whether its suspicions are justified." At the same time, the Commission limited the boarding of ships suspected of slavery to "maritime zones treated as suspect in the international conventions for the abolition of slave trade."[41]

The provision on slave trade was hotly attacked at the 1958 Law of the Sea Conference by the United Arab Republic and the Soviet Union, on the grounds that it was obsolete and discriminatory, was designed as a pretext for controlling maritime trade in certain areas, and was dealing with a matter which was left by the slavery conventions to domestic laws and courts. Committee 2 of the Conference rejected the U.A.R. proposal to delete the subparagraph on slavery, as well as a Bulgarian proposal to exempt government ships operated for commercial purposes from visits by foreign warships under this article.[42] In plenary session, however, the clause relating to certain areas suspected of slave trade was removed on proposal of South Africa, so that the paragraph would apply to slave trade anywhere.[43]

As a result of these changes, Article 22 of the 1958 Convention on the High Seas[44] read as follows:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ships 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 the 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.

Several additional points about this text need to be noted. It deals with interference by a warship with a merchant ship on the high seas. It does not apply to an encounter between two warships, or between a warship and a government ship operated for non-commercial purposes. While the "warship" that is permitted to interfere is narrowly defined in this Convention as a ship belonging to the naval forces of a State, properly marked as such, commanded by a naval officer, and manned by a crew under naval discipline,[45] the 1982 Convention on the Law of the Sea permits also action by a military aircraft, as well as "duly authorized ships or aircraft clearly marked and identifiable as being on government service."[46] Thus, it may be doubtful whether the Coast Guard is entitled to act under the 1958 Convention but has a clear right to take action under the 1982 Convention provisions to the extent that they are generally accepted as rules of customary international law.[47]

The 1982 Convention has also changed "foreign merchant ship" to "a foreign ship, other than a ship entitled to complete immunity in accordance with Articles 95 and 96,"[48] *i.e.*, making clear that both warships and "ships owned or operated by a State and used only on government service" are to be free from interference. This was merely implied in the previous text.

The final text of Article 110 of the 1982 Convention reads as follows:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with Articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
   (a) the ship is engaged in piracy;
   (b) the ship is engaged in the slave trade;
   (c) the ship is engaged is unauthorized broadcasting and the flag State of the warship has jurisdiction under Article 109

(d) the ship is without nationality; or
(e) 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 paragraph 1, 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.
4. These provisions apply *mutatis mutandis* to military aircraft.
5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

The actions that may be taken by warship (or a Coast Guard vessel) are precisely defined in order to diminish the fear of the states under whose flags most ships sail, as well as the apprehensions of ship owners and sailors that they may be unduly interfered with. While the early attempts to limit the use of the warship to "approach" and the request that the other ship identify itself and show its flag have been rejected, the additional rights are still quite limited. Basically, the warship is only entitled to verify the ship's right to fly its flag. As the International Law Commission explained it in its final report, first the other ship is requested "to show its colors"; second, if "the suspicion" of the right of the ship to fly a particular flag "is not allayed, the warship may proceed "to check the ship's papers." To this end, "it may send a boat under the command of an officer to the suspected ship." This is done, according to the Commission, not to broaden the powers of the investigating warship, but to save the ship's papers from being "exposed unnecessarily to the risk of getting lost," which could easily happen if a ship were ordered to put out a boat, carrying the papers to the warship. "If suspicions remain, after the documents have been checked," the officer "may proceed to a further examination on board the ship, which must be carried out with all possible consideration." The Commission again warned that such "examination must in no circumstances be used for purposes other than those which warranted stopping the vessel," namely to ascertain the true nationality of the ship. To ensure that, the Commission points out, "the boarding party must be under the command of an officer responsible for the conduct of his men." He has to watch that they do not go beyond the mission's purpose, do not interfere with the work of the captain or the crew, or behave improperly with respect to persons or property on board the ship.[49] Throughout the Commission's deliberations it was clear that the major concern was that the freedom of navigation should be interfered to the minimum extent possible and that the rights of the vessel's and cargo's owners and of the captain and the crew have to be respected to the maximum extent possible.

While the point of departure for some members of the Commission and Conference delegates was to safeguard national sovereignty, the

concern about the smooth working of maritime commerce and the rights of individuals involved soon came to the fore. Any rules that one state might apply to small boats, other states might apply to big ones, causing great losses to their owners; any hardships inflicted by one state on the citizens of another, might later be inflicted on the citizens of the state which started to disregard internationally recognized human rights. If the United States continues on board and seize foreign vessels in the Caribbean on various pretexts, Cuba and Nicaragua may start boarding and seizing vessels under the United States flag or foreign cruise ships carrying large numbers of American tourists. The United States is looking mainly for drugs; others may look, for instance, for weapons (which many United States pleasure craft now carry because of the increase in piracy). The Biblical statement that those who have sown the wind, shall reap the whirlwind,[50] is likely to be fulfilled on the "tempest-tost" sea.

Returning to the law of the sea provisions discussed here, some other issues need to be raised. It is the basic principle of international law that exceptions must be narrowly interpreted,[51] especially when they result from a reluctant accommodation by the majority to the wishes of the few dissenters in order to achieve a consensus. The history of these provisions shows that the International Law Commission and the 1958 Conference agreed to three exceptions and refused to go on any further even when they were pressed to permit the boarding of a vessel "suspected of committing acts hostile to the State to which the warship belongs, at a time of imminent danger to the security of that State."[52] Therefore, it is necessary to scrutinize closely the exceptions that are permitted. The general requirement is that there must be "a reasonable ground for suspecting" that the ship is not what it pretends to be. While reasonable men may differ whether a particular ground for suspicion was reasonable in certain circumstances, the jurisprudence of human rights, both national and international, is full of cases in which this question of reasonableness has been at issue and has been resolved in one way or another. The question whether there is a reasonable ground for suspecting a ship of an illegal activity cannot be left to the discretion of the commander of the warship or of the officer in command of the boarding party, as they might be prone to an abuse of the right to board, to check the ship's papers, and to ascertain its nationality. Consequently, both the 1958 and 1962 Conventions provide that the ship boarded shall be compensated for any loss or damage that may have been sustained, especially -- as noted by the International Law Commission -- "for any delay caused by the warship's action." Such compensation is due "not only where the ship was stopped without reasonable grounds," but also "in all cases where suspicion proves unfounded and the ship committed no act calculated to give rise to suspicion." The Commission added that this "severe penalty seems justified in order to prevent the right of visit being abused."[53]

It was noted that the two main grounds for stopping a foreign ship are that there is reasonable ground for suspecting that the ship is engaged in piracy or slave trade. Later, the case was added of a ship suspected of concealing the fact that it was of the same nationality as the warship. The 1982 Convention went two steps further, adding ships suspected of being "without nationality," and -- under strong pressure of Western European countries -- ships suspected of engaging in unauthorized broadcasting.[54] In the latter case, only warships of three specific countries and two groups of countries were allowed to board such ships, namely, those of the flag state of the ship, the state of

registration of a high seas installation, the state of which the person engaged in broadcasting is a national, any state where the transmissions can be received; or any state where authorized radio communication is suffering interferences.[55] While illegal broadcasting belongs clearly to a special category, it was included because of the existence of the European regional convention on the subject.[56]

The stateless ships were included in the 1982 Convention on the theory, probably, that it is dangerous to have ships sailing on high seas which are not subject to the jurisdiction of any state, and being law unto themselves need not comply with any generally accepted international regulations to ensure safety at sea. Consequently, the rule has been adopted that such a ship can be stopped by any warship and dealt with according to the law of the warship's state.[57] It is not clear what would happen if the examination should show that the stopped ship complies with all international regulations and there is no valid reason for interfering with its navigation. In any case, the persons on board the ship should be treated in accordance with the internationally recognized human rights, and if they have not been found engaged in any illegal activity, their "right to life, liberty and the security of person" should be recognized.[58] Unless the persons are also stateless (e.g., because they consider themselves as citizens of the world and had renounced their nationality, like Garry Davis[59]), they may be entitled to the protection of the state of their nationality regardless of the fact that they are travelling on a stateless vessel. They should be treated perhaps like Robinson Crusoe living on a no-man's island, rather than like pirates. Even if they are stateless, they are entitled to basic human rights.[60]

An additional complication is caused by Article 6, paragraph 2, of the 1958 Convention on the High Seas, which provides that a "ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality."[61] Some states may consider this provision as a license to treat such a ship any way they please, forgetting their obligations under international human rights. In particular, the rules about equal treatment and non-discrimination are applicable to the persons on these ships, and they are entitled to be protected against gross violations of internationally recognized human rights.[62]

It has been pointed out already that the rules relating to boarding of foreign vessels are not peremptory norms of *jus cogens* that cannot be derogated from, but may be changed, as far as their ships are concerned, by treaties between two or more states. It has to be emphasized that both the 1958 and 1982 Conventions contain an exception "where acts of interference derive from powers conferred by a treaty."[63] Many such treaties have been concluded over the years on a variety of subjects: for instance, they have allowed boarding of vessels suspected of having violated treaties relating to: trade in armaments in a maritime zone between Africa and the Arab peninsula;[64] slave trade in certain maritime zones;[65] numerous fisheries, and the taking of seals and sea otters;[66] interference with submarine cables[67]; liquor smuggling;[68] etc. All these instruments allow at least the right to approach to ascertain nationality, and in some cases to search if the examination of the ship's papers shows a reasonable ground for suspicion that the ship is engaged in activities prohibited by the treaty. Right to seize a ship is allowed only in a few of these treaties, and often is limited to delivering the offending ship into the

hands of the flag state for punishment. In the few cases that were brought before international tribunals when the flag state objected to the action of a foreign warship, the tribunals have interpreted the powers granted by the treaty very scrupulously. For instance, in *The Wanderer* case, the international arbitral tribunal held in 1921 that any agreement containing an exception to the general international law rule prohibiting visitation and search of foreign vessels "must be constructed *stricto jure*." The tribunal held that international regulations concerning fur-sealing contained only a prohibition of using firearms, not their mere possession; that an act of Congress which authorized seizure of vessels having on board implements for taking seals went beyond the regulations; that a seizure of a British vessel pursuant to that act was a contravention of the regulations; and that appropriate damages should be awarded.[69]

The emphasis in the 1958 and 1982 Conventions on "a treaty" as a basis for a right to deal with violations not listed in these Conventions or for granting to a warship broader powers to visit a foreign ship has two valid reasons: past exceptions have been carefully drafted to fit particular situations; and the matter is too important to be left to be settled case by case by a telephone conversation.[70] When this issue arose in the 1920s in connection with illegal liquor traffic, treaties were concluded by the United States with many countries to allow boarding foreign vessels on the high seas. The proper way to do it with respect to the illegal traffic in narcotic drugs is for the United States to make proper arrangements through a treaty, so that there would be no doubt that it would prevail over any prior act of Congress that might have been less solicitous of international law of the sea requirements.[71]

Another reason for a less cavalier approach to the issue of boarding foreign vessels is the cautious way in which the 1958 and 1982 provisions relevant to narcotic drugs were drafted -- allowing stronger action near the shore and slowly diminishing to practically zero when reaching the high seas. To claim that a state has broader powers on the high seas than it has in the territorial sea is clearly preposterous. To show this more clearly, it may be useful to put in context some of the provisions of these Conventions that were previously discussed seriatim.

Thus, the 1958 Convention on the Territorial Sea and the Contiguous Zone grants carefully restricted powers with respect to the exercise of criminal jurisdiction in the territorial sea in order to suppress illicit traffic in narcotics and provides anti-smuggling jurisdiction only in the twelve-mile wide contiguous zone.[72] At the same time, the 1958 Convention on the High Seas does not contain any provisions whatsoever relating to the search and seizure on the high seas of vessels suspected of illegal drug traffic.[73] It is quite clear, therefore, that the limited powers of search and seizure granted by the High Seas Convention with respect to piracy and slave trade cannot justify any action with respect to vessels suspected of drug smuggling.

Similarly, the 1982 Convention permits in certain circumstances the exercise of criminal jurisdiction for the purpose of suppressing illicit traffic in narcotic drugs and psychotropic substances on board ships passing through the territorial sea[74] and allows the exercise of jurisdiction to prevent infringements of customs laws and regulations in a broader contiguous zone extending up to twenty-four miles from the baseline of the territorial sea.[75] There are no parallel provisions with respect to the exclusive economic zone or the high seas, and any

mention of illicit traffic in narcotic drugs and psychotropic substances is conspicuously missing from Article 110 dealing with the right to visit; and that right is severely restricted even with respect to categories of offenses listed therein. Broader powers of seizure, arrest, and punishment are provided only in separate provisions for piracy and unauthorized broadcasting.[76] They were not granted even for a slave trade, as attempts to treat it in the same way as piracy were, as previously noted, repeatedly rejected. The separate article on illicit traffic in narcotic drugs and psychotropic substances provides, as mentioned above, for co-operation in suppressing such traffic."[77] Nevertheless, only the state "which has a reasonable ground for believing that a ship flying *its* flag is engaged in illicit traffic" in such drugs or substances "may request the co-operation of other states to suppress such traffic."[78] The opposite case of a state asking for co-operation of a state whose ship is suspected of smuggling drugs to other countries, is noticeably not mentioned.[79]

As this matter has become a growing concern to several states, Canada suggested in 1982 that "arrangements for law enforcement authorities to board vessels flying foreign flags" be studied by the United Nations expert group appointed "to study the functioning, adequacy and enhancement of the 1961 Single Convention on Narcotic Drugs." The group of experts noted the increasing use of seagoing vessels for the transportation of illicit narcotic drugs and psychotropic substances, and recommended that the Commission on Narcotic Drugs study the existing bilateral arrangements made in certain specified geographical areas "whereby ships flying the flag of the other country concerned could be boarded and inspected in order to apprehend drug traffickers or to seize illicit narcotic drugs," and "examine the possibilities of this law enforcement technique."[80]

On the basis of the experts' report, Canada, Italy, Pakistan and the United States presented a resolution in the Commission on Narcotic Drugs suggesting to the Economic and Social Council the adoption of certain modest measures "to improve international co-operation in the maritime interdiction of illicit drug traffic."[81] This proposal was adopted by the Economic and Social Council, with slight drafting changes; it emphasized the need for "effective steps by all States to provide, in accordance with relevant domestic constitutional safeguards and legislations, for prompt, positive and unmistaken identification of private vessels registered under their flag," and recommended several steps to achieve this goal.[82] Neither the four states' proposal nor the Council's resolution mentioned, however, the problem of boarding foreign vessels.

In 1984, the General Assembly asked the Commission on Narcotic Drugs to start preparing a draft convention on illicit traffic in narcotic drugs and sent to the Commission a working paper on the subject (in the form of a draft convention).[83] That draft, prepared by a group of states, including the United States, Canada, eighteen other American countries, and a few other states, condemned the traffic in narcotic drugs as "a grave international crime against humanity," but contained no provision on combating illicit traffic at sea.[84] There is also no explicit mention of the subject in the program for the 1987 Conference on Drug Abuse and Illicit Trafficking, that the General Assembly adopted in 1985.[85] Nevertheless, in the discussion in the Commission on Narcotic Drugs in 1985, some representatives suggested that "the present opportunity should be taken to consider the problem of drug smuggling in intercepting suspect vessels on the high seas";

and suggested that drug trafficking on the high seas should be given in international law the same status as piracy."[86] This appeal was echoed at the special session of the Commission in February 1986, where several representatives supported "the inclusion of provisions allowing for appropriate intervention on the high seas in cases of illicit drug traffic," and suggested that improved co-operation and "bilateral and regional agreements" in this field should be encouraged. Others pointed out that "provisions in the new instrument should be in conformity with those of the United Nations Convention on the Law of the Sea (1982)."[87] Consequently, the Commission included in its "Guidance on the drafting of an international convention to combat drug trafficking," as one of the elements of that Convention, "[s]trengthening mutual co-operation among States in the suppression of illicit drug trafficking on the high seas."[88]

Here is, therefore, a golden opportunity of preparing new rules on the subject that would conform to several common goals of the United States and other freedom-loving states, that would, in particular, provide effective means for dealing with drug smugglers on the high seas, but would at the same time avoid interference with maritime commerce and the internationally recognized human rights of the individuals present on the intercepted vessels. It is a difficult but not impossible task.

Alternatively, it might be possible to follow the path blazed by the United States agreement with the United Kingdom on interdiction of unlawful importation of narcotic drugs into the United States, that was concluded by an exchange of notes on 13 November 1981.[89] It allows the boarding by United States authorities of private vessels under the British flag in an area of the high seas embracing the Gulf of Mexico, the Caribbean Sea, a portion of the Atlantic Ocean, and all other areas "within 150 miles of the Atlantic coast of the United States." The boarding is allowed "in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation to the United States in violation of the laws of the United States." The basic excuse for boarding is the traditional rule that a foreign warship is allowed "to establish the place of registration of the vessel," and the boarding party may ascertain that by addressing inquiries to those on board and examining the ship's papers and, more vaguely, taking "such other measures as are necessary" for that purpose. Then comes the shift: "When these measures suggest that an offense against the laws of the United States relative to the importation of drugs is being committed, the Government of the United Kingdom agrees that it will not object to the authorities of the United States instituting a search of the vessel." While this provision is far-reaching, it may be noted that it implies that the starting point for this reinforced suspicion cannot be a physical search of the ship (as this is the *next* step), but must be the result of findings derived from documents or statements by the captain or the crew. If the authorities of the United States have been led by the search to the belief that an offense against the anti-drug laws of the United States is being committed, then they are allowed to seize the vessel and take it into a United States port.

As all these steps are to a large extent in the discretion of the authorities of the United States and lend themselves easily to abuse, the United Kingdom Government reserved to itself the right to object, within fourteen days of the vessel's entry into port, to further exercise of the United States' jurisdiction, and the United States agreed

that thereupon it would release the vessel without charge. Similarly, if the United Kingdom, within thirty days of the vessel's entry into port, objects to the prosecution of any United Kingdom national found on board, such person has to be released by the United States. On the other hand, in a departure from the traditional rule that the flag state is entitled, and perhaps even obliged, to protect the members of the crew of its vessels of their nationality (as the United States did in the period preceding the War of 1812), the United Kingdom agreed that it "will not otherwise object to the prosecution of any person found on board the vessel."

There is finally a weak provision for the settlement of disputes under this agreement, especially those relating to any loss or injury "suffered as a result of any action taken by the United States in contravention of these arrangements or any improper or unreasonable action taken by the United States pursuant thereto." In such a case, "representatives of the two Governments shall meet to decide any question relating to compensation." If they don't agree, there is no other recourse, as surprisingly there is no arbitration treaty between the two countries despite the fact that in the past they have found it possible to submit many claims to arbitration.

This is not a perfect model, but a good beginning. Perhaps it is even too good, as the United States has not embarked, as it did in 1924, on a diplomatic effort to have similar agreements with all other interested states. It is possible that the mild restrictions of the United Kingdom agreement on possible abuse of power by the United States authorities are found too uncomfortable; and that these authorities prefer instead to obtain *ad hoc* consent for each search and seizure,[90] or even to pretend that the fact that the flag state did not later object is equivalent to an *ex post facto* ratification of the seizure.[91] It is in order to avoid such abuses of the basic rules of the international law of the sea and of the interrelated rules of international human rights law that the law of the sea conventions require "a treaty" properly defining the allowable searches and seizures and providing at least some minimum guarantees that the fate of the owner of the ship and of the captain and the crew will be at complete mercy of the foreign warship.[92] I hope that in the future those that preach law and justice will themselves abide by these noble precepts.

It is quite clear that, unless there should be some changes in the attitude of the courts, a considerable revision of relevant legislation, or an unexpected change in enforcement procedures, little help can be expected on the domestic level.

In particular, as long as the United States courts continue to assert that the provisions of the law of the sea conventions are not self-executing and cannot be applied by them to protect individuals against actions by United States' officials on the high seas,[93] a remedy has to be sought on the international plane. The issues involved relate really to the application of international human rights law to governmental actions against foreign vessels on the high seas and the persons on board these vessels. An international human rights tribunal is most suitable for this purpose.

It just happens that we have such a tribunal, the Inter-American Court of Human Rights established by the American Convention on Human Rights which was signed by the United States in 1977 and is now languishing in the Senate waiting for approval.[94] The Inter-American Commission on Human Rights may refer a case to the Court that has been

submitted to the Commission by a petition presented by a person or group of persons, if a friendly settlement has not been reached with the State against which a complaint has been lodged.[95]

The jurisdiction of the Court is not limited to the interpretation of the Convention; member States of the Organization of American States (including the United States) may consult it regarding the interpretation of "other treaties concerning the protection of human rights in the American States."[96]

In its first advisory opinion, made in response to a request by Peru, the Inter-American Court interpreted this provision broadly by stating that "the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principle purpose of such a treaty, and whether or not non-member States of the Inter-American system are or have a right to become parties thereto."[97]

Consequently, any American State may ask the Court for an interpretation of the relevant articles of the Convention on the High Seas or the Convention on the Territorial Sea and the Contiguous Zone; a question may be asked, for instance, whether these provisions confer any rights on individuals. Or, the Inter-American Commission on Human Rights may ask the Court whether the United States is obliged to comply, not only on its territory but also when acting on the high seas, with the provisions of the Americas Declaration of the Rights and Duties of Man,[98] which the United States has accepted, and which the Commission is authorized to intepret. These provisions deal, for instance, with equality before the law, arbitrary arrest, due process, and other internationally recognized human rights. If any of these rights have been violated by the Coast Guard, the injured person, whether a United States citizen or an alien, may submit a petition to the Commission under the American Declaration, and the Commission may decide whether there has been a violation and present a report on the matter to the Organization of American States, as was done in several cases that were brought to the Commission against the United States.[99]

Finally, to remove any doubts about the Court's jurisdiction in this area, the United States could sign an agreement with the Caribbean and Central American states conferring jurisdiction on the Inter-American Court to render advisory opinions on request of one of the States Parties to this agreement, or of the Inter-American Commission, in any case in which an individual alleges that another party to the agreement has violated internationally recognized human rights with respect to persons on board a foreign vessel on the high seas.

If this could be arranged, a vision of a better future, where military might will bow to human right, may await us.

Some of you perhaps remember a beautiful picture by Botticelli in a Florence museum showing Venus emerging from the sea on a half-shell. I hope that out of the marriage of the law of the sea and the law of human rights an equally beautiful creature will be born.

NOTES

* The author wishes to acknowledge the diligent research assistance of Ms. Megan Devorsey in analyzing the complex mosaic of relevant decisions of United States courts.

1. See L. Sohn, "The New International Law: Protection of The Rights of Individuals Rather than States," 32 Am. U.L. Rev. 1, 9-17 (1982).
2. For a list and texts of these instruments, see United Nations, Human Rights: A Compilation of International Instruments, UN Doc. ST/HR/1/Rev.2 (1983).
3. Universal Declaration on Human Rights, approved 10 December 1948, G.A. Res. 217A, UN Doc. A/810 at 56 (1948).
4. In the 1975 Helsinki Final Act, the participating states of Western Europe, North America and Eastern Europe agreed that in the field of human rights they "will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights." 14 Int'l Leg. Mat. 1292, 1295 (1975).
5. The Foreign Assistance Act of 1961, as amended, codified at 22 U.S.C. Sec. 276 *et seq.*
6. *Id.*, 22 U.S.C. Sec. 2151n (a) (1983).
7. *Id.*
8. *Id.*
9. *Id.*, Sec. 2151n (d) (1983). For a collection of current U.S. legislation relating human rights to U.S. foreign policy, see H.R. Committee on Foreign Affairs, Human Rights Documents: Compilation of Documents Pertaining to Human Rights 24-58 (Comm. Print 1983).
10. See, e.g., U.S. Department of State, Country Reports on Human Rights Practices for 1981: Report submitted to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations, 97th Congress, 2d Sess., at 2(1982). The country reports must also now include information on worker rights within the beneficiary countries. This new requirement is found in Section 505 (c) of the Trade Act of 1974 as amended by Title V of the Trade and Tariff Act of 1984, 19 U.S.C. Section 2465 (c).
11. Country Reports on Human Rights Practices for 1981, *supra* note 10, at 4-5.
12. President's Proclamation on Human Rights Day and Week, 17 Weekly Comp. Pres. Doc. 1359 (12 December 1981).
13. As Professor Henkin has said "the rules of the international law of the sea are now supplemented by the international law of human rights: international human rights instruments recognize a right of privacy which applies to actions by the United States in respect of its own vessels and to foreign flag vessels despite consent of the foreign flag state." Henkin, "The Constitution at Sea," 36 Maine L. Rev. 201, 209 (1984).
14. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311.
15. United Nations Convention on the Law of the Sea 10 December 1982, UN Pub. Sales No. E.83.V.5 (1982). For the United States acceptance

of the navigation provisions, see Statement by the President, United States Ocean Policy, 19 Weekly Comp. Pres. Doc. 383 (10 March 1983), 83 Dep't State Bull., No. 2075, at 70-71 (1983), 22 Int'l Leg. Mat. 464 (1983).

16. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 13, Article 19(1)(d). That paragraph provides:

> 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
>
> (a) If the consequence of the crime extend to the coastal state; or
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
> (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
> (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

17. *Id.*, Article 19(5). It provides:

> 5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

18. *Id.*
19. Report of the International Law Commission to the General Assembly, 11 GAOR Supp. (No. 9) at 21, UN Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 275.
20. 3 UN[First] Conference on the Law of the Sea, Off. Rec. 116-17 (1958).
21. See, McDougal & Burke, The Public Order of the Oceans 300-1 (1962).
22. United Nations Convention on the Law of the Sea, *supra* note 15, Article 27(1)(d) and (5). The changes in this article relating to the protection of the marine environment and the resources of the exclusive economic zone are not relevant to the issues discussed here.
23. United Nations Convention on the Law of the Sea, *supra*, note 15, Article 108(1).
24. See Convention Relating to the Suppression of the Abuse of Opium and Other Drugs, January 23, 1912, 38 Stat. 1912, T.S. No. 612, 1 Bevans 855; Agreement Concerning the Suppression of the Manufacture of, International Trade in, and Use of Prepared Opium, 11 February 1925, 51 L.N.T.S. 337, 3 Hudson, International Legislation 1580 (1931); Convention on Traffic in Opium and Drugs, 19 February 1925, 81 L.N.T.S. 317, 3 Hudson, *op. cit.* 1589 (1931); Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic

Drugs, 13 July 1931, T.S. No. 863, 139 L.N.T.S. 301; Agreement Concerning the Suppression of Opium Smoking, 27 November 1931, 177 L.N.T.S. 373, 5 Hudson, *op. cit.* 1149; Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 26 June 1936, 12 U.N.T.S. 208, 7 Hudson, *op. cit.* 359 (1941); Protocol amending the Agreements, Conventions, and Protocols on Narcotic Drugs of 23 January 1912, 11 February 1925, 19 February 1925, 13 July 1931, 27 November 1931, 26 June 1936, done on 11 December 1946, 61 Stat. 2230, T.I.A.S. No. 1671, 4 Bevans 267, 12 U.N.T.S. 179, Protocol Bringing under International Control Drugs outside the Scope of the Convention of 13 July 1931, as amended, done 19 November 1948, 2 U.S.T. 1629, T.I.A.S. No. 2308, 44 U.N.T.S. 277; Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 23 June 1953, 14 U.S.T. 10, T.I.A.S. No. 5273, 456 U.N.T.S. 3.

25. Single Convention on Narcotic Drugs, 30 March 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204.
26. Protocol Amending the Single Convention on Narcotic Drugs, 25 March 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3.
27. Single Convention on Narcotic Drugs, *supra* note 25, Article 35.
28. *Id.*, Article 36.
29. Protocol Amending the Single Convention, *supra* note 26, Article 14.
30. See Convention on Psychotropic Substances, 21 February 1971, 32 U.S.T. 543, 564-66, T.I.A.S. No. 9725, 1019 U.N.T.S. 175, 191-92.
31. *The Wanderer* (U.S. v. Great Britain, 1921), 6 R. Int'l Arb. Awards 68, 71 (1955); see also, *The Jessie*, *id.* at 57-58.
32. 2 Hackworth, Digest of International Law 659 (1941).
33. 2 Moore, A Digest of International Law 987-1001 (1906).
34. The Lotus, P.C.I.J., Ser. A, No. 10, at 25 (1927).
35. Gutteridge, "Supplementary Slavery Convention, 1956," 6 Int'l & Comp. L.Q. 449, 454-56 (1957).
36. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery, 7 September 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3.
37. Gutteridge, *supra* note 35, at 467.
38. UN Doc. A/CN.4/17 (1950) at 12.
39. UN Doc. A/CN.4/42 (1951), at 22. Professor Francois relied on a statement by Justice Story that a warship seizes a foreign vessel at its peril and, if unjustified, "must make full compensation." *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 42 (1826).
40. Report of the International Law Commission to the General Assembly, 6 UN GAOR Supp. (No. 9) at 16, UN Doc. A/1858 (1951), reprinted in [1951] 2 Y.B. Int'l Law Commission 139-40.
41. Report of the International Law Commission to the General Assembly, 10 UN GAOR Supp. (No. 9) at 8, UN Doc. A/2934 (1955), reprinted in [1955] 2 Y.B. Int'l L. Comm'n 26-27. Such zones were delimited in the Brussels Act relating to the African Slave Trade, 2 July 1890, Articles 21, 42-49, 173 Parry's T.S. 293, 1 Bevans 134. That Act was abrogated, as between the parties to the new convention, by the Convention of St. Germain, 10 September 1919, 8 L.N.T.S. 25, 1 Hudson, International Legislation 343 (1931).
42. 4 UN [First] Conference on the Law of the Sea, Off. Rec. 80, 82-83, 90 (1958).
43. 2 *id.* at 22.
44. Convention on the High Seas, *supra*, note 14, Article 22.

45. *Id.*, Article 8(2).
46. United Nations Convention on the Law of the Sea, *supra* note 15, Article 110(4) and (5).
47. See, e.g., the statement by the President on United States Ocean Policy, *supra* note 15, accepting the relevant provisions of the Convention.
48. United Nations Convention of the Law of the Sea, *supra* note 15, Article 110(1).
49. 1956 Report of the International Law Commission, *supra* note 19, at 29-30, and 1956 Y.B., *ibid.*, at 283-84.
50. Hosea, 8:7.
51. See, e.g., Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion, 1923), P.C.I.J., Ser. B, No. 4, at 25 (an exception to international law principles does not lend itself to an extensive interpretation).
52. 1956 Report of the International Law, *supra* note 19, at 30, and 1956 Y.B., *ibid.*, at 284.
53. *Ibid.*
54. United Nations Convention on the Law of the Sea, *supra* note 15, Article 110(1)(c) and (d).
55. *Id.*, Article 109.
56. European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside of National Territories, 22 January 1965, 634 U.N.T.S. 239.
57. The Court in the United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979), quotes Oppenheim's statement that it is "[i]n the interest of order on the open sea" that a stateless vessel enjoy no protection. (1 L. Oppenheim, International Law 546 (7th ed. H. Lauterpacht, 1948).

    A stateless vessel can be stopped by any warship, because, as the United States courts view the situation, stateless vessels do not have the protection provided by a flag state. United States v. Dominguez, 604 F.2d 304, 308 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). "International law shelters only members of the international community of nations from unlawful boardings and searches on the high seas." United States v. Cortes, *supra*, at 110.

    Even if the boarding was in violation of international law, one court has said that the United States may violate international law in order to carry out national policy. United States v. Howard-Arias, 679 F.2d 363, 371 (4th Cir.), cert. denied, 459 U.S. 874 (1982). According to some decisions, even the protection of a flag state is ineffective if the flag state is not a party to the Convention on the High Seas. The guarantee of freedom of the high seas is only "afforded ships registered in a foreign nation which is a signatory of the Convention." United States v. May, 470 F.Supp. 384, 398 (S.D. Texas 1979).
58. The American courts do not recognize any individual rights in the drug interdiction cases beyond those guaranteed by the Fourth Amendment. Even this fundamental constitutional guarantee is diluted on the high seas. United States v. Williams, 617 F.2d 1063, 1082-84, 1089-90 (5th Cir. 1980). But see the concurring opinion by Judge Roney, in which five other judges joined, *id.*, at 1093 ("Williams, as a United States citizen on a foreign ship, just as on foreign soil, does have constitutional rights against an unreasonable search and seizure by United States Government authorities"); Judge Faye, dissenting in United States v. Warren, 578 F.2d 1058, 1082-83 n. 2

(5th Cir. 1978), cert. denied, 446 U.S. 956 (1980). ("I see no reason why a drug importer on the high seas should have fewer rights when confronted by the Coast Guard than should a person on land near the Mexican border when confronted by an officer of the Border Patrol").

59. See G. Davis, World Government: Ready or Not! 147-222 (1984).
60. See Convention on the Status of Stateless Persons, 26 April 1954, 360 U.N.T.S. 117 (in force with respect to more than thirty states, but not ratified by the United States). The Convention contains generally accepted standards on the subject. After all, a stateless person retains its status as a human being, and should be treated as such. A state should accord such person treatment at least as favorable as that accorded to its own nationals or to aliens generally; in the latter case the requirement of reciprocity should be waived. See *id.*, Articles 3, 4, 7, 16. There is even a special provision for stateless seamen. *Id.*, Article 11.
61. Convention on the High Seas, *supra*, note 14, Article 6(2). There is an identical provision in Article 92(2) of the United Nations Convention on the Law of the Sea, *supra*, note 15.
62. The persons on board a ship assimilated to a stateless ship should be treated at least as well as stateless persons (*supra*, note 60), or in accordance with their national status.
63. Convention on the High Seas, *supra*, note 14, Article 22, opening clause, quoted in text following note 44; United Nations Convention on the Law of the Sea, *supra*, note 15, Article 110, opening clause, quoted in text following note 48.
64. St. Germain Convention on the Control of Trade in Arms and Ammunition, 10 September 1919, Articles 6(3) and 16, 7 L.N.T.S. 331, 1 Hudson, International Legislation 323 (vessels may be boarded and seized but must be delivered to the nearest port of the flag State).
65. General Act of the Brussels Conference Relating to the Slave Trade, 2 July 1890, partly abrogated in 1919. See *supra* note 41.
66. See, e.g., Convention for Regulating the Police of the North Sea Fisheries, 6 May 1882, Articles 26-33, 73 Br. & For. State Papers 39, 160 Parry 219. With respect to seals, see, e.g., *The Wanderer*, *infra* note 69.
67. Protection of Submarine Cables, 14 March 1884, T.S. 380, 24 Stat. 989, 1 Bevans 89 (right to board vessels to ascertain nationality).
68. See, e.g., Convention for the Protection of Smuggling of Intoxicating Liquors, 23 January 1924, United States-Great Britain, T.S. 685, 43 Stat. 1761, 12 Bevans 414 (right to search and seizure for the distance of one hour travel).
69. *The Wanderer*, *supra* note 31, at 71-73 (1921).
70. Some government officials seem to prefer the case by case method. Morris Busby, of the Office of Ocean Affairs, U.S. Department of State, stated at a Congressional hearing that the United States should not take the initiative to define such boarding rights, but rather should continue to request permission on a case by case basis. Coast Guard Drug Law Enforcement: Hearings Before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries, 96th Cong., 1st Sess., at 55 (1970).

    The case by case method has been embraced with a vengeance in interpreting the provision relating to the "customs waters of the United States" used in the Anti-Smuggling Act of 1935, as amended (19 U.S.C. Sec. 1401(j)), which has been incorporated by reference

in the Marijuana on the High Seas Act (21 U.S.C. Sec. 955b(a)). According to that provision the term "customs waters" means, "in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States." The Marijuana on the High Seas Act makes it unlawful "for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance." (21 U.S.C. Sec. 955a(c).) By combining these provisions, the courts have come to the conclusion that by a telephone arrangement a custom area can be created around the vessel, and the persons on board can then be prosecuted for having committed an offense within the "customs waters of the United States," even if the seizure has occurred at a point hundreds of miles from the United States. See, e.g., United States v. Romero-Galue, 757 F.2d 1147 (11th Cir. 1985); United States v. Gonzalez, 776 F.2d 931, 93335 (11th Cir. 1985). The court considered in the latter case that requiring a more formal arrange ment would jeopardize the interdiction program. *Id.*, at 936. The same result was reached in United States v. Vouloup, 625 F. Supp. 1266 (D.P.R. 1985), in which a French vessel was involved. The Court found that, while the Coast Guard has no authority to search specific foreign vessels that are not within the United States customs waters, the United States may extend its customs waters to specific foreign vessels through the use of specific arrangements. A prior treaty is not necessary for these specific arrangements. *Id.*, at 1267.

71. As will be noted later, the United States has been willing in some instances to make arrangements through international agreements. The recent agreement with the United Kingdom, (note 89, *infra*) satisfies some, but not all, of the requirements mentioned in the text.
72. Convention on the Territorial Sea and Contiguous Zone, *supra* note 14, Article 19.
73. See Convention on the High Seas, *supra* note 14, Article 22.
74. United States Convention on the Law of the Sea, *supra* note 15, Article 27.
75. *Id.*, Article 33.
76. *Id.*, Articles 105 and 109(4).
77. *Id.*, Article 108(1).
78. *Id.*, Article 108(2). Emphasis added.
79. United States courts find, however, support for the Coast Guard boardings of foreign vessels on the high seas in the consent given by the flag State. This is supposedly not in violation of the Convention on the High Seas because the Convention is not self-executing. United States v. Postal, 589 F.2d 862 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1980), and even if the Convention were self-executing, these agreements would still be valid because permitting a flag state "to authorize boarding by a foreign vessel in no way interferes with this policy; indeed, it can only further

the recognition in Article 6 of the flag state's ability to exercise authority over its vessels." United States v. Green, 671, F.2d 46, 51 (1st Cir.), cert. denied, 457 U.S. 1135 (1982).

80. UN Doc. E/CN.7/1983/2/Add.1 (1982), paras. 4(a) and 39-40.
81. 1983 UN ESCOR, Supp. No. 5 (E/1983/15) at 3.
82. UN Doc. E/RES/1983/4.
83. G.A. Res.39/141, 39 U.N. GAOR Supp. (no. 51) at 229, UN Doc. A/39/51 (1985).
84. UN Doc. A/C.3/39/L.30/Rev.1 (1984).
85. G.A. Res. 40/122 (1985).
86. 1985 UN ESCOR, Supp. No. 3 (E/1985/23), at 16.
87. 1986 UN ESCOR, Supp. No. 3 (E/1986/23), at 8.
88. *Id.* at 24, 26, para. 3(j).
89. Agreement to Facilitate the Interdiction of Vessels Suspected of Trafficking in Drugs, Nov. 13, 1981, T.I.A.S. No. 10296. Agreements on the subject have also been concluded with the Bahamas, March 6, 1985, and Haiti, 22 August 1984, but their texts have not yet been published. See U.S. Department of State, Treaties in Force 10, 77 (1986). The agreement with the United Kingdom was applied in United States v. Reeh, 780 F.2d. 1541 (11th Cir., 1986) (for a dissenting opinion by Judge Hatchett emphasizing the "reasonable suspicion" standard, see *id.*, 1547, 1549); United States v. Quemener, 789 F.2d 145 (2d Cir., 1985) (the agreement modified the High Seas Convention).
90. See earlier statement, by Busby, *supra* note 70.
91. The United States courts have held that the failure of the flag State to object is equivalent to consenting to the seizure after the fact. The Court in United States v. Hensel, 699 F.2d 18, 28 (1st Cir.), cert. denied, 461 U.S. 958 (1983), decided that "[g]iven the need for speedy action, the hostility shown by all nations including Honduras to the international drug trade, and the fact that Honduras apparently did not protest the seizure, Honduras may arguably be said to have ratified the search." The Hensel Court cited United States v. Dominguez, 604 F.2d 304, 308 (4th Cir., 1979), cert. denied 444 U.S. 1014 (1980), for support of this statement as, in Dominguez, the Bahamas government consented to the search of a ship on the basis of a registration number that proved to be wrong, but did not protest when a vessel with a different number was searched instead.
92. The United States courts overlook the position of those on the boat. For instance, the court in United States v. Williams, 617 F.2d 1069 (5th Cir., 1980) asserted that because the flag state, Panama, waived its rights under common international law, the case no longer raised a question of international law. "[R]ights under international common law must belong to sovereign nations, not to individuals, just as treaty rights are the rights of the sovereign."
93. The Convention on the High Seas was held to be non-self-executing in United States v. Postal, 589 F.2d 862 (5th Cir., 1979), cert. denied, 444 U.S. 832 (1980). The court reasoned that if the Convention was self-executing, the United States would not have jurisdiction and the court decided that since the United States has always asserted jurisdiction, the treaty must be non-self-executing. *Id.*, at 879. United States courts have gone so far as to say that even if the High Seas Convention were self-executing, it would not offer protection to citizens of states which were not parties to the treaty. "The treaty is not an act of disinterested benevolence for

the peoples of the world. There is no indication in the treaty, or elsewhere, that it was intended to confer rights on non-member nations, let alone on citizens of non-member nations." United States v. Canada, 585 F.2d 1252, 1261 (5th Cir., 1978). (A critical examination of the theory of self-executing treaties may be found in Iwasawa, "The Doctrine of Self-Executing Treaties in the United States," 26 Va. J. Int'l L. 627 (1986). See also Riesenfeld, "The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win At Any Price?": 74 Am. J. Int'l 892 (1980).)

94. American Convention on Human Rights, 22 November 1969, OAS Official Records, OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, 7 January 1970, 9 Int'l Leg. Mat. 101 (1970), 65 Am. J. Int'l L. 679 (1971).
95. The Commission on Human Rights submitted to the Court in 1986 three cases involving human rights violations, each directed against Honduras. This is the first time that cases rather than advisory opinion requests have been submitted to the Court. Inter-American Court of Human Rights, Press Release, 17 June 1986.
96. American Convention on Human Rights, *supra* note 94, Article 64.
97. Inter-American Court of Human Rights, "Other treaties" subject to the advisory jurisdiction of the Court (Article 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of 24 September 1982, Ser. A, No. 1, at 43.
98. American Declaration on the Rights and Duties of Man, Pan American Union, Final Act of the Ninth Conference of American States 38-45 (1948), 43 Am. J. Int'l L. 133 (Supp., 1949).
99. See, e.g., White and Potter v. United States, Inter-American Commission on Human Rights, Case 2141, Resolution No. 23/81, 6 March 1981, Inter-American Commission on Human Rights, Annual Report, 1980-81, OAS Doc. OEA/SER.L/V/II.54, Doc. 9/Rev. 1, pp. 25-54 (1981) (a case involving alleged United States violation of the right to life by allowing abortion).

INTERDICTION AT SEA AND THE FOURTH AMENDMENT

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> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.
>
> *Boyd* v. *United States*
> 116 U.S. 616, 635 (1886).

Introduction

The past two decades have witnessed a massive increase in drug smuggling into the United States. Drugs have been and continue to be smuggled into the United States in large quantities over land borders, through the air, and by sea. In an effort to diminish or even halt the increase in the smuggling of drugs by sea,[1] the United States Coast Guard and other law enforcement agencies have vigorously exercised their powers to stop and search vessels.[2] This power has been applied on the high seas, in the contiguous zone, and in territorial waters, and has affected American vessels and citizens as well as foreign vessels and citizens.

The resultant criminal prosecutions have, of course, spawned a plethora of case law. Indeed, each of the circuit courts that span the nation's coastlines have written extensively on a multitude of issues arising from these law enforcement activities.[3] The issues raised in the case law concern a wide variety of statutory questions, jurisdictional issues, international law problems, and constitutional commands. Most prominent in the case law and most significant for enforcement purposes, however, is the role of the Fourth Amendment in regulating the activities of law enforcement officials.

Two parallel statutory provisions, 14 U.S.C. Sec. 89(a)[4] and 19 U.S.C. Sec. 1581(a),[5] in their language, give the Coast Guard and other federal customs authorities virtually plenary power to stop and search all vessels subject to the jurisdiction of the United States. Read literally, these provisions make up what has been appropriately described as "one of the most sweeping grants of policy authority ever written into the law."[6] Further, sections 89(a) and 1581(a) raise serious constitutional questions because they literally permit searches and seizures without probable cause or a warrant. This is so even though the United States Supreme Court has repeatedly stated that a warrant based upon probable cause is a Fourth Amendment requirement, subject only to a few specifically established and well-delineated

exceptions.[7] Moreover, in ruling on the constitutionality of warrantless stops and searches under the authority of these statutes and in other circumstances, courts have largely failed to apply established Fourth Amendment principles in an analytically sound manner. Indeed, it is no exaggeration to say that judicial authority has strongly supported an almost unlimited authority on the part of law enforcement officials to stop and search vessels on the seas.

The major purpose of this essay is to examine the Fourth Amendment implications of vessel stops and searches conducted under these statutes and in other circumstances,[8] and to determine how far law enforcement authority may extend without violating the Fourth Amendment. More particularly, this essay addresses two significant fourth amendment concerns: First, what grounds, if any, are necessary to justify the stop (seizure) of a vessel? Second, assuming a proper stop, precisely how extensive may an inspection (search) of the vessel be?

The paper proceeds through several stages. Part I discusses the Fourth Amendment Tradition and its radiating principles which establish the constitutional framework through which one must necessarily view the problems that arise in this area. This discussion includes an analysis of the words and structure of the amendment and its fundamental principles, which have been interpreted as such by the juridiciary over the past century.

Part II discusses the authority of the Coast Guard and other federal customs officials to make routine documentation and safety inspection stops under 89(a) and 1581(a), and the permissible scope of a search conducted pursuant to such a stop. Included in Part II is an analysis of the Supreme Court's opinion in *United States* v. *Villamonte-Marquez*,[9] the only major Supreme Court opinion that has spoken directly to some of the questions raised about searches and seizures at sea.[10] But the decision is a limited one. It merely interprets the power of customs officers to board and inspect a vessel for documents in customs waters pursuant to the authority granted them under 1581(a). The remainder of Part II, therefore, is used to discuss the implications of *Villamonte-Marquez*[11] to searches and seizures at sea conducted under the authority of 89(a).

Part III discusses the constitutionality of stops and searches at sea undertaken for customs purposes where the documentation and safety inspection authority is not relied upon or is exceeded. Part III focuses on two major areas: border stops and searches, and stops and searches made upon reasonable suspicion of criminal activity. Finally, Part IV suggests a number of proposals for conducting these so-called administrative searches and seizures which may help to bring the activities of law enforcement officials within the boundaries of the Constitution.[12]

I. The Fourth Amendment Tradition

Freedom from unreasonable searches and seizures by government officials is one of the most remarkable and most celebrated aspects of American constitutional law. It helps define the relationship between the government and the individual. It suggests a sphere of private activity that must be left free from government intrusion. In so doing, it also helps shape our relationships with other private individuals and groups by protecting our right to be let alone. The fourth amendment helps define what the United States stands for as a nation.

This principle is rooted in the text of the Constitution, but like other Bill of Rights guarantees, it has been the decisions of the

Supreme Court over the last century that have, in my opinion, nurtured that principle. They have given it much of its present day shape. These decisions also account for much of its force and sweep.

In speaking of a Fourth Amendment Tradition, I mean an all encompassing perspective. Everything related to the Fourth Amendment is included. Every encounter between the government, the individual, the Supreme Court, and the Fourth Amendment is part of the Tradition. There is, however, a shape and point to the Tradition. It is not meant to be a mere list of factors in encyclopedic form, but more in the nature of a shared understanding. Those of us who speak of a Fourth Amendment Tradition try to see all the decisions and to abstract from them an understanding of what freedom from unreasonable searches and seizures means: what lies at the core and what at the periphery, what is included and what is beyond the protection of the Fourth Amendment. The shape is not, of course, fixed for eternity. Rather, each new decision is included within the Tradition and therefore contributes to the meaning of the whole. It is also true, however, that the Tradition acts as a constraining force on present and future decisions. The Tradition is the background against which the judge confronts those issues. The Tradition orients the judge. It is the background against which every judge writes.

To understand the Fourth Amendment Tradition in the context of searches and seizures at sea, it is useful to look at the words and structure of the Fourth Amendment itself and to see the principles that have been judicially interpreted to make up a significant part of that Tradition. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is a broad, general statement about the relationship between the individual and the government. Its function, according to the Tradition, is to secure the permanence of personal autonomy against the constantly changing demands of perceived social necessity. But there is a fundamental problem with the language and structure of the amendment: It is general and does not answer specific questions.[13] It has the virtue of brevity and the vice of ambiguity.

The amendment divides neatly into two clauses. The first clause contains a general protection against "unreasonable" searches and seizures; the second clause specifies the conditions for issuance of a warrant. This latter clause makes it clear that a valid arrest or search warrant may issue only upon a showing of probable clause for the arrest or search. Nowhere in the amendment, however, is the relationship between the two clauses discussed or clarified. Nor is there a definition of what kind of governmental action may constitute an unreasonable search and seizure. Neither the structure nor the language of the Fourth Amendment answers the question of whether searches or seizures are constitutionally permissible and therefore reasonable without a warrant or probable cause.

To answer some of these questions, the Court has built upon the Tradition of the amendment by measuring its language and structure against the values perceived to undergird the relationship between the

citizen and the government. In this light, the Tradition suggests several possible readings of the amendment. First, the second clause may be seen as a partial explanation of the first, so that any search or seizure conducted without a warrant is, by that fact alone, unreasonable. Second, it is possible to argue that the first clause provides an additional requirement by implying that some searches and seizures may be unreasonable even when made under the authority of a warrant. Finally, one can plausibly claim that the first clause provides additional search and seizure power which is reasonable even when done without a warrant.

While the manifest purpose of the Fourth Amendment is to restrict searches and seizures by government officials that invade individual privacy, today it is clear that the Tradition created by the Supreme Court's interpretation of the amendment allows some searches and seizures that are reasonable independent of the warrant clause. To put it another way, in limited circumstances, the first clause does provide some additional power to government officials. They can search and seize in very carefully circumscribed situations without a warrant. For example, the police are free to search movable vehicles without a search warrant when the exigencies are such that it is not feasible to obtain a warrant beforehand.[14] Moreover, the police may sometimes make an arrest without a warrant even when they had ample time to obtain one prior to the arrest.[15] But in neither of these described circumstances is the warrantless activity constitutional under the Fourth Amendment unless the police had probable cause for the search and seizure.

There are, however, even more narrowly circumscribed situations in which a warrant is not required and probable cause standards are lowered or not required at all. In certain "stop and frisk" circumstances, for example, a warrantless seizure of the individual falling short of a "full fledged" arrest may be made upon information which is less than that needed for a "full fledged" arrest.[16] There are even situations in which neither probable cause or a reduced cause standard nor a warrant are required for the validity of a search or seizure. For example, if someone crosses our international border, a search and seizure of that person and his property is said to be reasonable simply by virtue of the fact that the person crossed our border.[17] These narrowly circumscribed exceptions, however, are judicially recognized only because of serious and compelling governmental interests which are said in the context of these exceptions to outweigh the intrusion on individual privacy. But there is no "natural" limit to this reasoning. Expanding these exceptions can lead only to the Fourth Amendment Tradition becoming a "mere form of words."

In sum, the Fourth Amendment Tradition applicable to searches and seizures at sea is not difficult to express. The Fourth Amendment prohibition of unreasonable searches and seizures means that government officials may neither search nor seize an individual or his private property unless there is probable cause. But probable cause alone is not necessarily sufficient. In most circumstances, there must also be a warrant or exigent circumstances to excuse the failure to obtain one. There are exceptions to these general principles, but they are carefully defined and narrowly limited ones.

The Fourth Amendment Tradition has been violated in cases concerning searches and seizures of vessels at sea. Courts have generally failed to apply established Fourth Amendment principles in ruling on the constitutionality of searches and seizures at sea. They often allow government enforcement officers to stop, board, and search a vessel at

sea without probable cause and without a warrant. Courts further violate the Tradition by failing to articulate the requirements of an exception to these Fourth Amendment principles which might justify the government actions in the absence of probable cause or a warrant. Thus, in too many circumstances, courts fail to determine whether the facts of a particular case meet any of the requirements of any of the exceptions. Even when the courts base their decisions on recognized exceptions, however, they generally blend discussion of the different exceptions together. Further, they generally do not ensure that all the requirements of any single exception are met, but simply mention certain factors which may be relevant to each of the exceptions they mix together. Perhaps even more disturbing is the failure of some courts to make any but a cursory reference to the materials which constitute the Tradition -- earlier Supreme Court cases discussing analogous land-based requirements. Indeed, when viewed against the background of the Tradition, it is possible to argue that a great majority of the cases dealing with searches and seizures at sea, and the government actions leading to these decisions, are constitutionally vulnerable.

II. Safety and Documentation Inspections

What authority consistent with the Fourth Amendment gives the Coast Guard and other federal customs officials the right to interdict vessels at sea? By far, the most common basis in the case law for asserting such authority is statutory. As noted below, two statutory provisions, 14 U.S.C. Sec. 89(a) and 19 U.S.C. Sec. 1581(a), give the Coast Guard and other federal law enforcement authorities almost unfettered authority to stop and search all vessels subject to the jurisdiction of the United States. Title 14, United States Code, Section 89(a) empowers the Coast Guard to:

> make inquiries, examinations, inspections, searches, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

Title 19, United States Code, Section 1581(a) provides that:

> any officer of the customs[18] may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters[19] ... and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicles,[20] and use all necessary force to compel compliance.

If read literally, these statutes violate the Fourth Amendment Tradition. Nowhere in either of the statutes does there appear a warrant requirement, a probable cause standard, nor any reasons which could justify a possible exigency excusing the warrant requirement or lowering the probable cause standard to one of "reasonably articulate suspi-

cion." Indeed, the scope of these statutes is mind boggling. If read literally, it is possible to argue that they allow random stops of any vessel any place and any time, seizure of the vessel for indefinite periods of time, searches of all parts of the vessel, its occupants, and any trunk, package, or cargo aboard, and seizure of anything law enforcement officials find which may be incriminating or which may lead to incriminating evidence to be used to prosecute someone for a crime.

It is, of course, just these possibilities that have led the courts to construe the broad statutory language in a more limited manner. Most courts typically claim that the Coast Guard's and other federal custom officer's authority under these statutes to stop, board, and search vessels is limited to conducting document and safety inspections.[21] Further, courts also typically recognize that both statutes allow for such inspection of any vessel found in United States customs waters,[22] and of American and stateless vessels on the high seas.[23] Moreover, where the safety and documentation power is all that is relied on, most courts hold that the statutes authorize a search of no greater scope than that which is reasonably necessary to ensure compliance with safety and documentation regulations.[24] These statutes generally have not been found to give the Coast Guard or other federal customs officials plenary authority to conduct a full search of any vessel absent probable cause or some other exception to the fourth amendment requirements.[25] But the scope of the search under these statutes nonetheless encompasses almost all areas where drugs may be found and, if probable cause arises during the search, a full search is then permitted.

Vessels are subject to a panoply of statutes and regulations that govern maritime documentation which are as extensive and complex as the typical state requirements for vehicle licensing.[26] Vessels must obtain documentation according to their size and frequently according to the trade in which they engage.[27] Vessels are also subject to periodic safety inspections to ensure compliance with federal regulations.[28] Foreign vessels are similarly regulated. For example, they are required to have a manifest which must be exhibited upon arrival in the United States,[29] and also permits to proceed from port to port.[30] When limited in scope and properly executed, a documentation and safety inspection can serve important governmental functions. Indeed, these documentation laws obviously serve the public interest in many ways. They are the linchpin for the regulation of maritime travel, for the enforcement of environmental laws, and for the collection of customs and tonnage duties, as well as for the regulation of imports and exports.[31] For these and other reasons, safety and documentation inspections have been regarded as important and are generally encouraged through statutory grants of authority. Yet, given this grant of authority and its potential for abuse, there is, in the case law, a certain ambiguity about the validity of safety and documentation stops and searches. The ambiguity concerns the exact standards necessary for a stop, and the precise limits of the search. Thus, in assessing the validity under the Fourth Amendment of a safety and documentation stop and search, two questions must be addressed: First, what grounds are necessary to justify the stop? Second, what are the precise limits on the scope of the search conducted pursuant to a safety and documenta tion inspection.[32]

Necessary Grounds to Justify an Initial Stop

Assuming the right to make a stop for a safety and documentation inspection, we are faced with a preliminary question: May such a stop be made completely at random and as a routine matter, or must there first exist a reasonable suspicion that a particular vessel subject to a seizure is not in compliance with the safety or documentation regulations before it can be stopped? Most circuit courts which have considered these questions hold that boarding and inspection need not be founded on any particularized suspicion.[33] A minority view claims that random warrantless stoppings of vessels to conduct safety and documentation inspections are impermissible.[34]

Clearly, this latter view is more consistent with the fourth amendment Tradition and its radiating principles. A common theme running through the Supreme Court's Fourth Amendment opinions is that of controlling the arbitrary discretion of field officers. The Supreme Court has repeatedly stressed that, whenever possible, the decision to make "administrative" searches and seizures must not be left to the unfettered discretion of the individual officer in the field.

Consistent with this theme, the Court has in analogous land-based situations refused to allow warrantless random inspections for safety purposes. For example, warrantless random inspections for safety purposes have been barred when directed at homes,[35] business premises,[36] or automobiles.[37] Similarly, warrantless random documentation checks, whether to establish citizenship[38] or the presence of a driver's license and vehicle registration,[39] have been found to be constitutionally impermissible.

The most relevant precedents for our purposes are those governing stops or searches of vehicles on land by police on random patrol or at fixed checkpoints.[40] A common set of requirements has emerged from these cases. Every one of the vehicle-stop precedents requires that a stop or search be supported by either probable cause, reasonable suspicion, or another feature which limits officer discretion, such as the use of fixed checkpoints.

To understand these principles and their applicability to seizures and searches of vessels, it is useful to review some of the more significant land-based decisions. In *Almeida Sanchez* v. *United States*,[41] for example, the Supreme Court held that police officers on a roving border patrol must have probable cause to suspect that a vehicle contains illegal aliens or contraband before they may search it. And in *United States* v. *Ortiz*,[42] the Court held that probable cause is necessary before a vehicle can be searched at a fixed checkpoint.

In *United States* v. *Brignoni-Ponce*,[43] and *United States* v. *Martinez-Fuerte*,[44] the Court addressed the limits on police officers' power to stop vehicles and question the occupants without searching either vehicles or occupants. The Court held that these cases were not governed by the probable cause requirement because the police procedures in question were considerably less intrusive than the full vehicle searches of *Almeida-Sanchez*[45] and *Ortiz*.[46] But the Court nonetheless continued to insist on a meaningful check on the arbitrary discretion of the officer in the field.

In *Brignoni-Ponce*,[47] the Court held that stops made by Border Patrol officers on a roving patrol are permissible only if the police have a reasonable suspicion that the vehicle contains illegal aliens. The Court continued to require that police discretion be limited by constitutional constraints. As the Court stated:

> We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. The reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. . . . To approve roving-patrol stops of all vehicles in the border area, carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.[48]

In *Martinez-Fuerte*,[49] the Court held that Border Patrol officers may stop vehicles and question their occupants at fixed checkpoints without either probable cause or reasonable suspicion. According to the Court, fixed checkpoints have two major advantages over roving border patrols for Fourth Amendment purposes which allowed the police to stop vehicles and question their occupants without probable cause or reasonable suspicion: "They decrease somewhat the intrusiveness of the stop, and they signficantly channel and limit the discretion of the officers and the consequent potential for abuse."[50] As the Court noted:

> Checkpoint operations both appear to and involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources . . . Since field officers may stop only those cars passing the checkpoints, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops.[51]

Perhaps the most relevant Supreme Court authority for our purposes concerning stops of automobiles is *Delaware* v. *Prouse*.[52] There, the Court found unconstitutional the police practice of making random automobile stops to check for safety and documentation requirements. These stops were made to ensure that only the properly qualified individuals were operating those vehicles, that licensing, registration, and safety inspection requirements were being observed, and that the vehicles were in proper condition for safe operation. In reaching its conclusion, the Court found that the incremental contribution of random stops to highway safety was slight. This was so, in the Court's view, because the probability of finding an unlicensed driver or an unsafe or unregistered automobile which could not otherwise be discovered was insubstantial. The Court therefore concluded that such a marginal contribution "cannot justify subjecting every occupant of every vehicle on the roads to a seizure -- limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable -- at the unbridled discretion of law-enforcement officials."[53]

Particularly because many of the random stops of vessels at sea are motivated by a desire to find drugs,[54] it would seem appropriate to use *Prouse*[55] and the other vehicle cases as authority for requiring a standard of at least reasonable suspicion of a law violation before the Coast Guard or other federal customs officials should be allowed to stop and board a vessel for a safety and documentation inspection under the relevant statutes. Yet, despite the similarity between a discre-

tionary on-land vehicle stop and the Coast Guard's random stopping of vessels for a safety and documentation inspection, the majority of circuit courts have found such stops reasonable under the fourth amendment[56] without any suspicion. Similarly, the Supreme Court has recently rejected the land based vehicle case rationale as controlling the statutory authority of customs officers under 1581(a) to "at any time go on board of any vessel . . . at any place in the United States . . . and examine the manifest and other documents and papers."[57] In *United States* v. *Villamonte-Marquez*,[58] the Supreme Court interpreted 1581(a) for the first time. The Court held that the Fourth Amendment is not offended "when customs officials, acting pursuant to [1581(a)] and without any suspicion of wrongdoing, board for inspection of documents a vessel located in waters providing ready access to the open sea."[59]

In *Villamonte-Marquez*,[60] customs officers, while patrolling a ship channel which connects the Gulf of Mexico with Lake Charles, Louisiana, a Customs Port of Entry, sighted an anchored, forty-foot sailboat. The wake of a passing vessel caused the French registered sailboat to rock violently. When one of the two defendants, who was aboard the vessel, shrugged his shoulders in an unresponsive manner when asked if the sailboat and crew were all right, one of the customs officers, accompanied by a Louisiana State Police officer, boarded the sailboat and asked to see the vessel's documentation. While examining a document, the customs officer smelled what he thought to be burning marijuana and, looking through an open hatch, saw burlap-wrapped bags that proved to be marijuana. Defendant, Villamonte-Marquez, was on a sleeping bag on top of the bales. Both men were arrested and given *Miranda*[61] warnings. A subsequent search of the sailboat revealed some 5,800 pounds of marijuana, stored in almost every conceivable place on the boat. A jury found the defendants guilty of several marijuana offenses. The Court of Appeals reversed the District Court's judgment of conviction, finding that the boarding of the sailboat was not reasonable under the Fourth Amendment because it occurred in the absence of a reasonable suspicion of a law violation. The Supreme Court reversed.

In justifying the authority of customs officers to stop and board a vessel for a routine inspection in the absence of even a modicum of suspicion, Justice Rehnquist, speaking for the Court, began by tracing the historical roots of 1581(a). He noted that the statute's lineal ancestor, Act of Aug. 4, 1790, 1 Stat. 145, Sec. 131, was enacted by the same Congress that promulgated the Fourth Amendment, and that the previous statute authorized the suspicionless boarding of vessels.[62] In Justice Rehnquist's view, this reflected the position of that Congress that such boardings are not contrary to the Fourth Amendment. Recognizing that 1581(a) has "an impressive historical pedigree,"[63] Justice Rehnquist found such historical roots to be significant for evaluating the scope of 1581(a) as consistent with the Fourth Amendment.

The Court then reviewed land-based precedents regarding the authority of the officer in the field to stop and search vehicles. In reaching its conclusion, the Court of Appeals had relied upon the language in *Brignoni-Ponce*,[64] which requires that roving patrol stops of vehicles are constitutional only upon a reasonable suspicion that the vehicle contains illegal aliens or contraband.[65] Justice Rehnquist noted, however, that decisions subsequent to *Brignoni-Ponce*[66] indicate that while roving patrols engaging in random stops are not permissible, stops at fixed checkpoints or roadblocks are.[67] Yet he concluded that the nature of waterborne commerce in waters providing ready access to the open sea was sufficiently different from the nature of vehicular

traffic on highways so that possible alternatives to the type of stop made here were less likely to accomplish the obviously essential governmental purposes involved.[68]

> [N]o reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established "avenues" as automobiles must do. Customs officials do not have as a practical alternative the option of spotting all vessels which might have come from an open sea and heading them into one or more corals or straits in order to make fixed checkpoint stops. Smuggling and illegal importation of aliens by land may, and undoubtedly does, take place away from fixed checkpoints or ports of entry, but much of it is at least along a finite number of identifiable roads. But while eventually maritime commerce on the inland waters of the United States may funnel into rivers, corals, and the like, which are more analogous to roads and make a "roadblock approach more feasible, such is not the case in waters providing ready access to the seaward border, beyond which is only the open sea.[69]

In addition, Justice Rehnquist found that vessels need never come to harbor, even were a fixed checkpoint to be established at various points.[70] Under the principle of reasonableness embodied in the first clause of the Fourth Amendment, he concluded that these factual differences justify a different result in this case.

Justice Rehnquist next recognized that documentation requirements for vessels are significantly distinguishable from the system of vehicle licensing, and also justify the kind of stop[71] made here. While a "police officer patrolling a highway can often tell merely by observing a vehicle's license plate and other outward markings whether the vehicle is currently in compliance with the requirements of state law,"[72] this is not the case with vessels:

> No comparable "license plates" or "stickers" are issued by the United States or by States to vessels. Both of the required exterior markings on documented vessels -- the name and hailing port -- as well as the numerals displayed by undocumented American boats, are marked on the vessel at the instance of the owner. Furthermore, in cases like this one where the vessel is of foreign registry it carries only the markings required by its home port. Here those markings indicated that the vessel was of Swiss registry, while in actuality it carried French documentation papers.[73]

Moreover, the Court concluded that the panoply of statutes and regulations governing maritime documentation are more extensive and more complex than the typical state requirements for vehicle licensing.[74] This extensive regulation system serves the public interest in a variety of obvious ways,[75] and "while inspection of a vessel's documents might not always conclusively establish compliance with United States shipping laws, more often than not it will."[76] With these differences in mind, the Court determined that the need to make document checks is great in comparison to the limited intrusion on fourth amendment interests.[77] The stop for a documentation and safety inspection involves only a brief detention where officials "come on board, visit

public areas of the vessel, and inspect documents,"[78] and any interference created is only a modest intrusion.[79]

Justice Brennan vehemently disagreed with the majority's conclusions. In a compelling dissent, he noted that the Court's precedents regarding stops of vehicles by police on a random basis or at fixed checkpoints should control this case but cannot be read to support the majority holding,[80] since those cases "uniformly hold that any stop or search requires probable cause, reasonable suspicion, or another discretion-limiting feature such as the use of fixed checkpoints instead of roving patrols."[81] The result of the majority opinion to Justice Brennan was that

> for the first time in the nearly 200 year history of the Fourth Amendment, the Court approves a completely random seizure and detention of persons and an entry onto private, noncommercial premises by police officers, without any limitations whatever on the officer's discretion or any safeguards against abuse."[82]

Since neither the majority nor the dissent denied that the vehicle stop cases would not justify the result reached in this case,[83] the debate focused on the validity of the factual differences between automobiles and vessels that allegedly justify a different result.[84] Justice Brennan enunciated what he believed were three basic flaws in the majority opinion regarding these factual differences. First, he noted that the majority had "put the cart before the horse."[85] He claimed that by focusing first on the available tools of investigation, the majority completely overlooked what is the gravamen of the automobile cases -- the Court's "unqualified and consistent rejection of any 'standardless and unconstrained discretion' that would subject our liberties to the whim of an individual police officer in the field."[86] Justice Brennan recognized that *Almeida-Sanchez*[87] and *Ortiz*[88] mandate that the discretion of police in the field be limited by the requirement of probable cause as a meaningful check on arbitrariness,[89] while *Martinez-Fuerte*[90] and *Prouse*[91] recognize that such a check may also be accomplished through the use of fixed checkpoints rather than the use of roving patrols.[92] Thus, to Justice Brennan, the vehicle-stop precedents on which the Court relies require that a stop or search be supported "by either probable cause, reasonable suspicion, or another discretion limiting feature such as the use of fixed checkpoints."[93] Since the boarding here was done by a roving patrol and without a well-founded reasonable suspicion of criminal activity, upholding "it is flatly contrary to the square holdings of [Supreme Court] cases."[94]

Nor did Justice Brennan agree with the Court that any intrusion here is a modest one, since this type of stop "does not involve a mere stopping and questioning, but an actual boarding of a private vessel -- more similar to [the] entry of a private house than to the vehicle stops."[95] Justice Brennan correctly recognized that which the majority refused to acknowledge -- the greater expectation of privacy that persons enjoy on boats:[96] "A boat, unlike a car, quite often serves as an actual dwelling for its owners. . . . even where the owners do not live aboard full-time, a boat may serve essentially the same function as a summer vacation cottage -- a residence, albeit a temporary one."[97]

Second, Justice Brennan felt that any factual differences that justify the result reached by the majority "are either insubstantial or of the Government's own making."[98] He noted that any argument that it is not practical to set up fixed checkpoints on water are not supported

by the facts of this case, since the boarding in this case took place on a ship channel which bears a strong resemblance to a limited-access interstate highway on which fixed checkpoints are routinely set up.[99] Justice Brennan also argued that random stops might not be necessary at all since, as in automobiles, most safety defects in vessels are usually detectable without any need for a random stop. Thus, he concluded that any governmental interests could just as easily be served by stopping those who commit a violation.[100] Moreover, in light of how easy it would be to provide boats with means of identification similar to those used by automobiles -- uniform license plates giving visible evidence of compliance with registration laws -- "[i]t is unseemly at best for the Government to refrain from implementing a simple, effective, and unintrusive law enforcement device, and then to argue to this Court that the absence of such a device justifies an unprecedented invasion of constitutionally guaranteed liberties."[101] Finally, even under the present system, such a document inspection could be accomplished without a boarding, by pulling "alongside or [requesting] that someone from the vessel come on board the police vessel. Use of ship-to-shore radio, too, contributes considerably to the Government's ability to keep track of documentation and registration matters."[102]

Justice Brennan found a third and final flaw in the Court's result. He concluded that "it simply does not follow that, because the police in particular situations dislike limitations placed on their powers of search and seizure, [the Court] may therefore sanction an unprecedented invasion of constitutionally protected liberties."[103] Justice Brennan claimed, therefore, that he would not agree with the Court's holding even if it could make a more persuasive showing that there are significant differences between vessels and vehicles as to the difficulty of law enforcement.

In assessing the impact of *Villamonte-Marquez*[104] on vessel stops and searches, one must keep in mind precisely what was decided by the case. The majority notes that while 1581(a) grants broad authority to customs officers, the case only addressed the more narrow issue of the power of customs officials under 1581(a) to board a vessel for document inspection.[105] Thus, the case does not address the power of customs officers to stop vessels where the authority to conduct a documentation and safety inspection is not relied on. Nor does it decide what the minimum standard of reasonableness is under the Fourth Amendment in this latter situation.[106] Furthermore, "[s]ince the Court's reasoning rests primarily on the need to suppress maritime smuggling, it is necessarily limited geographically to waters accessible to the open sea."[107] The same reasoning may require that the rule of the case be limited to such vessels as are capable of having entered the country from the open sea. Moreover, the scope of *Villamonte-Marquez*[108] is not necessarily limited to customs officers, since the Coast Guard is authorized to enforce the customs laws.[109] Finally, the Court did not rule on the power of the Coast Guard to conduct a document or safety inspection on the high seas under the authority of 89(a).

In analyzing *Villamonte-Marquez*[110] and its possible application to stops by the Coast Guard on the high seas under the authority of 89(a), it is important to analyze five intertwined but essentially individual factors:[111]

(1) *The strength of the public interest in maximum effectiveness in enforcement of laws relating to ship safety and documentation.*[112]

It is doubtful that any federal interest in ship safety and documentation warrants justifying random stops, when such an interest

clearly does not warrant a similar result with automobiles under the reasoning of *Prouse*.[113] In the Coast Guard context under the authority of 89(a), the strongest argument in support of the claim that the federal interest in ships is greater than the state interest in vehicles concerns international law obligations. The United States has a duty under international law to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[114] Since no nation may exercise sovereignty over the waters on the high seas, maintenance of public order on the high seas depends on this kind of control. Further, to ensure that foreign governments do not interfere with United States vessels on the seas, the United States must exercise this control over its vessels.

But even this duty should not mandate a different result than the vehicles cases, especially when one considers the higher expectation of privacy in a boat than in a vehicle. If ship safety and documentation were the only concern, mandatory licensing stops similar to motor vehicle registration inspections could substantially effectuate this governmental purpose and with far less intrusion into personal liberties. Arguably, with facts such as those presented in *Villamonte-Marquez*,[115] the possibility of the use of fixed checkpoints is a practicable alternative. It is obvious, however, that the interdiction of drug smuggling was foremost in the Court's mind in *Villamonte-Marquez*,[116] and that goal is arguably more easily met with a holding which encourages a policy of "suprise investigations." Yet it is doubtful that the public interest in stopping drug importation should be sufficient to uphold the Court's reasoning in *Villamonte-Marquez*.[117] That is, it is not clear that

> the problem is any different or more critical on the high seas near Haiti than it is on the Mexican border, and, as a result, [there is] no reason why a possible drug importer on the high seas should have fewer rights when confronted by the Coast Guard than should a person on land near the Mexican border when confronted by an officer of the Border Patrol.[118]

Further, the desire to stop drug smuggling clearly does not fit within a safety and documentation check rationale. Finally, the Court's concern with limiting the discretion of officers in the field remains paramount. It is simply not outbalanced by the Coast Guard's law enforcement concerns.

(2) *The extent to which "acceptable results" can be achieved only by random stops.*[119]

Unlike automobiles, unsafe conditions in boats are less likely to be discovered without inspection. Moreover, unlike automobiles, external evidence on vessels, such as license plates or registration stickers, which proves that documentation is in order, is usually lacking. The question remains nonetheless whether there are less intrusive means by which the safety and documentation inspection objectives could be maintained at a proper level. As Justice Brennan pointed out in his dissent in *Villamonte-Marquez*,[120] some safety defects may be observable by visual means without the need for a random stop, and the Government could impose on vessels similar licensing techniques as those used on cars.[121] Moreover, in coastal channels such as the one in *Villamonte-Marquez*,[122] fixed checkpoints could practicably be imposed. Finally, if the real concern is with documentation inspection, it would certainly

be less intrusive than boarding the vessel to simply pull alongside it, or to use ship-to-shore radio, or to require a crew member of the vessel in question to board the government patrol boats.

(3) *The extent of the invasion involved*[123]

The majority opinion in *Villamonte-Marquez*[124] characterized the intrusion as "modest."[125] The dissent correctly criticized the majority for failing to take into consideration in their balancing test the greater expectation of privacy one has in a vessel than in an automobile.[126] Indeed, this failure is not easily explicable. The intrusion here is severe. As will be discussed below, whatever limitations the majority seems to place on the subsequent search, by arguing it is limited to "common areas,"[127] for example, the scope of such a search is often very broad. Perhaps more significantly, the stops and searches are often used as a pretext to search for drugs. Indeed, these searches are often broad enough to allow a complete search of the vessel if, in the course of checking the vessel for safety and documentation violations, probable cause develops to search the vessel for contraband.[128]

(4) *The extent to which a "grave danger" of an abuse of discretion is present.*[129]

This danger cannot be underestimated since the Court in *Villamonte-Marquez*[130] expressly authorized an inspection and boarding without even a modicum of suspicion.[131] The authority to pick out a vessel at the officer's discretion or "hunch" cannot be supported by any alleged factual differences between vessels and automobiles. Such a distinction is simply inconsistent with the Fourth Amendment Tradition. Nobody doubts that maintaining proper border security is of paramount importance, as is curtailing the rise in drug trafficking. But these concerns cannot justify sanctioning arbitrary actions by officers in the field. In his dissent, Justice Brennan noted that "for the first time in the nearly 200 year history of the Fourth Amendment, the Court approves a completely random seizure and detention of persons and an entry onto private, noncommercial premises by police officers, without any limitations whatever on the officers' discretion or any safeguards against abuse."[132] Difficulties in maintaining governmental law enforcement interests can never justify evisceration of Fourth Amendment protections. Nor should it in this context. The reality is that:

> the sea coast of our nation cannot be regarded as creating a unique problem warranting a singular constitutional interpretation. Most of the nation's 3,987 miles of border with Canada are unpatrolled and unmarked. Our border with Mexico stretches 2,013 miles, it is marked and patrolled to some extent, but we all know that literally millions of persons have crossed it undetected. Airplanes may enter our territory from any point of the compass and from any elevation.[133]

(5) *The extent to which meaningful yet practicable limitations upon the authority of officials in the field may be achieved.*[134]

The concern here is with striking a proper balance between a reasonable limitation on police officers and the finding in *Villamonte-Marquez*[135] that random stops are unobjectionable. It is worth reiterating that new licensing procedures could easily be established to make vessel registration similar to automobile registration. On inland waters, fixed checkpoints are feasible. Perhaps broad area warrants

which allow searches of all vessels of a certain length at a certain place and time could be imposed,[136] or an administrative warrant issued on a case-by-case basis whenever warrantless inspection is refused, similar to that adopted by the Supreme Court for housing and business inspections, could be required.[137] These are all possibilities the majority in *Villamonte-Marquez* failed[138] even to consider.

Whatever form the considerations encompass, they do not justify random stops and boardings of any vessel on customs waters or on the high seas. The underlying tone of the majority opinion in *Villamonte-Marquez*[139] suggests, however, that the Court perceives itself to be involved in a war against drug trafficking. To help defeat drug smugglers, the Court, under the auspices of alleged factual differences between cars and vessels, and the resulting justifications for safety and documentation stops, has inadvertently decided to run roughshod over established Fourth Amendment doctrines which mandate discretion limiting devices in such situations. The Court's failure to recognize increased expectations of privacy in a vessel, and its failure to consider practicable available alternatives in factual scenarios such as that presented in *Villamonte-Marquez*,[140] necessarily lead to a concomitant derogation of the Fourth Amendment Tradition.[141] There is no justification for this result. The opinion and its reasoning are simply constitutionally unacceptable.

The Scope of the Search Incident to a Stop for a Safety and Documentation Inspection

The previous section of this paper considered the grounds necessary to justify the initial stop of a vessel under the authority of 1581(a) and 89(a). In this section, I proceed to discuss the permissible scope of a search conducted for safety and documentation reasons: Assuming that the stop and boarding of a vessel are valid, precisely what are the limits of such an inspection under the Fourth Amendment?

In *Villamonte-Marquez*,[142] the Court dealt only with the right of customs officials to board a vessel for inspection of documents under the authority of 1581(a). The Court did not decide what the proper scope of a search conducted under that same statutory authority would be. But in its opinion in *Villamonte-Marquez*,[143] the Court did note in passing that a stop under the authority of 1581(a) is nothing more than a "brief detention where officials come on board, visit public areas of the vessel, and inspect documents."[144] This statement is, of course, ambiguous because the nature of public areas is left open. Further, the exact parameters of a safety and documentation search under the authority of 89(a) have not been fully defined because the Supreme Court has yet to rule on the issue. What is clear from the circuit court cases, however, is that the scope of the search under the authority of either 1581(a) or 89(a) extends to all areas where one could reasonably expect either a safety or documentation violation may be found.[145]

Assuming that the stop of the vessel is constitutional and the search remains limited in scope to the areas of the vessel where safety and documentation violations may be found, then the Fourth Amendment Tradition has not been violated. But the moment the intrusion is extended in any way, absent probable cause to justify such an extension, then the seizure and search become unconstitutional. This is standard Fourth Amendment doctrine. Moreover, there appears no reason why this doctrine would not be applicable to vessel searches. Every search must be "reasonably related in scope" to the justification for the intrusion.[146] Such a rule limits the authority of law enforcement officials

arbitrarily to stop a vessel and to search for drugs under the pretext of a safety and documentation inspection.

Although the search power is limited by the reasons for the search, this power is nonetheless quite broad. Thus, while courts have held that the power to search a vessel for safety and documentation purposes does not include the search of private papers, personal belongings, and private living quarters,[147] it is broad enough to cover practically the remainder of the vessel.[148] Moreover, if in the course of such a "limited" inspection probable cause arises as to a violation of a customs law or other criminal activity, a full search, seizure, and arrest may follow under traditional Fourth Amendment authority.[149]

Villamonte-Marquez[150] is certainly not adverse to this position. There, the Court upheld a boarding by customs officers under the authority of 1581(a) for the limited purpose of examining the vessel's documentation. The officer who boarded smelled burning marijuana and, through an open hatch, saw burlap-wrapped bags of marijuana. The Court upheld the subsequent arrest of the two crew members and the seizure of the marijuana, and emphasized that it was permitting only a limited intrusion under the statute. The smell of burning marijuana and the viewing of burlap-wrapped bags of marijuana apparently gave the customs officers probable cause to arrest the crew members and to search the boat.[151]

Thus, the significance of such a broad view of the areas which may be searched pursuant to a safety and documentation inspection is that such areas are usually enough to satisfy a Coast Guard crew's initial "hunches," and usually enough to allow a blossoming of full probable cause to conduct a full scale search.[152] Further, since the desire to stop drug trafficking appears to be the main reason for these stops, and since courts usually hold that the stop is not tainted even if it is a pretext to look for contraband, as long as the scope of the stop and search do not extend beyond those areas allowed for a safety and documentation inspection,[153] the courts generally have not had to address fully the constitutionality of such a search. Hence, the facts of most if not all cases allow practically unlimited authorization to search throughout all parts of a vessel where drugs may be hidden.

This power is certainly open to abuse. And, when the courts sanction such abuses, the Fourth Amendment Tradition is needlessly demeaned, causing serious consequences for the rights of individuals. The recent case of *United States* v. *Warren*[154] is an excellent example of the kinds of Fourth Amendment violations which go unchecked under these circumstances. There, the Coast Guard Cutter *Steadfast* sighted a shrimping vessel as she sailed southward between Haiti and Cuba, approximately 700 miles from the United States coast, hailed her, and told her to prepare for boarding. A boarding party first had the Captain produce the ship's enrollment papers, and inquiry was then made as to whether there were any firearms aboard. Three pistols were produced, after which Coast Guard officers made a "cursory search" of the vessel and found a small amount of marijuana in the Captain's cabin. Suspecting that the vessel was being used to pick up narcotics, an agent asked a member of the crew if there was money on board. The crew member answered that there were several thousand dollars on board and in response to further questioning said it had not been declared. The agent then asked to see the money, and when he examined it, arrests were made for currency violations.

The Eleventh Circuit Court of Appeals, sitting *en banc* in *Warren*, split 8-6 in overruling the panel's decision that the warrantless

search of the vessel violated the Fourth Amendment. The majority concluded that the boarding, interrogation, and search in this case came within the established principle that the Coast Guard can board to conduct documentation and safety inspections. The Court further concluded that if during the course of such an inspection circumstances arise that generate probable cause to believe that a violation of United States law has occurred, the Coast Guard may conduct searches, seize evidence, and make arrests. The dissenters, on the other hand, were of the view that the agents engaged in an affirmative investigation beyond a safety and documentation inspection without probable cause and that the Coast Guard was without constitutional authority to conduct such an investigation.

Because the so-called "cursory search" extended to the cabin of the ship's captain and because it was made before there was probable cause to support a search, the majority opinion is simply incorrect. Further, the so-called "cursory search" extended far beyond the scope of a documentation and safety inspection and cannot be upheld on that basis. It included "going through all areas of the boat, opening closets, cabinets, drawers, and even going through personal items such as one of the defendant's shaving kits."[155] It is clear that the government treated the stop as an opportunity to look for whatever evidence of criminal activity might be found. Yet, even though the scope of the search extended far beyond the reasons for it, the majority upheld the search and seizure. This result cannot be squared with the Fourth Amendment Tradition. It should be rejected as an ill-conceived decision. Its reasoning should be relegated to the scrap heaps of history.

III.Other Justifications for Stops and Searches at Sea

Part II of this paper discussed the power of the Coast Guard and other federal customs officers, consistent with the Fourth Amendment, to stop and board vessels and to conduct routine safety and documentation inspections under the authority of 1581(a) and 89(a). The increase in drug trafficking by sea, however, is not adequately curtailed by such inspections, and other authority for interdicting this traffic is often relied on by federal law enforcement officials to justify a stop and subsequent search of a vessel. This section discusses the legality of a stop and search at sea undertaken for customs purposes where the safety and documentation authority is not relied on, or is exceeded.

As noted below, it is frequently the case that a stop of a vessel under the authority of 1581(a) or 89(a) is used as a pretext for discovering other customs violations,[156] particularly the smuggling of drugs into the United States. The situations discussed in this part of the paper, therefore, are not controlled by the Supreme Court's decision in *Villamonte-Marquez*.[157] There, the Court held that under the authority of 1581(a), customs officers could, without any suspicion of wrongdoing, board vessels for a document inspection. The Court expressed no view on any additional authority conferred by that statute.

More particularly, this part of the paper focuses on two fourth amendment exceptions to the warrant and probable cause requirements which justify vessel stops and searches: (1) border stops and searches, and (2) stops and searches based on a reasonable suspicion of criminal activity where exigent circumstances *may* justify dispensing with the warrant requirement.

Border Stops and Searches

The Supreme Court has stated that searches of persons and property crossing our international border "are reasonable simply by virtue of the fact that they occur at the border."[158] Thus, persons and property may be stopped and searched without a warrant or probable cause upon their entry into the United States.[159] The Court has justified these border searches by reference to notions of national self-protection. Indeed it cannot seriously be questioned that "the long standing right of the sovereign to protect itself by stopping and examining persons and property crossing into their country"[160] is a significant and valid government interest that demands strong judicial support. Because of this self-protection reason, such searches are universally thought to be legitimate in land-based situations. Further, there appears to be no compelling reason why the border search exception to the warrant and probable cause requirements should not apply to vessels, as long as there is evidence a border has been crossed.

Stops and searches at the borders of our nation help to prevent smuggling, an activity which would be almost impossible to detect without such searches. Moreover, people crossing into a nation's territorial waters know they are likely to be searched. As one commentator has noted:

> [A] major factor supporting the reasonableness of such searches is that they occur at a predesignated place -- the border. Thus, an individual is on notice that a search may occur there. He can control the time and point along the border of his crossing, thereby determining the time and place of any border search which may be performed. While he does not control the method of the search, he can decide what property he will bring with him and thus determine what will be subject to search.[161]

Furthermore, vessels are searched only because they belong to a morally neutral class. This controls the arbitrary power of field officers, thus protecting a major theme of the Fourth Amendment Tradition. For all of these reasons, therefore, the right of federal law enforcement officials to employ the border search exception when applicable in cases of vessel searches makes a great deal of sense.

Moreover, a border search need not be conducted only at the border, for searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. For example, "searches at an established station near the border at [an] airport . . . after a nonstop flight . . . would clearly be the functional equivalent of a border search."[162] In the at-sea scenario, a border search should be reasonable when the border can be said to have been crossed with reasonable certainty.[163] Further, the search would be justified even if it takes place where a ship docks in this country after having been to a foreign port,[164] since such an area is the functional equivalent of a border.[165] Thus, once a vessel approaching the United States enters the three-mile limit it has crossed our border. It may be searched. It is even arguable that the contiguous zone, which extends seaward from three to twelve miles from the coast, should be considered the "functional equivalent" of our border.[166]

Given the fact that border searches are *per se* reasonable under the Fourth Amendment, the question arises as to how far that exception can be stretched as applied to at-sea situations and still remain consistent with the Fourth Amendment Tradition. Does the border search

exception allow federal law enforcement officials the right to conduct a customs search of any vessel in the territorial waters of the United States without reasonable certainty that there has been a border crossing and without any suspicion of criminal activity? One view is that a full stop and search may be conducted on any vessel found within these waters.[167] But if the reason for the border search exception is national self-protection against the entry of illegal aliens and drugs, searches of vessels should only be allowed when there is a reasonable certainty that there has been a border crossing. To use this reason to justify any broader rule would eviscerate the Fourth Amendment.

Moreover, the majority of cases indicate that this is the sounder position. Although the Supreme Court has never addressed the issue,[168] most circuit courts hold that without evidence of a border crossing, any ship found in territorial waters is *not* for that reason alone subject to a stop and search absent probable-cause-*cum*-emergency-or-warrant.[169] Even more significantly, this view is consistent with land-based border search cases which recognize that an automobile is not subject to a stop or search simply because it is near the border.[170] A departure from this position would seem to be justified only if the differences between the on-land-based and at-sea-based situations are so great as to warrant it.

Although there certainly are differences between the on-land-based and at-sea-based circumstances, they are not sufficiently significant to justify a search of any vessel found in territorial waters simply for that reason. At least one court has claimed that

> there is a substantial distinction between a landlocked vehicle and a nautical vessel for Fourth amendment purposes. First, the national frontiers of the oceans are much more difficult to police than the territorial boundaries of the land. The exact lines are difficult to discern and there is no limit to the numbers of fixed points of entry. It's simply not practical to stop and inspect every vessel at the actual border, an imaginary line on the seas.[171]

But it is not clear that the sea coast of our nation can be regarded as creating a unique problem warranting a singular constitutional interpretation. As noted below,[172] our borders with Canada and Mexico are very long and difficult to patrol. Indeed, most of our border with Canada is left unmarked and unpatrolled. The Mexican border, although patrolled and marked to a limited extent, is everyday overrun with scores of poor Mexicans encouraged by employers in the United States to come here for jobs. Finally, scores of undetected airplanes enter our territory daily.

Even if law enforcement problems could be found to be greater at sea than on land, privacy interests on vessels are usually more substantial. A rule allowing all vessels found within the three-mile limit for that reason alone to be subject to a full search under the border search exception would authorize too great an intrusion on the privacy rights of domestic water travelers.[173] Further, it would give federal enforcement officials the authority to stop and search these vessels without any constraints. It is just this type of arbitrary intrusion that the Fourth Amendment Tradition correctly bars. This is so even if it diminishes the effectiveness of law enforcement.

This analysis, nicely enough, leads to another issue: May a border search of a vessel be conducted in the contiguous zone, which extends

seaward from three to twelve miles from the coast?[174] Expansion of the border concept beyond the three-mile territorial demarcation line surely conflicts to some extent with the Fourth Amendment Tradition. Such an extension would give federal law enforcement officials virtually unlimited authority to search vessels without probable cause or a warrant. To approve roving-patrol stops of all vessels in the contiguous zone without any suspicion of criminal activity would increase the pool of vessels and the number of innocent, law-abiding individuals who would be subject to potentially unlimited interference with their use of the sea. For the same reasons, the Court in *Brignoni-Ponce*[175] refused to approve roving border patrol stops of all vehicles which may fortuitously be found in the border area.

On the other hand, practical considerations of maritime customs enforcement are to some extent significant.

> Many vessels can traverse the three-mile limit so quickly that it would be difficult for enforcement authorities to detect or intercept them if confined to those waters. Furthermore, vessel traffic bound for the United States frequently follows generally defined routes to certain points of confluence, from which the vessels once again diverge and head for their respective destinations. By concentrating patrols between these points and the shore, enforcement authorities can more effectively patrol the border.[176]

Moreover, some courts have argued that the contiguous zone should be considered the functional equivalent of our border.[177] Most commentators seem to agree, because the contiguous zone:

> provides customs officers with an area of reasonable scope for enforcement activities while subjecting incoming vessels to the possibility of search over only a relatively limited time and area. Although the twelve-mile zone is somewhat arbitrary, the very fact that the Fourth Amendment requires certainty as to the time and location of the search demands existence of a clearly and rigidly defined border area. Therefore, searches committed within the twelve-mile limit, but only such searches, should be considered presumptively to have occurred at the functional equivalent of the border.[178]

But even if the border search exception is found to be applicable to vessels found in the contiguous zone, it must not apply automatically to every vessel found in that zone. Rather, such a search should be reasonable only if it is limited to vessels in the contiguous zone *and* bound for the United States. It should not be applicable to vessels that simply cross customs waters en route between two foreign ports because such a vessel "will not contact the United States at all."[179]

Can the border search exception be stretched to allow border searches in international waters, beyond the twelve-mile contiguous zone? While the general view is that the border search exception could not possibly justify the search of a ship located outside of the twelve-mile zone absent some other justification for the stop,[180] at least one circuit court case has apparently authorized such an exception.

In *United States v. Harper*,[181] the Coast Guard boarded a shrimping trawler 800 miles off the coast of North Carolina pursuant to a policy

of stopping all United States vessels less than 250 feet in length travelling along waters that were allegedly notorious sea lanes for clandestine operations. The court upheld the stop as a "systematic border" stop and inquiry.[182] The court analogized the border stop to one conducted at a fixed checkpoint,[183] and found the stop reasonable *per se* because it was conducted pursuant to a neutral policy that limited the discretion of federal law enforcement officers.[184]

The court's characterization of the stop and boarding of the vessel 800 miles off the United States coast as a border search is absurd; it added nothing positive to the court's analysis. The stopping of the vessel took place neither at the border nor at its functional equivalant. This mistaken use of the border search exception tainted the court's opinion and left it open to mischaracterization. It can only be described as an inappropriately reasoned opinion.

Reasonable Suspicion Cum *Exigency*

A second type of stop, board, and search situation, where the right to conduct a safety and documentation inspection is not relied on or is exceeded, is that in which the particular vessel stopped is selected for *investigation* because of reasonable suspicion it is involved in criminal activity. Illustrative is *United States* v. *Streifel*.[185] There, the Coast Guard seized and searched a Panamanian flag vessel on international waters, approximately 200 miles from the United States coast. The search yielded hundreds of bales of marijuana. The circuit court upheld the defendants' convictions, relying primarily on the authority of *Terry* v. *Ohio*.[186]

In *Terry*, the Supreme Court recognized that sometimes, in the absence of probable cause, officers may briefly stop a person on the street for investigatory purposes. The Court reasoned that since such stops are less intrusive than full scale arrests, the standard for allowing a stop need not be as high as that needed for a full scale arrest. But there are nevertheless standards which must be met before a stop is constitutionally valid. Under this exception, a police officer is justified in seizing a person only if the officer is "aware of specific articulable facts, together with rational inferences from those facts that reasonably warrant suspicion"[187] that the individual is, was, or is about to be engaged in criminal activity.[188] Moreover, in such situations, reasonableness is determined by balancing the governmental need for the stop against the degree of intrusiveness.

The *Streifel*[189] court recognized that allowing this type of a *Terry* stop does not violate the Fourth Amendment because, although the standard is less than full probable cause, "it too is an 'objective standard' . . . requiring a 'reasonable and articulable suspicion'. . . and it means that legitimate investigatory stops cannot be made completely at random or at the 'unfettered discretion of officers in the field'."[190] In working out its balancing test, the court found that the officials had reasonable and articulate grounds for suspecting violations of the laws, that the government interest in prevention of drug smuggling was high, and that the boarding was not unreasonably intrusive.

> The decision to stop and board the *Roondiep* was made on the basis of the observations and analyses of officials experienced in the prevention and detection of smuggling into the United States. They had previously dealt with many "mother ship" operations, in which a large vessel lingers offshore while other smaller boats

come to pick up narcotics. When last sighted the *Roondiep* had hovered off the coast of Aruba for a time, leaving without going into port. When the Coast guard first encountered the *Roondiep* it was hovering fifty miles off the United States coast, lying dead in the water for no apparent reason with no visible cargo. When discovered by the Coast Guard airplane, the *Roondiep* immediately started its engines and commenced to move on. When asked its destination it stated that its original orders had been to go to "Maine or Canada" -- an unusual lack of certainty. Nor had officials at the nearest major ports, which included two in Maine and one in Canada, ever heard from the *Roondiep*. The *Roondiep* also had no new orders for a new destination -- a circumstance the experienced officers also found suspicious. Having given these suspicious answers, the *Roondiep* bit by bit altered its course until it ultimately was heading nearly directly out to sea. By morning it had moved to a point 200 miles off the coast. On the basis of all the circumstances, the officials were entitled to suspect, drawing on their experience, that the *Roondiep* was engaged in smuggling. The suspicion was reasonable and it justified further investigation.

The stop and boarding of the *Roondiep* were not an unreasonably intrusive means of investigating further. The Coast Guard's suspicions justified a more extensive investigation than could be made merely through additional radio inquiries. The officers were not required to receive answers to their questions from whomever the *Roondiep* master chose to put on the radio. Nor were they required to continue to assess the veracity of the *Roondiep*'s answers through the inferior medium of airwaves rather than face-to-face questioning. Once the Coast Guard reasonably believed that it was receiving evasive answers from the *Roondiep's* captain, it was reasonable to seek an interrogation in person. Given the *Roondiep's* apparent attempt to escape, as well as the various factors indicating that the *Roondiep* might be involved in smuggling, the most practical means of investigation was to board the *Roondiep.*[191]

Similarly, other courts have upheld the stopping and boarding of vessels on the high seas upon reasonable suspicion of criminal activity.[192] This result generally is sound. Most significantly, it squares with land-based Fourth Amendment decisions. Both *Brignoni-Ponce*[193] and *Prouse*,[194] for example, require reasonable suspicion of wrongdoing before automobiles may be stopped for investigative purposes. Nevertheless, there is a caveat to the analogy. It is clear that a stop and boarding of a vessel at sea is more intrusive than a similar land-based stop of an automobile and subsequent questioning through a car window.[195] Caution should dictate, therefore, that whenever possible, less intrusive means be employed in conducting the investigative stop.[196] Such means should require limiting the circumstances in which Coast Guard officials board vessels. Alternatives include hailing the vessel, using ship-to-shore radio, or allowing a member of the vessel under investigation to board the Coast Guard boat for questioning. If after such questioning probable cause develops, then the Coast Guard should be allowed to board the vessel *if* exigent circumstances excuse the absence of a warrant.

Moreover, it is even arguable that probable cause is not necessary to validate a full search of a vessel. Indeed, some courts[197] have held that a reasonable suspicion that contraband or evidence of criminal activity will be found, alone justifies a search of private areas of the vessel. Further, in such cases, courts assume that probable cause or reasonable suspicion alone is sufficient for a search of the vessel *without* a finding of exigent circumstances to excuse the failure to obtain a warrant, because the "location and nature of a vessel usually make the circumstances exigent."[198] That is, in most at sea circumstances, exigent circumstances will be assumed to exist because "there is the evident possibility that evidence might be jettisoned or that, even under the Coast Guard guns, an attempt might be made to flee."[199]

United States v. *Williams*[200] is illustrative of many of these issues. There, the Coast Guard seized a vessel of Panamanian registry on the high seas 100 miles east of the tip of the Yucatan peninsula. A search of the cargo hold revealed a large amount of marijuana. The court held that seizure of a foreign vessel on the high seas on a reasonable suspicion of criminal activity satisfies the fourth amendment, although reasonable suspicion may not be the minimal required standard for such a seizure.[201] More significantly, the court held that any vessel found in international waters could be subjected to a warrantless search of any private area of the hold upon a reasonable suspicion that contraband or criminal activity will be found.[202]

The court reasoned that a less restrictive constitutional standard governs searches on the high seas than searches on land "because of the substantial and long-recognized differences between nautical vessels and vehicles and buildings on land."[203] In support of this conclusion the court listed five factors:

> First, the national borders of the oceans are much more difficult to police than the territorial boundaries of the land. Second, the extensive federal and international regulation of shipping and boating significantly limits the privacy that anyone might expect to have on the seas. Third, drug smuggling has grown into a massive problem. Technological changes have benefited smugglers to a greater extent than the Coast Guard. Their vessels are capable of faster speeds and greater ranges and are equipped with detection systems as sophisticated as those the Coast Guard utilizes for law enforcement practices. Furthermore, smuggler's vessels now operate within a vast, undistinguishable sea of recreational boaters. Without the ability to conduct warrantless searches on a suspicion less than probable cause, the Coast Guard's task may well be impossible. Fourth, the practical problems that would be created by requiring the Coast Guard to obtain a warrant to conduct a search on the high seas -- or by requiring the government to litigate the issue of "exigent circumstances" in every case where there is a warrantless search -- will likely eviscerate the Coast Guard's ability to combat drug smuggling. Finally, it is manifest that the Congress that created the first customs statute and proposed for ratification the Fourth Amendment did not intend the Fourth Amendment warrant requirement to be applicable on the high seas.

The *Williams* court went on to note that reasonable suspicion is, therefore, the appropriate standard because "the standard reflects a reasonable balancing of the government's interest in enforcing its

criminal laws and the individual's interest in his dignity and privacy, giving weight to the special problems in law enforcement, and the highly regulated nature of shipping and boating."[204]

The court's reasoning in *Williams* is flawed. Its conclusions are wrong. The departure from the probable cause *cum* exigency requirement is simply misleading on the facts of the case.

More particularly, the balancing that the court engages in with respect to the first three factors reflects an incorrect calculus.[205] The calculus is incorrect because it assigns the wrong weights to the relevant factors. Although motor vehicles are subject to extensive regulation, the Supreme Court has not found that the expectations of privacy in automobiles is therefore made low enough to allow a search on reasonable suspicion alone.[206] Further, the privacy expectations in a vessel are significantly greater than those in an automobile, since "the ship is the sailor's home,"[207] and is generally less open to the naked eye. Moreover, as stated above, it is to be doubted that law enforcement problems at sea are so significantly greater than those on land as to justify a separate Fourth Amendment rule.

There are other problems with the opinion. The court's failure to take seriously the requirement that a warrant be obtained before a search may be conducted absent exigent circumstances, also suggests questionable reasoning. The difficulty of obtaining warrants should not make warrantless searches of vessels *per se* reasonable once probable cause has been established. As one commentator has accurately noted:

> Since the doctrine is primarily based on the impossibility of securing a warrant, warrantless searches should be allowed only in situations where the facts demonstrate that a warrant could not have been obtained in advance and that delaying the search would have created a likelihood that the vessel would flee or evidence would otherwise be lost.[208]

This rule would require the government to prove that exigent circumstances existed on a case-by-case basis before a warrantless search of a vessel would be upheld.[209] This is, of course, the way our system of Fourth Amendment law generally operates. If because of this requirement a smuggler goes free, that is simply one of the costs of enforcing constitutional rights. The Fourth Amendment Tradition protects individuals against abuses of governmental power. The focus for Fourth Amendment purposes must, therefore, be on the conduct of the government, not on the conduct of the accused. In the long run, we have more to fear from a government with unrestricted power than we do from the acts of criminals. Indeed, that is one of the major premises upon which our constitutional system is built.

In any event, whether the standard be probable cause, reasonable suspicion,[210] or as yet some undefined minimum standard, that standard must be met *before* the ship is stopped and *before* it is searched. There is no general set of facts that amount to a reasonable suspicion of criminal activity that one can look up in any "legal guide to reasonable suspicion." Rather, the case law suggests a convergence of a number of factors and observed activities of the vessel in question which then provide a reasonable suspicion for a stop and search, or even probable cause for a full search.[211] These factors include: obscure or no identification on the vessel;[212] a destination or origin near a major drug center, most frequently Columbia;[213] a location on the sea inconsistent with stated itinerary;[214] riding low in the wa-

ter;[215] failure to answer radio calls by the Coast Guard;[216] suspicious or inconsistent statements regarding registration or destination;[217] drifting in the water without a purpose;[218] a failure to have the gear normally associated with a particular type of boat, for example, no fishing gear on a fishing boat;[219] a fake water line;[220] a great deal of electronic equipment not regularly associated with that type of boat;[221] sudden or evasive movement;[222] operating at night without lights;[223] steering an erratic course;[224] refusal to stop when radioed;[225] a boat that is in a state of disrepair;[226] an officer's training regarding smuggling and his observations relevant to that training;[227] denial to board which is given in a defensive manner;[228] a dirty water line on a "prize" boat;[229] status on the EPIC list, a list kept at a central location which compiles those boats suspected of being involved in smuggling operations;[230] use of a motor on a sailboat on a perfect sailing day;[231] failure of a crew to appear on deck after being contacted by the Coast Guard.[232]

As noted above, any factor alone is not generally sufficient to satisfy even the lower "reasonable suspicious" standard, "but it is not the case that [the factors which amount to reasonable suspicion] must be completely inconsistent with innocent activity before they amount to a reasonable suspicion."[233]

IV. Alternatives

A century ago, the Supreme Court warned that the courts have a duty "to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[234] In ruling on the constitutionality of warrantless vessel stops and searches, the courts have not performed their constitutional function. The courts, in general, have only paid lip service to the demands of the fourth amendment Tradition. To put it another way, they have failed to be faithful to Fourth Amendment requirements expressed in simple language, and interpreted against the words of the Constitution and the background of history and modern life. Even when the courts appear to base their decisions on a valid Fourth Amendment exception, they frequently blend discussion of several of these exceptions together, and they often fail to ensure that all the requirements of any exception are met.

Boardings for safety and documentation inspections under the authority of 1581(a) and 89(a), for example, are frequently a pretext for the discovery of drugs. Yet the courts often uphold this practice, thus violating the Fourth Amendment Tradition. Given all that has been discussed in this paper regarding the various justifications for stopping vessels either in customs waters or on the high seas, and the problems associated with each justification, it is clear that further checks are needed to limit the arbitrary discretion of officers in the field. The difficulties for law enforcement at sea are simply not substantial enough to warrant random, suspicionless, warrantless stops and searches of vessels. What then are some possible alternatives?

One possible alternative to the random stopping of vessels is the use of a checkpoint.[235] Under a set administrative policy, the Coast Guard and other federal customs officials could set up checkpoint sites at specific locations along sea lanes. All American vessels passing the checkpoint would be subjected to a safety and documentation inspection. But this is not all. The search of the vessel after a boarding would be limited to the reasons for the search -- the discovery of noncompliance with safety and documentation laws. Strict guidelines as to the scope of such a search must be set by administrative policy and published so

that those subjected to such a search are given prior notice. Upon boarding a vessel, Coast Guard and other federal customs officers should be required to hand out a set of guidelines describing the scope of the search. Evidence discovered by Coast Guard officers who have gone beyond the scope of such a search must be found inadmissible at trial. The checkpoint and limited search alternative would substantially limit the officer's abuse of discretion in randomly stopping vessels and in conducting a full search of the vessel.

A second alternative would be to eliminate completely random at-sea vessel stops and inspections for safety and documentation violations and allow such inspections only under a mandatory dockside inspection program similar to automobile inspection programs required by many states. This alternative fully eliminates officer discretion in stopping and inspecting a vessel at sea. It allows vessel owners to have their vessels inspected at their convenience. For example, an inspection could be required at stated places and intervals, such as at the vessel's home dock once every year. If the vessel met the documentation and safety requirements, a sticker could be prominently displayed on the vessel. This would eliminate the need for random stops and boardings by the Coast Guard. Further, this alternative would obviously increase compliance with safety regulations. Not least of all, the Fourth Amendment Tradition would be vindicated. Stops and searches of vessels would be allowed only when there was probable cause or reasonable suspicion of criminal activity.

A third alternative is the "area warrant" created along the lines suggested by Justice Powell in *Almeida-Sanchez* v. *United States*.[236] Under this alternative, before a Coast Guard or customs boat could set out on patrol, the officers would be required to obtain a warrant which sets out the circumstances and manner in which a vessel inspection could take place under the authority of that warrant. Those applying for such a warrant would not usually, of course, be able to specify any vessel by name. Rather, this procedure would involve the Coast Guard obtaining "advance judicial approval of the decision to conduct roving searches on a particular [waterway] for a reasonable period of time."[237] It would also be effective both in cutting down the arbitrary discretion of officers and in reducing safety and documentation violations.

Whatever direction these alternatives take, their purpose should be to limit the discretion of the officer on the at-sea roving patrol. Further, the result should be that a seizure of a vessel could take place only in very limited situations, such as where there is probable cause or reasonable suspicion of criminal activity and exigent circumstances justify dispensing with the warrant requirement, or where a border has been crossed, or where the stop is pursuant to a "clearly-defined-in-scope" right to conduct a safety and documentation inspection.

While restricting the present authority of the Coast Guard may reduce its ability to stop drug traffic to some minor extent, that is the price the Fourth Amendment Tradition extracts from our society. It is a price well worth paying.

> The needs of law enforcement stand in constant tension with the Constitution's protection of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional

safe-guards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg trials:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States*, 338 U.S. 160, 180 [(1949)] (Jackson, J., dissenting). *Almeida-Sanchez*, 413 U.S., at 273-274.[238]

NOTES

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1. *See Stopping "Mother Ships": A Loophole in Drug Enforcement: Hearings on S. 3437 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 1 (1978) (statement of Sen. John Culver). *See also Coast Guard Drug Interdiction: Hearings on H.R 10371 and H.R. 10608 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 119 (1978) (statistics on seizures of contraband from 1973 to 1978).
2. *See, e.g., Drug Interdiction Hearings, supra* note 1, at 7, 104 (statements of Rep. Mario Biaggi and Rear Admiral Norman Venzke, U.S.C.G., respectively). *See also U.S. Coast Guard, U.S. Dept. of Transportation, Boarding Manual* Sec. 111-1(b), at 3-1 (1977) ("Boarding Officers should not request permission to board. Such requests are an open invitation for uncooperative persons to say 'no'"); U.S. Department of Transportation Press Release U.S.C.G. 34-79 (Dec. 16, 1979) ("Because of the Coast Guard's increasing involvement in combatting illegal drug trafficking," all boarding officers have been ordered to wear sidearms).
3. *See, e.g.*, United States v. Elkins, 774 F.2d 530 (1st Cir. 1985) (construing 14 U.S.C.A. Sec.89(a) and the Coast Guard's authority to stop and board American vessels); United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) (discussing standing to challenge a search conducted by the Coast Guard, as well as the Coast Guard's authority to stop and board a vessel flying no flag); United States v. Green, 671 F.2d 46 (1st Cir. 1982) (construing 19 U.S.C.A. Sec. 1581 and Coast Guard authority to stop and board a foreign vessel on the high seas pursuant to consent of the foreign nation); United States v. Hilton, 619 F.2d 127 (1st Cir. 1980) (discussing Coast Guard's authority to conduct documentation and safety inspection of American vessel found on high seas); United States v. Pinto-Mejia, 720 F.2d 248 (2d Cir. 1984) (construing 21 U.S.C. Sec 955a(a) (1981), which subjects to United States jurisdiction any vessel without nationality); United States v. Streifel, 665 F.2d 414 (2d Cir. 1981) (discussing Coast Guard's authority to stop and board foreign

vessels on the high seas); United States v. Manbeck, 744 F.2d 360 (4th Cir. 1984) (discussing authority of Customs officers to make investigatory stops of vessels on inland waters); Blair v. Moore, 665 F.2d 500 (4th Cir. 1981) (discussing customs officer's authority to stop and search vessels found on inland waters); United States v. Harper, 617 F.2d 35 (4th Cir. 1980) (discussing Coast Guard's authority to stop and board an American vessel on the high seas); United States v. Williams, 617 F.2d 1063 (5th Cir. 1980) (discussing Coast Goard's authority to seize a foreign vessel in international waters); United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (discussing Coast Guard's authority to stop, board, and search American vessels on the high seas); United States v. Humphrey, 759 F.2d 743 (9th Cir. 1985) (discussing Coast Guard's authority to conduct daytime boarding of vessel absent warrant, probable cause, or administrative plan); United States v. Watson, 678 F.2d 765 (9th Cir. 1982) (discussing authority of Coast Guard to conduct document and safety inspection of vessel on high seas after dark pursuant to an administrative plan absent any founded suspicion of non-compliance with regulations); United States v. Gonzalez, 776 F.2d 931 (11th Cir. 1985) (construing 21 U.S.C.A. 955a (1981) and Coast Guard's ability to seize foreign vessel on high seas); United States v. Romero-Galue, 757 F.2d 1147 (11th Cir. 1985) (construing 21 U.S.C.A. 955a (1981); United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982) (discussing Coast Guard's authority to stop and board stateless vessels on the high seas and jurisdiction over such a vessel under 21 U.S.C.A. Sec. 955a (1981)).

4. 14 U.S.C. Sec. 89(a) (1974).
5. 19 U.S.C. Sec. 1581(a) (1980).
6. S. Evans, *The United States Coast Guard 1790-1915*, at 218 (1949) (referring to Act of 22 June 1936, ch. 705, 49 Stat. 1820 (current version at 14 U.S.C. Sec. 89(a) (1974)).
7. Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted).
8. Aside from stops and searches of vessels conducted for safety and documentation inspections, government enforcement officers sometimes justify these stops and searches under a border search theory, as an investigative stop, and as a proper stop or search because it is based upon probable cause or reasonable suspicion to believe a crime has been or is being committed.
9. 462 U.S. 579 (1983).
10. The Supreme Court had never expressly held the Fourth Amendment applicable to vessel seizures and searches at sea until its opinion in United States v. Villamonte-Marquez, 462 U.S. 579. Nevertheless, the Court did implicitly recognize the Fourth Amendment's applicability to vessel seizures and searches in United States v. Lee, 274 U.S. 559 (1927), where it analyzed such a search in fourth amendment terms.
11. 462 U.S. 579.
12. In addition to attacking the constitutionality of seizures and searches at sea, defendants frequently challenge the jurisdiction of the Coast Guard to stop non-United States flag vessels on the high seas. In general, it has been argued that foreign flag vessels are not subject to seizures and searches on the high seas. *See, e.g.*, C. Colombos, *The International Law of the Sea* at 139-40 (6th ed. 1967). Several courts have held, however, that the Coast Guard may stop foreign vessels on the high seas on a reasonable suspicion of criminal activity. *See, e.g.*, United States v. Williams, 617

F.2d 1063 (5th Cir. 1980); *See also* 3 W. LaFave, Search and Seizure Sec 10.8(f)196, n. 96 (Supp. 1986) [hereinafter LaFave] for other cases.

Congress has been aware of the jurisdictional problems for a considerable time and in 1980 enacted the Marijuana on the High Seas Act, 21 U.S.C. Sec. 955a (1981), to cope with this difficulty. Congress enacted this act in an effort to "prohibit all acts of illicit trafficking in controlled substances on the high seas which the United States can reach under international law." H.R. Rep. No. 323, 96th Cong., 1st Sess. 11 (1979). The Act creates four different criminal offenses. Section 955(a) forbids possession with intent to manufacture or distribute certain controlled substances by any person on board a United States vessel or vessels subject to the jurisdiction of the United States. A vessel subject to the jurisdiction of the United States includes a stateless vessel, which is defined as "a ship which sails under the flags of two or more states, using them according to convenience . . ." Article 6 of the Convention on the High Seas, *opened for signature* 29 April 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 [hereinafter Convention on the High Seas]; United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982). Section 955a(b) forbids possession with intent to manufacture or distribute certain controlled substances by a citizen of the United States on any vessel. Neither Sec. 955a(a) or Sec 955a(b) requires a showing of intent to distribute within the United States. United States v. Gonzalez, 776 F.2d 931, 934 (11th Cir. 1985). Section 955a(c) is intended to forbid possession with intent to distribute certain controlled substances by foreign nationals on board foreign vessels in customs waters in cases where intent to distribute within the United States cannot be shown. Section 955a(c) on its face is limited to vessels found within the customs waters of the United States. This section has been interpreted, however, to include areas on the high seas designated by the United States and another nation, by treaty or other arrangement, as places where laws of the United States are to be enforced. United States v. Gonzalez, 766 F.2d 931 (11th Cir. 1985) (consent by foreign nation sufficient as "other arrangement"). Section 955a(d) prohibits possession with intent to manufacture or distribute certain controlled substances into the United States by any person.

As noted above, this statute is intended to reach all illicit activities to the extent permitted under international law. Under international law, a clearly marked foreign flagship is under the exclusive jurisdiction of the flag nation. United States v. Williams, 617 F.2d 1063, 1082 (5th Cir. 1980). Moreover, consent by the flag nation to stop and board a foreign flagship waives such rights. United States v. Williams, 617 F.2d 1063 (5th Cir. 1980). *But cf.*, United States v. Streifel, 665 F.2d 414 (2d Cir. 1981) (consent by foreign flag nation is not an effective third-party consent under the Fourth Amendment). Furthermore, reasonable suspicion of criminal activity or a universally recognized violation of international law, for example, piracy or slave trade, waives this right to exclusive jurisdiction by the flag nation. United States v. Marino-Garcia, 679 F.2d 1373, 1382, n. 16 (11th Cir. 1982). A foreign vessel may be stopped in United States customs waters for a safety and documentation inspection without a modicum of suspicion,

however, and such a stop is "reasonable" under the fourth amendment. *Villamonte-Marquez*, 462 U.S. 579.
In any event, an extended discussion of the jurisdictional issue is beyond the scope of this essay. For purposes of this essay, it is assumed that jurisdiction exists.

Moreover, assuming that the Fourth Amendment is implicated, a defendant must also have standing to contest the seizure and search. It is not sufficient to establish standing, however, that the defendant claim prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rather, the individual raising a Fourth Amendment claim must have been a victim of a search and seizure. Indeed, it is elementary that Fourth Amendment rights "are personal rights which . . . may not be vicariously asserted." Rakas v. Illinois, 439 U.S. 128, 133 (1978) (quoting Alderman v. United States, 394 U.S. 165, 174 (1969).

Those challenging a seizure and search must assert either a property interest or a possessory interest in the property seized. *Rakas*, 439 U.S. 128. This is not necessarily sufficient to establish standing, however. A person must have a legitimate expectation of privacy in the area searched and in the object seized, and the expectation must be one society is prepared to accept as reasonable. *Rakas*, 439 U.S. 128. *See also*, United States v. Salvucci, 448 U.S. 83 (1980).

Circuit courts addressing this issue in the context of at-sea stops and searches have not been terribly consistent. The differences and inconsistencies appear to depend on whether it is the boat owner or crew member who is asserting the violation, United States v. Alvarez-Mena, 765 F.2d 1259, 1269 (5th Cir. 1985), United States v. Pinto-Mejia, 720 F.2d 248, 255 (2d. Cir. 1983), whether it is a violation of United States law or international law that is being challenged, United States v. Hensel, 699 F.2d 18, 30 (1st Cir. 1983), or whether it is the initial stop, as distinct from the subsequent search, that is being challenged, United States v. Streifel, 665 F.2d 414, 419 (2d Cir. 1981). For purposes of this paper, standing to raise any particular violation will be presumed to be satisfied.

It is interesting to note, however, that a writ of certiorari granted by the Supreme Court to review a decision by the Ninth Circuit that defendant had standing to challenge the search of a boat that he had never personally used and that had been out of his custody and control for two months at the time of the search, on the ground that he owned the boat and was a co-venturer in the smuggling enterprise in which the boat was used, was dismissed as improvidently granted. United States v. Quinn, 54 U.S.L.W. 4357 (U.S. 22 April 1986).

13. Even the second clause, which is a rather narrow prescription about the form and content of search warrants, leaves many questions unanswered. It does not, for example, address the questions of who may issue a warrant, how it must be executed, or in what circumstances seized property may be retained. The problem of interpretation of ambiguous text is, of course, endemic to many constitutional amendments, as well as to any text.
14. Carroll v. United States, 267 U.S. 132 (1925).
15. United States v. Watson, 423 U.S. 411 (1976).
16. Terry v. Ohio, 392 U.S. 1 (1968).

17. United States v. Ramsey, 431 U.S. 606 (1977).
18. 19 U.S.C. Sec. 1401(i) (1980) defines "officers of the customs" to include Coast Guard officers.
19. Customs waters is defined in 19 U.S.C. Sec. 1401(J) (1980) as those waters within twelve miles of the coast of the United States. The twelve mile zone includes the territorial sea, which extends to three miles from the coast, and the contiguous zone, which extends from three to twelve miles from the coast. The high seas lie seaward of the territorial sea and thus encompass the contiguous zone. United States v. Williams, 617 F.2d 1063, 1073 (5th Cir. 1980).
20. The Coast Guard may enforce compliance with customs law pursuant to 14 U.S.C. Sec. 143 (1974).
21. United States v. Freeman, 660 F.2d 1030 (5th Cir. 1981); United States v. Arra, 630 F.2d 836 (1st Cir. 1980); United States v. Hilton, 619 F.2d 127 (1st Cir. 1980); United States v. Warren, 578 F.2d 1058 (5th Cir. 1978).
22. *Villamonte-Marquez*, 462 U.S. 579; *Williams*, 617 F.2d 1063.
23. United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982); *Williams*, 617 F.2d 1063. The statutes have never been interpreted to allow the Coast Guard to stop and board a clearly marked foreign vessel *solely* for such an inspection, since a flagship is recognized under international law as under the exclusive jurisdiction of the flag nation, unless consent is given by the flag nation to allow such a boarding by the Coast Guard. *Marino-Garcia*, 679 F.2d at 1380. *But cf.*, United States v. Streifel, 665 F.2d 414 (2d Cir. 1981) (consent of foreign nation not an effective third-party consent under the Fourth Amendment).
24. *Villamonte-Marquez*, 462 U.S. 579; United States v. Warren, 578 F.2d 1058, 1080 (Fay, J., dissenting).
25. *Villamonte-Marquez*, 462 U.S. 579; United States v. Humphrey, 759 F.2d 743 (9th Cir. 1985); *Williams*, 617 F.2d 1063.
26. *See*, 46 U.S.C. Sec. 65 et. seq. (1976 ed., Supp. V).
27. *Id.*
28. *Id.*
29. 19 U.S.C. Sec. 1439 (1980).
30. 46 U.S.C. Sec. 313 (1958).
31. *Villamonte-Marquez*, 462 U.S. at 591.
32. A wide variety of different factors are used by the Coast Guard to justify the initial stop. *See* United States v. Alvares-Mena, 765 F.2d 1259 (5th Cir. 1985) (fake water line; a great deal of electronic equipment not generally found on such boats; sudden and/or evasive movement); United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) (no flag; easily removable nameplate); United States v. Pinto-Mejia, 720 F.2d 248 (2d Cir. 1984) (last designated port near Columbia was a "known drug exporting port"; vessel in state of disrepair); United States v. Hensel, 699 F.2d 18 (1st Cir 1983) (vessel drifting afloat in water without a purpose; operating at night without lights; fishing boat yet no fishing gear); United States v. Green, 671 F.2d 46 (1st Cir. 1982) (vessel rides low in water; crew fails to answer when radioed; upon contact with crew, inconsistent statements regarding registration and destination); United States v. Streifel, 665 F.2d 414 (2d Cir. 1981) (ship registered with El Paso Intelligence Center (EPIC), a computerized information center of the Drug Enforcement Agency (DEA) which regularly supplies information regarding vessels suspected of smug-

gling; refusal to stop); United States v. Arra, 630 F.2d 836 (1st Cir. 1980) (located away from stated itinerary).

The scope of the search of the vessel is also quite broad. According to the circuit courts, it is clear that a stop is not unlawful even if it is pretextural in nature. *Arra*, 630 F.2d 836. Moreover, a lawful search has included virtually all parts of a vessel, and if probable cause arises from the search to suspect narcotics violations, an arrest and full search are said to be justified. *Villamonte-Marquez*, 462 U.S. 579; *Arra*, 630 F.2d 836; *Williams*, 617 F.2d 1063. The courts have been generous indeed in determining the scope of these searches. *See, Villamonte-Marquez*, 462 U.S. 579 (public areas); United States v. Elkins, 744 F.2d 530 (1st Cir. 1985) (fuel tanks); *Pringle*, 751 F.2d 419 (main cabin); United States v. Stuart-Caballero, 686 F.2d 890 (11th Cir. 1982) (search includes places where hazardous conditions exist, such as the engine room or oil hold); *Warren*, 578 F.2d 1058 (fish-hold; ice-chest); United States v. Odom, 526 F.2d 339 (5th Cir. 1976) (search may include all areas necessary to ensure compliance with safety regulations; identification number on ship's main beam).

The requirements of the Code of Federal Regulations (C.F.R.) are also frequently used to justify the scope of a search. *See, e.g.*, United States v. Thompson, 710 F.2d 1500, 1507 (11th Cir. 1983) (discussing C.F.R. regulations that require vessels to carry numerous safety devices such as fire extinguishers, life preservers, and visual distress signals).

33. *Villamonte-Marquez* 462 U.S. 572 (1983) (inland waters with ready access to open sea); United States v. Alley, 778 F.2d 1411 (9th Cir. 1985) (daytime only); United States v. Eagan, 707 F.2d 362 (9th Cir. 1982) (after dark if pursuant to a discretion limiting device such as an administrative plan); United States v. Alonzo, 673 F.2d 334 (11th Cir. 1982); United States v. Hilton, 619 F.2d 127 (1st Cir. 1980); United States v. Conroy, 589 F.2d 1258 (5th Cir. 1979); *Warren*, 578 F.2d 1058; United States v. Hillstrom, 533 F.2d 209 (5th Cir. 1976); *Odom*, 526 F.2d 339.
34. United States v. Keller, 451 F. Supp. 631 (D.P.R. 1978); United States v. Coats, 611 F.2d 37 (4th Cir. 1979) (dicta only); Casel v. State, 375 So.2d 1077 (Fla. Dist. Ct. App. 1979).
35. Camara v. Municipal Court, 387 U.S. 523 (1967).
36. In a very select number of highly regulated industries, where great harm can be caused by safety violations, the Supreme Court has allowed warrantless searches. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594 (1981) (mining); United States v. Biswell, 406 U.S. 311 (1972) (licensed gun dealers); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor business). In less regulated industries, however, a warrant is required. Marshall v. Barlows, 436 U.S. 307 (1978) (OSHA inspections); See. v. City of Seattle, 387 U.S. 541 (1967) (commercial building inspection).
37. Delaware v. Prouse, 440 U.S. 648 (1979).
38. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).
39. *Prouse*, 440 U.S. 648.
40. *Prouse*, 440 U.S. 648; United States v. Martinez-Fuerte, 428 U.S. 543 (1976); *Brignoni-Ponce*, 422 U.S. 873; United States v. Ortiz, 422 U.S. 891 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).
41. 413 U.S. 266.
42. 422 U.S. 891.

43. 422 U.S. 873.
44. 428 U.S. 543.
45. 413 U.S. 266.
46. 422 U.S. 891.
47. 422 U.S. 873.
48. *Id.* at 882-83.
49. 428 U.S. 543.
50. *Villamonte-Marquez*, 462 U.S. at 603 (Brennan, J., dissenting).
51. *Martinez-Fuerte*, 428 U.S. at 558-59.
52. 440 U.S. 648.
53. *Id.* at 661.
54. *See, Warren*, 578 F.2d 1058, 1081 n. 2 (Fay, J., dissenting).
55. 440 U.S. 648.
56. *Villamonte-Marquez*, 462 U.S. 579; United States v. Lilley, 778 F.2d 1411 (9th Cir. 1985) (daytime only); United States v. Eagan, 707 F.2d 362 (9th Cir. 1982) (after dark, if pursuant to a discretion limiting devices such as an administrative plan); United States v. Alonso, 673 F.2d 334 (11th Cir. 1982); Blair v. Moore, 665 F.2d 500 (4th Cir. 1981); United States v. Streifel, 665 F.2d 414 (2d. Cir. 1981); United States v. Hilton, 619 F.2d 127 (1st Cir. 1980); *Warren*, 578 F.2d 1058; United States v. Hillstrom, 533 F.2d 209 (5th Cir. 1976); United States v. Odom, 526 F.2d 339 (5th Cir. 1976).
57. 19 U.S.C. Sec. 1581(a) (1980); *Villamonte-Marquez*, 462 U.S. 579.
58. 462 U.S. 579.
59. *Id.* at 580-81.
60. *Id.* at 579.
61. Miranda v. Arizona, 384 U.S. 436 (1966).
62. *Villamonte-Marquez*, 462 U.S. at 584.
63. *Id.* at 585.
64. *Brignoni-Ponce*, 422 U.S. 873.
65. *Id.*
66. *Id.*
67. *Villamonte-Marquez*, 462 at 587-89.
68. *Id.* at 593.
69. *Id.* at 589.
70. *Id.*
71. *Id.* at 589-90.
72. *Id.* at 590.
73. *Id.*
74. *Id.*
75. *Id.* at 591.
76. *Id.*
77. *Id.* at 592.
78. *Id.*
79. *Id.*
80. *Id.* at 599.
81. *Id.*
82. *Id.* at 598.
83. *Id.* at 588, 600.
84. *Id.* at 600. Justice Brennan also disagreed with the Court's argument regarding the "historical pedigree" of 1581(a). *Id.* at n. 7.
85. *Id.* at 601.
86. *Id.*, (quoting *Prouse*, 440 U.S. at 661).
87. *Almeida-Sanchez*, 413 U.S. 266.
88. *Ortiz*, 422 U.S. 891.

89. *Villamonte-Marquez*, 462 U.S. at 601-2.
90. 428 U.S. 543.
91. 440 U.S. 648.
92. *Villamonte-Marquez*, 462 U.S. at 603-5.
93. *Id.* at 605.
94. *Id.*
95. *Id.* at 605-6.
96. *Id.* at 606.
97. *Id.*
98. *Id.* at 601.
99. *Id.* at 607.
100. *Id.* at 608.
101. *Id.* at 609.
102. *Id.*
103. *Id.*
104. 462 U.S. 579.
105. *Id.* at 581 n. 2.
106. This topic is discussed in Part III, *infra*.
107. 462 U.S. at 605 n. 8 (Brennan, J., dissenting).
108. 462 U.S. 579.
109. *See supra* note 20.
110. 462 U.S. 579.
111. By reading the first clause (the reasonableness clause) of the Fourth Amendment as independent of the second clause (the warrant clause), the Supreme Court has found that the government has additional search and seizure power which, when invoked, may be reasonable even when done without a warrant. Indeed, this is the very method that the Court employs in *Villamonte-Marquez*, 462 U.S. 579. Further, in determining the reasonableness of a seizure or a search, the Court employs a "balancing test." It balances the need for the government action against the degree of intrusiveness on an individual's privacy interests. Moreover, in this balancing calculus, the Court often considers five factors discussed in the text. For a somewhat different elaboration of these factors in the at-sea context see *LaFave*, *supra* note 12, at 200-4.
112. *LaFave*, *supra* note 12, at 200.
113. 440 U.S. 648.
114. *Convention on the High Seas*, *supra* note 12, at art. 5.
115. 462 U.S. 579.
116. *Id.*
117. *Id.*
118. *Warren*, 578 F.2d 1082 n. 2 (Fay, J., dissenting).
119. *LaFave*, *supra* note 12, at 202.
120. 462 U.S. at 608.
121. *Id.* at 609.
122. *Id.* at 607.
123. *LaFave*, *supra* note 12, at 202.
124. 462 U.S. 579.
125. *Id.* at 591.
126. *Id.* at 606.
127. *Id.* at 592.
128. *See supra* note 32.
129. *LaFave*, *supra* note 12, at 202.
130. 462 U.S. 579.
131. *Id.* at 581, 593.
132. *Id.* at 598 (Brennan, J., dissenting).

133. *Williams*, 617 F.2d 1063, 1095 (Rubin, J., dissenting).
134. *LaFave*, *supra* note 12, at 203.
135. 462 U.S. 579.
136. *Almeida-Sanchez*, 413 U.S. 266, 275-85 (Powell, J., concurring).
137. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967).
138. *Villamonte-Marquez*, 462 U.S. 579. This failure suggests, of course, a structural weakness in Justice Rehnquist's fourth amendment analysis.
139. 462 U.S. 579.
140. *Id.*
141. Once the Tradition is violated in this kind of broad and short-sighted manner, there is no natural stopping point in the reasoning of the Court which would necessarily leave any viable Fourth Amendment protection. Why, for example, should the police not have a right to search a house without probable cause or a warrant if they have a "hunch" drugs are in that house?
142. 462 U.S. 579.
143. *Id.*
144. *Id.* at 592.
145. *See, e.g.*, United States v. Espinosa-Cerpa, 630 F.2d 328, 334 (5th Cir. 1980); *see also supra* note 32.
146. *Warren*, 578 F.2d 1058, 1080 (Fay, J., dissenting).
147. United States v. Hilton, 619 F.2d 127, 132 (1st Cir. 1980).
148. *See supra* note 32.
149. *See Odom*, 526 F.2d 339, 342.
150. 462 U.S. 579.
151. The Court's opinion does not discuss this issue. It appears that the Court simply assumes the existence of probable cause. *See Id.* at 583. For a more recent discussion by the Court about the probable cause requirement, *see*, Illinois v. Gates, 462 U.S. 213 (1983).
152. *Villamonte-Marquez*, 462 U.S. 579, is an excellent example of this point.
153. But, as noted, this "area" has been construed quite liberally. *See supra* note 32.
154. 578 F.2d 1058.
155. *Id.* at 1084 (Fay, J., dissenting).
156. Consider Judge Fay's comment, dissenting in *Warren*, 578 F.2d 1058, 1081, n. 2:

> I think this court is kidding itself if it thinks that the purpose for the majority of the stops . . . is for safety and documentary inspections. What the Coast Guard is rightfully concerned about is the large amount of drugs imported into the United States . . . I do not think, however, that the problem is any different or more critical on the high seas near Haiti than it is on the Mexican Border, and, as a result, I see no reason why a possible drug importer on the high seas should have fewer rights when confronted by the Coast Guard than should a person on land near the Mexican border when confronted by an officer of the Border Patrol.

Most circuit courts also claim that the fact that a search may be pretextual does not necessarily taint the validity of a safety and documentation stop. *See, e.g., Alonso*, 673 F.2d 334, 336.

157. 462 U.S. 579.
158. United States v. Ramsey, 431 U.S. 606 (1977).
159. *Id.* at 621-22.
160. *Id.*
161. Note, 93 *Harv. L. Rev.* 725, 734 (1980).
162. *Almeida-Sanchez*, 413 U.S. at 272-73.
163. "If it is demonstrated with reasonable certainty that a vehicle has crossed the border and that any contraband found at the time of the search was aboard it at the time it entered United States jurisdiction, a search of that vehicle made inland from the border qualifies as a border-type search." *Williams*, 617 F.2d 1063, 1096 (Rubin, J., concurring).
164. *Id.*
165. *Id.*
166. *Id.*; Maul v. United States, 274 U.S. 501, 525-29 (1927) (Brandeis, J., concurring).
167. *Williams*, 617 F.2d 1063, adopts this view. *Cf.* United States v. Tilton, 534 F.2d 1363, 1365 (9th Cir. 1976) (vessel's anchorage in domestic port is the functional equivalent of the border).
168. *Villamonte-Marquez*, 462 U.S. 579, did not address this issue. The Court's holding was limited to vessels found on "waters providing ready access to the seaward border." 462 U.S. at 589.
169. *Williams*, 617 F.2d 1063, 1098 (Rubin, J., concurring).
170. *Brignoni-Ponce*, 422 U.S. at 872-73.
171. United States v. Freeman, 579 F.2d 942, 946 (5th Cir. 1978).
172. *See supra* note 133 and accompanying text.
173. Comment, 68 *Geo. L. J.* 1035, 1051 (1980).
174. On its face, 1581(a) authorizes such searches because the statute makes reference to customs waters, which are defined as those waters within the twelve mile limit. *See supra* note 19.
175. 422 U.S. 872.
176. Note, 93 *Harv. L. Rev.*, 725, 734 (1980).
177. *Williams*, 617 F.2d 1063, 1096 (Rubin, J., concurring).
178. Note, 93 *Harv. L. Rev.* 725, 735 (1980). *See also, LaFave, supra* note 12 Sec. 10.5(i).
179. Note 93, *Harv. L. Rev.* 725, 736 (1980).
180. *See supra* note 178.
181. United States v. Harper, 617 F.2d 35 (4th Cir. 1980).
182. *Id.* at 37.
183. The court seemed to blend the border stop and search exception with the checkpoint stop exception, thus needlessly confusing the issues.
184. 617 F.2d at 38.
185. United States v. Streifel, 665 F.2d 414 (2d Cir. 1981).
186. Terry v. Ohio, 392 U.S. 1 (1968).
187. *Brignoni-Ponce*, 422 U.S. at 884.
188. *Streifel*, 665 F.2d at 421.
189. 665 F.2d 414.
190. *Id.* at 421. *See also*, United States v. Wray, 748 F.2d 31 (1st Cir. 1984); United States v. Kleinschmidt, 596 F.2d 133 (5th Cir. 1979); United States v. Watkins, 662 F.2d 1090 (4th Cir. 1981).
191. *Streifel*, 665 F.2d at 424.
192. *Marino-Garcia*, 679 F.2d 1373; United States v. Green, 671 F.2d 46 (1st Cir. 1982); *Streifel*, 665 F.2d 414; *Hilton*, 619 F.2d 127; *Williams*, 617 F.2d 1063. Moreover, reasonable suspicion may not be the minimum standard required to stop foreign vessels on the high

seas, *Williams*, 617 F.2d at 1084, 1088, n. 2, and some cases even suggest that the Fourth Amendment may not be applicable at all to stateless vessels. *See e.g., Marino-Garcia*, 672 F.2d 1373.

193. 422 U.S. 873.
194. 440 U.S. 648.
195. United States v. Manbeck, 744 F.2d 360 (4th Cir. 1984); Note, 93 *Harv. L. Rev.* 725, 737 (1980).
196. Additional authority for allowing an investigatory stop can be found in our duty under international law to regulate United States flag vessels. Because clearly marked flag vessels are generally allowed the right to navigate freely on the high seas and are, in effect, like "floating pieces" of the flag nation, subject to that nation's exclusive jurisdiction, it is the duty of the flag nation to control the vessel. *See*, United States v. Rubies, 612 F.2d 397 (9th Cir. 1979).

    A second method for justifying an investigatory stop is pursuant to a fixed checkpoint operation similar to that recognized as constitutional by the Supreme Court in *Prouse*, 440 U.S. 648. A fixed checkpoint, of course, acts as a discretion limiting check on the officer in the field. *See Harper*, 617 F.2d 35.
197. *Williams*, 617 F.2d 1063.
198. *Id.* at 1099 (Rubin, J., concurring). Exigent circumstances are those circumstances where probable cause develops to believe that a law is being violated, but the delay occasioned by securing a warrant might result in the loss or destruction of evidence. An example of exigent circumstaces is best seen in its application to automobiles in Chambers v. Maroney, 399 U.S. 42 (1970), where the Court found that a search warrant could be dispensed with because "the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." 399 U.S. at 51. "Hot pursuit" is another example of exigent circumstances. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967).
199. *Id.*
200. 617 F.2d 1063.
201. *Id.* at 1075, 1084.
202. *Id.* at 1075, 1086.
203. *Id.* at 1087.
204. *Id.* at 1088.
205. The Court's last two reasons have to do only with the warrant requirement and do not justify a lower probable cause standard.
206. United States v. Chadwick, 433 U.S. 1 (1977); *Ortiz*, 422 U.S. 891; *Almeida-Sanchez*, 413 U.S. 266.
207. United States v. Cadena, 588 F.2d 100 (5th Cir. 1979).
208. Note, 93 *Harv L. Rev.* 725, 729 (1980).
209. The *Williams* court rejected this approach. 617 F.2d at 1088.
210. Significantly, a number of courts both prior to *Villamonte-Marquez*, 462 U.S. 579, and subsequent to that decision, yet notwithstanding its ruling, have required that a reasonable suspicion exist to justify a Sec. 1581(a) stop for other than a safety and documentation inspection. United States v. Manbeck, 744 F.2d 360 (4th Cir. 1984); United States v. Herrera, 711 F.2d 1546 (11th Cir. 1983); United States v. Guillen-Linares, 643 F.2d 1054 (5th Cir. 1981); United States v. Serrano, 607 F.2d 1145 (5th Cir. 1979).

211. Compare, for example, a similar notion with the use of a "drug courier profile" that frequently justifies an initial investigatory stop of a person in an airport search situation. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980).
212. *See, e.g.*, United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) (no flag).
213. *See, e.g.*, United States v. Pinto-Mejia, 720 F.2d 248 (2d Cir. 1984) (last designated port near Columbia).
214. *See, e.g.*, United States v. Arra, 630 F.2d 863 (1st Cir. 1980) (located away from stated itinerary).
215. *See, e.g.*, United States v. Green, 671 F.2d 46 (1st Cir. 1982).
216. *Id.*
217. *Id.*
218. *See, e.g.*, United States v. Hensel, 699 F.2d 18 (1st Cir. 1983).
219. *Id.*
220. *See, e.g.*, United States v. Alvarez-Mena, 765 F.2d 1259 (5th Cir. 1985).
221. *Id.*
222. *Id.*
223. *See, e.g., Hensel*, 699 F.2d 18.
224. *See, e.g., Alvarez-Mena*, 765 F.2d 1259.
225. *See, e.g., Streifel*, 665 F.2d 414.
226. *See, e.g., Pinto-Mejia*, 720 F.2d 248.
227. *See, e.g.*, United States v. Herrera, 711 F.2d 1546 (11th Cir. 1983).
228. *See, e.g.*, United States v. Reeh, 780 F.2d 1541 (11th Cir. 1986).
229. *Id.*
230. *Streifel*, 665 F.2d 414.
231. *Reeh*, 780 F.2d 1541.
232. *Id.*
233. *Id.*
234. Boyd v. United States, 116 U.S. 616, 635 (1886).
235. The Supreme Court in *Villamonte-Marquez*, 462 U.S. 579, rejected such a suggestion. The Court reasoned that such checkpoints are impractical in waters providing ready access to the open sea because "vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do." 462 U.S. at 589. *But c.f., Harper*, 617 F.2d 35 (ships stopped at checkpoint on the high seas).
236. 413 U.S. 266.
237. *Id.* at 283 (Powell, J., concurring).
238. *Villamonte-Marquez*, 462 U.S. at 609-10 (Brennan, J., dissenting) (quoting *Almeida-Sanchez*, 413 U.S. at 273-74, quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).

Jonathan Charney: Now I would like to turn the program over to the audience to ask if you have questions of our panelists or brief statements. Ms. Platzoeder.

Renate Platzoeder: Professor Riesenfeld, you mentioned that the International Court of Justice has rejected the "package deal" doctrine. I doubt that the ICJ has done this. The package deal is not a doctrine; it is a fact. And this fact has been documented throughout the official records of the Law of the Sea Conference. Let me give you one example. In the very last phase of the Conference, formal amendments were introduced by various states and groups of states. The United States proposed amendments to the deep seabed regime which are also referred to as "The Green Book." There was a group of about forty developing countries, including Romania, which wanted to change the regime of the territorial sea affecting the passage of warships. Both amendments were withdrawn only after intensive negotiations between the United States, other very important participants of the Conference, and, of course, the sponsors of the amendments on the regime of the territorial sea. This is just one example of political deals that were struck linking and tying together provisions of different parts of the Convention, and this is understood as the "package deal." Of course, there have been attempts to unravel it, but the overwhelming majority of states reacted by stating that the Convention is a package deal. Statements to this effect are found in declarations, resolutions, and statements. As long as the Convention is not be revised and no fundamental changes are made, it remains a "package deal." Thank you very much.

Jonathan Charney: Professor Riesenfeld, would you like to respond?

Stefan Riesenfeld: Yes. I can only say: I've heard the speech; what is the question?

Renate Platzoeder: I did not want to question you, I just wanted to make a comment. But if you want to respond, of course I can formulate a question. Why do you think that the "package deal" is a doctrine? Can you elaborate on that?

Stefan Riesenfeld: Yes, of course I can. I hope I can. I know that it has been asserted by many people, including delegates, that the whole conference was a "package deal." On the other hand, there were lots of separately tied-up issues which are more identifiable as particular deals with a particular issue involved. I was not sitting in judgment on whether the "package deal" is right or not. You probably know as well as I that Sir Robert Jennings wrote a long article on that subject in the *Melanges Offerts a Paul Reuter* (1981), discussing the legal issues raised by the package deal concept. I only made one comment, which is also true, that the International Court has said so. I quoted. And that's all I did. And it is beyond question that the Chamber of the ICJ said so. I think that the "package deal" doctrine has been overextended by people who have interests in saying that all is a package deal. On the other hand, as I remember, some members of the delegations took the view that only certain things were tied together. The notion that it is the history of negotiations which transforms

certain concepts into customary international law has been recognized by the International Court of Justice in the *Tunisia/Libya* case and in the *Gulf of Maine Boundary* case. I don't want to question the correctness of the Court; I only made the comment that the Court has said so. Whether justly or unjustly depends on the particular views which you feel are correct and of course all these matters are matters which are debatable. I know your views. I did not express any views of my own. I only stated what the Court said twice; once the Court referred specifically to the "package deal" doctrine and nevertheless indicated that the institution of the Exclusive Economic Zone has become customary international law. The other time the Court said nothing and was criticized by Judge Oda in the dissent. And that's all I said. Personally, I think the Court was right. But I also believe, in deference to you, that other views may also be expressed, have been expressed by you, have been expressed by Ambassador Koh, and the matter really has been discussed at great length by Sir Robert Jennings in that particular article.

Jonathan Charney: I think the Law of the Sea Convention and the "package deal" is an important element of the question at hand. That is, what is the extent of the right and power of the coastal state to interdict at sea foreign and domestic vessels for suspicion of drug smuggling or illegal immigration?

Gary Barkus: I'm with the Miami law firm of Haley, Snider, & Perez. I'd like to pose a question to the panel. How has the United Nations treaty on controlled and psychotropic substances been applied as an enforcement tool to stop the international carriage of drugs?

Jonathan Charney: Commander Anderson?

Andrew Anderson: At this time we are not actively using the provisions of that treaty. We are complying basically with the Convention on the High Seas, the various international bilateral agreements to which we subscribe, the multilateral single convention on narcotic drugs, as well as some working agreements with various nations. We do adhere or subscribe to the principles announced in the Law of the Sea Convention, specifically that one basis for interference with a vessel on the high seas is suspicion that it's a stateless vessel. We also endorse the concept that all nations should cooperate to suppress the illicit traffic in narcotic drugs and psychotropic substances. But we are not at this time using specifically the provisions of that convention.

Jonathan Charney: Professor Sohn, did I see you rise to that?

Louis Sohn: This is one of those provisions that Professor Riesenfeld might have mentioned, namely that a provision on narcotic drugs and psychotropic substances was added only in the 1982 Convention which supposedly is not yet in force. Nevertheless people already talk about the possible enforcement of that provision, at least to the extent that it requires cooperation and some joint action, etc. But, of course, this is a very vague obligation and any attempts to go beyond it, saying that states should allow actual searches and seizures and so on, immediately were stopped. What always fascinated me in the negotiations: when the European countries decided they wanted a special prohibition on what they called pirate broadcasting, they got that provision

into the treaty with quite a lot of details. On the other hand, the people that wanted to have a provision on narcotics and psychotropic substances only got a vague general provision. So you can draw your conclusions about the importance of one or the other.

Jonathan Charney: Professor Craven?

John P. Craven: I'd like to make a comment and then have a question passed specifically to the Commander of the Coast Guard. In the past, throughout the generations, the freedom of the seas has been established not so much on moral purposes but on pragmatic purposes. That is, the technological feasibility of interdiction at sea in an effective way has always proved to be more expensive to the interdicting state in terms of costs and in terms of danger to which their people are exposed than has been the productive value of such interdiction. As we look at the technology which is being used by the movers of illicit substances and people, we see that they have a great many financial resources, that they have used technology, that as the interdiction becomes more effective, they will use more effective technology, that they have not yet really scratched the surface, if I may use a pun on the technology. Such things as the use of submarines will be both cost effective and much more difficult to interdict on the high seas. And therefore, if past history has been a guide, we'll come to a point where we'll ask ourselves whether this is indeed an effective tool in the fight against narcotics as compared with the inspection at the port, port control both flag-state and other control, and control at the entry points. And it's my own personal value judgment that this technology will unfortunately favor the smugglers, that the technology of submersibles and the technology of sophisticated vehicles at sea is coming way down in cost and will provide many, many mechanisms for coming in. I know that the Commander will be required to say that the Coast Guard can mount an effective interdiction technique, and so I rephrase my question to him in the following way: what kind of resources and assets do you feel that the Coast Guard will need in the future, as compared to your current resources and assets, in order to have an effective interdiction at sea program given that you are allowed to continue with the inspection and search and seizure authority that you now have?

Andrew W. Anderson: I don't doubt that we'll be allowed to continue with that present authority. I don't really think that submersibles, submarines, are a practical alternative. They're highly regulated and strictly controlled and I don't see their becoming a smuggling alternative. I think your basic premise is correct insofar as the initiative always has been with the smuggler. The initiative is always with the criminal no matter what type of enterprise you're talking about. He knows who, what, when, where, and how he's going to do it, and it's the job of law enforcement people to try to anticipate that and put themselves in a position to stop it. Technologically, we are usually a little bit behind them, that's true. But we have never totally depended on interdiction as the be-all and the end-all solution to the problem. We measure our effectiveness not in pure statistical terms but primarily in our ability to impact and interfere with the smugglers. When they change their way of doing business by buying new technology, we know we've hurt them. We are getting more technology ourselves. I'm hoping to see in the future more long-range C-130 aircraft with side-

looking airborne radar; we're starting to use tethered aerostats or blimps on vessels to increase radar coverage and increasing our use of high-speed intermediate range patrol boats off the coast of the United States to deal with the problem of high-speed smuggling vessels.

Part of the practical problem that we have to deal with again is that, in these millions of square miles, there are no highways, no interstates, no fixed routes that they have to follow. There's no such thing as immobilizing a vessel. Even if you stop it, in the wind and the currents it's still going to move. I'd like to see a fixed checkpoint in Government Cut. It would be interesting on a Saturday morning to see all the passenger liners sitting there waiting for their turn to come in.

But the ports are not the solution to the problem, because the biggest part of the problem is this: the vessel leaves a port in Colombia, clears customs, gets its *zarpe* from the captain of the port, then leaves Barranquilla or Santa Marta, and goes off to the Guajira where thirty-, forty-foot dugout canoes come out loaded with marijuana and trans-ship on the high seas. This vessel then goes to, say, Misteriosa Bank below Cuba, trans-ships again into two U.S. shrimp boats, and they proceed off the coast of Florida or Louisiana and trans-ship into yet more boats. So this is not a question of dealing with it at either end at the port; it has to be dealt with in a practical manner on the high seas.

But, again, I don't think that we're going to be relying totally on interdiction as the solution to the problem. Interdiction is a component of the total solution, which also includes drug education of the American consumer, treatment of the person who's abusing the drugs, crop substitution, crop eradication, and international cooperation. This is very rapidly becoming a global problem. The governments of other countries are recognizing this, they're actively cooperating. I think this type of cooperation will eventually put the large-scale dope smuggler out of business. There's always going to be a small level; people were using marijuana in this country in the thirties and the forties. I think we're going to see a return to small-scale use, and it's no longer going to be used as a recreational drug. Same thing with cocaine.

Hasjim Djalal: I have two small questions to Commander Anderson. The first one is, what is the American experience, or your experience, with a much more severe penalty for drug trafficking? Has it been helpful or has it not been helpful? In Southeast Asia, for instance, Malaysia has imposed a death penalty and has executed persons involved in drug trafficking of more than fifteen grams, something like that.

The second question is, if I may, Mr. Commander: I'm very much intrigued with your statement that international cooperation within the context of the law of the sea is important to fight this drug trafficking on the high sea. Louis Sohn has indicated that, and there is some reference to that in Article 108, obligating States Parties to the Law of the Sea Convention to cooperate against drug trafficking on the high seas. My question is: how does the United States think they can do this without being party to the Law of the Sea Convention? Would it not be helpful for international obligations for the international community to cooperate within the context of the Law of the Sea Convention?

Andrew Anderson: With regard to the first question, I don't advocate capital punishment for drug smuggling. We have found that the increased

probability of prosecution and conviction and increased penalties have had an impact on drug smuggling. They have driven a lot of people out of the business. It used to be that a lot of Americans, for example, were involved in the trade. It's very rare to find Americans involved any more. You'll find that drug traffickers are using more and more non-professional seamen, farmers and automobile mechanics, as deck hands and ship engineers. Drug traffickers are, in fact, deterred by the increased penalities. That's also one of the reasons why they're resorting to hidden compartments and resisting. The *Dauntless* seized the vessel *Cramay*, a vessel out of Cayman Islands. The captain resisted for twenty-four hours, and finally the vessel had to be fired on, resulting in secondary explosions and the disablement of the vessel. It turned out that he was resisting because he was deathly afraid of being caught. He was a three-time loser and was facing thirty-five years, which is what he got.

Answering the second question: would not the United States be better off cooperating within the provisions of the Law of the Sea Convention -- is like wandering into a minefield. The current provisions of the Law of the Sea Convention are somewhat ambiguous. As Professor Sohn pointed out, they're nowhere near as specific as the provisions with regard to pirate radio broadcasting. I think we'd be better off as we have been, pursuing a series of bilateral and multilateral agreements which are geared specifically to deal with questions of documentation, verification, boarding, inspection, processing of seizures, and things like that. The State Department is doing that, and they've been enjoying quite a bit of success. Informal agreements have also been very successful.

Professor Sohn: We have been addressing here primarily the law of the sea part of the question, but there is also a human rights part of the question. People sometimes forget that in the western hemisphere we have an Inter-American Court of Human Rights which could be asked an advisory opinion on the subject which, because of the importance of the Court and its general good reputation, would certainly be followed. Even non-parties to the American Convention on Human Rights are permitted under the Convention to ask for advisory opinions. Also, the question can be raised by the Inter-American Commission on Human Rights, to which the Americans have access. In fact, there was an interesting case a few years ago where one of the conservative groups, you might call it, asked the Commission for an opinion on whether abortion is prohibited by the law of human rights of the Americas. The Court rejected the complaint because it was related to the American Declaration of Human Rights rather than to the Convention, and in the Declaration there is no prohibition of abortion. If the Convention is ratified by the United States, there might be a different story. What is important is that there are international remedies available. If the United States would ratify the United Nations Covenant on Civil and Political Rights, it would have access to the United Nations Committee on Human Rights. There have already been cases there relating not to narcotics but to the questions of arrest, kidnapping, etc. There was a very interesting case, for instance, about the kidnapping of an Uruguayan from Argentina. And Uruguay accepted the Convention. The matter went to the Committee and the Committee said it's illegal under international law to arrest somebody in another country even with the permission of that country. That's interesting because much of what the Coast Guard is doing is based on the permission of the other country. If there were

a special treaty permitting it, that's something different, but simply some Argentine official permitting you to do it is not sufficient.

Stefan Riesenfeld: I'd like to point out for the purpose of our discussion here that among the rights of the Coast Guard, its power to search and stop foreigners is much more limited than has been stated and that this restriction is laid down as well by Section 1581(a), which Professor Stotzky mentioned, and by Section 1701(b), which he did not mention. I'd like to underline that the Coast Guard's authority with respect to foreign vessels depends on the consent of foreign nations and is circumscribed not only by Section 1581(a) but also by 1581(h) and 1701(b) and 1709(c).

Leon Irish: I have a question for Commander Anderson. One of the long traditions of this country has been that the military forces do not engage in law enforcement, and of course the principal reason for the uniformed service of the Coast Guard is to engage in law enforcement. In recent years, however, because of the lack of resources of the Coast Guard, the U.S. Navy has been permitted to assist the U.S. Coast Guard in particular cases such as drug enforcement. Will you tell us what the rules are for that engagement and to what extent it is actually used?

Andrew Anderson: You're speaking about the *Posse Comitatus* Act which applied by statute to the U.S. Army and the U.S. Air Force and by policy to the U.S. Navy. That was recently amended to delineate the extent to which they can cooperate. The basic principle that the Department of Defense Armed Forces -- because the Coast Guard is an armed force, something which people tend to forget quite frequently -- cannot directly participate in law enforcement is still intact. What the *Posse Comitatus* Act does allow now, however, is the provision of assistance. For example, DOD military hardware, radars, aircraft, helicopters, have been provided to the U.S. Customs Service for their use, flown by Customs pilots. In other cases, sophisticated Army helicopters and Navy planes have been flown by Navy pilots or Army pilots, but all they do is report back the results of their sensors. They fly Coast Guard surveillance missions but take no active part in any enforcement action. In other cases, military aircraft have provided transportation services to Drug Enforcement Agency and Customs agents. There again, they are the ones who are taking the law enforcement actions. The Coast Guard has a number of tactical law enforcement teams, or mobile boarding parties, who ride Navy vessels during the course of routine Navy operations or, in some cases, are specifically supplied with Navy vessels and boarding platforms. At the time a potential drug vessel is detected, the Navy vessel chops to the Coast Guard, or comes under the operational control of the Coast Guard, the communications with the vessel are done by the Coast Guard officer, the Coast Guard ensign is hoisted on the Navy vessel, and the entire process is handled by Coast Guard personnel, only supported and assisted by the Navy personnel. The Navy people take no direct law enforcement action nor are they permitted to do so under their regulations. The Navy vessels are authorized under Coast Guard direction, using Coast Guard guidelines, to fire warning shots and disabling fire. They have done so in the past. But again, it's under Coast Guard direction and in accord with Coast Guard guidelines using our rules of engagement and not theirs.

Jonathan Charney: Professor Richardson.

Henry Richardson: I have a question for Professor Sohn and a question for Professor Stotzky. First, to Professor Sohn, I am interested in your note that, with respect to unilateral action concerning narcotics enforcement, especially as that action is related to human rights issues, the United States is most reluctant to recognize principles of reciprocity. Are you implying the danger that the United States and to some extent the Soviet Union claim that two kinds of international law should evolve, one law for great powers to protect interests in their own sphere of influence and another kind of international law for the rest of the states of the world, and that this issue of reciprocity with respect to human rights and narcotics enforcement may well be a kind of benchmark as to that particular danger?

Professor Stotzky, if your overall argument is that the Fourth Amendment should be applied equally to land-based activities in the narcotics enforcement area and to activities that occur on the high seas, with respect to U.S. or foreign vessels, I wonder how you treat what I might call "the spirit of Curtis Wright." As you will remember, the distinction in dicta in *U.S.* v. *Curtis Wright* is that indeed there are two kinds of powers granted to the President, one of which is more limited by the Constitution than the other. Domestic power is more limited by Bill of Rights guarantees than is foreign policy power where the President has a greater degree of discretion. Don't you have to more directly confront that issue by characterizing narcotics interdiction activities as domestic activities or by arguing that the guarantees of the Fourth Amendment are so important that they overcome the traditionally wide presumption of executive discretion with respect to foreign policy activities?

Jonathan Charney: Professor Sohn.

Louis Sohn: There's always some tendency among the major powers to think that everybody's equal but that some are more equal than others. But, in fact, international law does not make that distinction, and the Soviet Union has been one of the first to object to the idea. For instance, when the issue of slavery, and even more of slave traffic, was of concern, there was objection to the idea that there should be unlimited right to search foreign vessels because maritime states felt that this was a very dangerous precedent and would cause a lot of trouble on the high seas if generally permitted. A bilateral attempt by the major powers together to impose it on the rest of the world is not likely to be successful under present circumstances. Everybody knows that. It has to be a general international agreement, an agreement that would bring together not only the law of the sea experts but also the human rights experts and try to establish some common rules on the global scale that would apply. We already have some rules in the United Nations Covenant on Human Rights and a number of inter-American documents, some of which the United States accepts. As it seems to me, the problem is simply to marry those two. In the conclusion of my paper I say, "Some of you perhaps remember a beautiful picture by Botticelli in a Florence museum showing Venus emerging on a half shell," from the sea. I suggest that, if you marry properly human rights and law of the sea, another beautiful creature might emerge for the benefit of human kind. Thank you.

Irwin Stotzky: I have several things to say in response to your interesting question. First, in my talk I was referring only to the statu-

tory bases for the government's right to take this kind of action. These are the claims the government makes as to why the boat was stopped and searched to begin with.

Second, and a significant point, there are other kinds of exceptions to the Fourth Amendment's stringent warrant and probable cause requirements which could possibly justify the government's actions in stopping and searching vessels. These exceptions, however, are usually not raised in the judicial opinions or, if they are raised, the requirements for these exceptions are rarely, if ever, met. Even in the rare case when a court bases its decision on recognized exceptions, however, it usually blends discussion of several exceptions together. Moreover, the courts generally do not ensure that all the requirements of any single exception are met. Instead, they generally discuss several factors which may be relevant to some of the exceptions they mix together. The border search exception, for example, would allow the stopping and searching of a vessel for no reason at all within the three-mile limit if there is a reasonable suspicion that the border has been crossed. This is, of course a standard part of the Fourth Amendment Tradition. However, rarely do the cases, when discussing this exception, work through all the factors needed to meet its requirements. This failure violates the Tradition.

But to respond more specifically to your question, I think this is clearly a domestic issue. I think the stopping and searching of boats on the high seas is done to stop narcotics from entering the United States, which clearly affects the citizens of the United States, whether the boat is a United States vessel, a foreign vessel, a stateless vessel, or any other kind. The main purpose of these stops is to cut down on the demand, and perhaps on the supply, of that kind of drug traffic. Furthermore, the President does have constitutional powers to stop the drug trafficking problem, which he has not necessarily employed. He has not declared a national emergency concerning narcotics nor has he asked Congress to pass some legislation which would give the Coast Guard and other customs officials authority in this area. That has not been done. What has been done is simply to employ a certain kind of statute that several of us have talked about today, and perhaps in some circumstances to attempt reasonably to infer a suspicion of probable cause to whole catagories of vessels in order to stop and search them. Further, even in the foreign policy power of the President, there is clearly a constitutional role for the courts to play and a constitutional right of individuals to make claims against the government. To give you an example in a more domestic sense, but which obviously has foreign policy implications, we should think back to the circumstances in which the *New York Times* and the *Washington Post* decided to publish the *Pentagon Papers*. As you recall, in *New York Times Co. v. United States*, the government went to court immediately, trying to invoke the power of the courts of the United States to issue an injunction to restrain that kind of publication, claiming that overriding foreign policy concerns played a supreme role and therefore, ought to override any First Amendment interests. The Supreme Court disagreed with the government in that context. In this context, I agree that we do have a serious drug problem in this country. But I also agree that there are processes by which we can deal with it in ways that don't violate our constitutional traditions. Indeed, when it comes to Fourth Amendment concerns, I do think they're as important as what you were suggesting in terms of following the rules. It seems to me that there are substantive rights behind the rules, and if the rules

aren't followed, what's to stop the government from claiming national emergencies in a variety of contexts? For example, suppose the government claims that there is a significant drug trafficking emergency in Coral Gables or indeed in Bal Harbour. Suppose further that, to alleviate the problem, the government decides to stop and search all people walking on the streets or decides to search all houses in these designated areas. Can they do so merely on the basis of a government declared "emergency"? I'm not suggesting that the government is going to take such action immediately. I'm saying that there's no natural limit to this type of reasoning that suggests that's appropriate government behavior. As history has shown, those who have power tend to abuse it if it goes unchecked.

Geoffrey Dabb: I'm interested in the system that seems to be growing up of *ad hoc* authorization by a flag-state for the search by the vessels of another country of the flag state's vessel on the high seas. It seems to me that in this situation, the search and any action incident to it, what might otherwise be an unauthorized assault or damage to property, would need to be authorized by the law of the flag state or an action could be brought, possibly against the flag state itself for having consented to this action. So from that point of view, I wonder what the United States position as a matter of law is if it suddenly needs to respond to a request from the government of another country to search a United States vessel on the high seas some distance away from the United States. That search, it seems to me, would need to be authorized by United States law or actions could be brought for assault or unauthorized use of force or damage to property. Possibly, if there were time, there could even be an application, as we've just heard, for an injunction to restrain the unauthorized search. Thank you.

Andrew Anderson: I'm not really sure what the position of the State Department might be in this regard. There is a provision in United States law for reciprocity. In other words, if a foreign country penalizes, or cooperates in the suppression of, smuggling into the United States, then it is a violation of United States law to smuggle into that country. If an American vessel, for example, were smuggling into the Bahamas -- and the Bahamians do penalize people smuggling into the United States -- then that would be a violation of United States law. This is speculation on my part, but if there were no U.S. vessels available or reasonably available to enforce U.S. law, we would request the assistance of that nation in enforcing the law on our behalf. We have done this in some limited cases and it's typically what we do when we contact the Bahamas or Colombia or whatever. We, in fact, receive one of two authorizations. One is to board the vessel and enforce U.S. law and the other is to board the vessel and, in some cases, enforce, say, Panamanian law on behalf of Panama. So under those circumstances, assuming a reciprocity, drug trafficking into another country would be a violation of U.S. law and penalizing it would be justified under U.S. law.

Professor Stotzky: I just want to raise one issue. I'm not sure it's a direct response to your question, but it is certainly related to it. How can a foreign country actually consent to the search of a ship? Suppose, for example, that a ship from another country is near the territorial waters of the United States and the Coast Guard wishes to stop and board it. Suppose further that these Coast Guard officials

contact that particular nation's embassy, either by telephone or in some other manner, and get the foreign nation's permission to stop and search the ship. Why is it that the foreign nation can consent to the search of that ship when the individuals on that boat may very well, under United States constitutional law, claim that their rights are being violated? That is, a number of cases hold that when a foreign citizen is charged with a crime in the United States, he has all the constitutional rights that any American citizen would have in these circumstances. Now if that is so, the interesting question would be whether or not those people have standing to make claims against the United States. I haven't really seen anything in the literature about that. No one seems to mention it. But it is certainly a serious constitutional issue.

Jonathan Charney: Now we will have final statements from each of our panel members. Professor Riesenfeld?

Stefan Riesenfeld: I'd like first to address a question. There's a famous Supreme Court case called *United States* v.*Pink* in which the constitutionality of agreements was discussed. There the Supreme Court said that it was not a violation of the due process clause to accept the assigning of Russian expropriations without compensation because Russia, not the United States, had expropriated. It was not for the Supreme Court to decide what Russia could or could not do, and the United States' acceptance didn't violate the Constitution. To me that is an authorization to steal from Peter to give to Paul; but that is what the Supreme Court said. I'm puzzled by that decision; I don't think that the Supreme Court would do that again today.

I would also like to respond further to that question addressed to me at the beginning. Since the Law of the Sea Conference, forty-nine nations have enacted legislation which accepts the exclusive economic zone, taking it out of the "package deal." Those nations are listed in 54 *British Yearbook of International Law* on page 361; the list is the reply to a parliamentary question in the House of Lords.

Jonathan Charney: Anybody else?

Andrew Anderson: I'd like to address two areas. First, Professor Stotzky's comments on the Fourth Amendment. As Professor Charney pointed out, he and I do tend to disagree on the point. Perhaps much of the perception that Professor Stotzky shares with Justice Brennan in this regard comes from a lack of appreciation of the practical realities that are involved on the high seas. You can't deal with a vessel over the radio any more than a police officer can enforce the law over the telephone. I take serious exception to some of the bases of his philosophy in the sense that I do not agree that the expectation of privacy is greater aboard a vessel than it is in an automobile. There's a long tradition going back to the First Congress that cargo holds, fish holds, operating areas, engine rooms, and common areas of the ship are subject to public regulation, and no reasonable expectation of privacy exists therein. In fact, that's where 99.9 percent of all drugs are discovered. We do not and will not search people's private areas without probable cause. It's grossly impractical to obtain a search warrant on the high seas. For one thing, there's no court that has jurisdiction to issue a search warrant on the high seas. The concepts of establishing a fixed choke point or bringing a person on board are

just not practical. In point of fact, the majority, which constitutes every circuit except the Ninth, has upheld the view that the tradition of the Fourth Amendment has never included vessels. There's always been a different way of looking at vessels than of looking at land. There's no basis for an analogy between land and sea. Those of you who are seamen or who have been to sea can appreciate that statement.

Many of the commentators here today have been talking about theoretical problems and theoretical solutions. One of things that we're supposed to be addressing here and one of the underlying themes is "What Lies Ahead?" Where is the law of the sea going? Looking at it in terms of the harsh realities of the high seas today, looking at public order analysis, what we can claim to do out there is what is reasonable. What is reasonable is what other nations are willing to allow us to do. And the fact of the matter is, despite the protests of academicians and commentators, the nations of the world are not only not objecting to what we're doing out there, they are actively cooperating in what we're doing out there. So I submit to you that what we're doing is rapidly becoming the customary practice of nations. Therefore it's going to be reasonable, it's going to be accepted, and it's going to be the law of the sea. And that's what lies ahead, folks.

Jonathan Charney: Professor Stotzky?

Irwin Stotzky: Yes, I'd certainly like to respond to that statement. Perhaps, as Commander Anderson said, I do have a lack of understanding of the practical realities of the seas. One of the reasons, first of all, is that I haven't been on the sea much. But I think what Commander Anderson said today is the prime example of why we do need regulations on the unfettered discretion of government officials. Without such restraints on these officials, there seems to be no stopping point for his reasoning and almost no possibility of regulating the power of government officials to stop and search vessels. This notion, that there's less expectation of privacy on vessels than there would be in land-based vehicles comes from Commander Anderson's own idea of what expectations of privacy may mean. Indeed it is an elastic term, and the Court has used that term in a variety of different ways and changed its emphasis from one context to another. That's one of the problems of decision-making. But looking at it in the Tradition of Fourth Amendment law itself, the justifications have to make sense. The courts don't say that the land-based vehicle cases are totally irrelevant. I'm not convinced, at least in some of the land-based vehicle cases in the circuit courts, that the distinctions the courts use make sense. Indeed, many of the cases mix the exceptions together, rather than seeing them separately as the Fourth Amendment demands. But interestingly enough, the Supreme Court has decided only one case on these issues. It hasn't accepted *certiorari* in a whole variety of others, perhaps because the Court fears that it might have to deal with a panoply of important issues that would change the tradition of the Fourth Amendment in a very radical way, if the judgment came out the way that Commander Anderson suggests.

Another point I wish to speak to is the warrant requirement. Commander Anderson's argument, that there is no court to issue a warrant on the seas, is certainly true. On the other hand, there is no nation in the middle of the ocean that gives Commander Anderson or others on Coast Guard vessels the consent to search the ship. They phone their requests in to the foreign nation's officers and ask them

questions. Clearly we could do that with courts if we wanted to limit the unfettered discretion of officers.

The other point is that I've heard these kinds of arguments about government authority before, in a wide variety of circumstances. One of these circumstances, of which I am intimately familiar, because I represent Haitian refugees, is the government's claim that virtually every Haitian refugee wishes to waive his rights to claim asylum in the United States and return to Haiti. This was prior to the change of government in Haiti. What I found, however, was that this is not exactly the case. That is, they didn't want to waive their rights, they didn't understand their rights, and the government was not abiding by its own rules and regulations. Thus ensued ten years of litigation, which is still going on today, to make the obvious point that the law must be followed. And I think that no person in this country has the intelligence or the motives that would suggest that he ought to have the power to make those kinds of decisions. If our history has proved one thing it is this: A properly working democracy must be based on the informed opinions of the entire electorate which develops views on issues after hearing all the points of view on the serious questions of the day. A properly functioning constitutional system must be based on the principles developed within an interpretative Tradition over the centuries. The Fourth Amendment Tradition represents a powerful check on over-reaching government. Only when the judiciary protects inalienable rights can we have a nation which speaks in terms of the dignity of individuals. Thank you.

Louis Sohn: We have been discussing two related areas, law of the sea and human rights, and what is amazing about both areas is how much they developed over the last forty years. It also means that the law on both topics is developing all the time. The only plea I'm trying to make is that it's very bad to try to develop it by unilateral action, even if some countries which don't dare to say "no" don't say "no." This is not sufficient. It was very clear, for instance, that the United Kingdom didn't want to have a two-way street here. They said, "We are willing to agree on certain things for the United States to do, next to the United States. We don't want them to have the same rights around the United Kingdom." It was purely a unilateral concession. What we need is really law that applies to everybody everywhere and applies in both fields: the law of the sea and the law of human rights. And we don't need the unilateral decision that something is reasonable because we think it's reasonable. We also have to consider two things. First, would we accept our action as reasonable if somebody did it to us as well? I pointed out very easily how it could be considered by the United States to be quite unreasonable. Second, we have to accept the fact that we have two things here: (1) abuse of the powers you have by getting around the various exceptions, etc., and (2) what the French call *de tournement de pouvoir*, namely, the use of power given for one purpose, namely to search the vessel to ascertain its nationality, for other purposes. I think that was not the original meaning in the Law of the Sea Convention. What is very important, therefore, is for us to establish international standards. There's a chance here, as I said, if the interested governments would really put this matter in the forefront of that next convention that they have started to negotiate in the United Nations. But even when some other country had suggested that it be put in detail into the Convention, for some reason we only want to have some kind of general things done. Again, we prefer to have a

lot of leeway rather than have exact rules that tell us what we can do and what we cannot do, and I think that's wrong. We have to have a clear law on the subject because if it doesn't lead to trouble today, it's likely very much to lead to trouble tomorrow. We do not have the complete control of all the seas as much as we would like, though we have of course quite a lot. But as was pointed out by one of the questions, there's another major power involved. There are also 160-some other nations involved. And therefore it's not for the United States or a few powers to decide what the law of the sea and the law of human rights for the world should be. It has to be done by agreement, by consensus, and we ought to do it the right way.

Jon Charney: Thank you very much. I think we have had an excellent panel discussion.

LUNCHEON SPEECH

INTRODUCTION

Thomas A. Clingan, Jr.
Professor of Law
University of Miami

For several reasons I am pleased to introduce Ambassador Negroponte today. As you know, he holds the post of Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, having recently come from duty as the Ambassador to Honduras. John previously was the Deputy Assistant Secretary for Oceans and Fisheries Affairs. While his duties are now much broader than they were at that time, he is still dealing with oceans issues and certainly for that reason has an interest in what we are doing here this week.

My friendship with John goes back a number of years. I know him to be a knowledgeable, industrious, and intelligent administrator of oceans affairs and therefore it gives me great pleasure to introduce him to you today.

WHO WILL PROTECT THE FREEDOM OF THE SEAS?

John D. Negroponte
Assistant Secretary of State for Oceans,
International Environmental and Scientific Affairs

Today I would like to consider the question: "Who will protect the freedom of the seas?" I intend to put aside the fine points and phrases of the law of the sea, and, instead, speak as a layman to this question.

The world's oceans are vital to mankind in diverse ways. We are just beginning to understand their environmental significance. We have always used their fishery resources. We have begun to learn how to exploit some of their other resources. And through the centuries the world's oceans have been essential as waterways, and now airways, necessary to preserve the peace and to move world trade and commerce.

The freedom of use of the world's marine waters is what we mean by the freedom of the seas. It is perhaps our oldest customary international law doctrine.

The freedom of the seas was not given to mankind. It was won -- won through scholarly and legal debate and in naval engagements.

Over the years, the freedom of the seas has undergone some changes and refinements. Its exercise has become geographically compressed; its composition has been broken into fragments, and some of those have been lost. So, today, when we speak of the freedom of the seas, we mean, primarily, the freedom of movement on the world's seas and oceans by navies and maritime commerce, the freedom to navigate and to fly from one continent to another over broad expanses, the freedom to navigate and to fly from one sea to another through even the narrowest of straits.

Without the freedom of the seas the world would be a different place. Maritime commerce as we know it would not exist. The global balance of power would be unalterably shifted.

The freedom of the seas has come under attack, traditionally, because of two considerations: coastal security and resource requirements of coastal communities. Security considerations have played a role in promoting new coastal state jurisdictions. Both the legal regimes of the territorial sea and the continental shelf were justified on security grounds. And coastal state resource considerations have justified virtually all forms of maritime jurisdiction.

Thus, in spite of its traditions and benefits, the freedom of the seas is confronted by something called the coastal state. The coastal state regards the sea as a resource -- its resource. Some coastal states go beyond that, seeing in the sea a means of providing a security buffer for their territory. The upshot is that the coastal state seeks to bring within its grasp as much of the offshore area and resources as it can justify.

The coastal state is assisted in its efforts by some of our finer professions: scientists, engineers, lawyers, and politicians. Marine science's search for knowledge is resulting in many new discoveries of the ocean's potential. Engineers find in the ocean the opportunity to invent and to apply new technologies to capitalize on that potential. Lawyers find ample opportunities to create "new" law, quietly whispering how to justify exploiting that potential without, as they say, "adversely affecting" the freedom of the seas. And, then comes the

politician, weighing the issue, and, as he or she does so, we must ask: "does he hear an advocate for the freedom of the seas?"

The technique which coastal states have used for many years to assert control over area and resources, while ostensibly not "adversely affecting" the freedom of the seas, is to draw a distinction between the interest of the coastal state and that of the international community. The normal pattern is that the coastal state acknowledges that the international community has a certain right to navigate off its coast, if the resource or security-related jurisdictional claim by the coastal state is accepted by the international community.

In concept the distinction between resource use and navigation is a reasonable approach which provides a basis for balancing the interests of all states. And the balance which exists between coastal state security concerns and the rights of the international community also has justification. In fact, however, over the years the international community has had a hard time protecting its navigation rights. The fine points of the law, the subtle distinctions which are often the key to concluding negotiations, often are lost sight of in practice. The result is ironic. Instead of coastal state jurisdiction being an exception -- a limited encroachment on the freedom of the seas -- we find the opposite to be true, at least in terms of political emotions: the freedom of the seas becomes an exception or encroachment upon the rules of coastal state jurisdiction.

This trend, which has been going on for some time, further endangers the freedom of the seas. It does so by creating a new way of thinking about the oceans in the minds of scientists, engineers, lawyers, politicians and others. We begin to think in proprietary terms about the sea off our coast, and in doing so the freedom of the seas takes second place to coastal state jurisdiction.

Examples of this process are evident in the law of the sea. Once the freedom of the sea applied to all marine waters. Then the concept of the narrow territorial sea developed -- in which there is the right, or some would call it an exception, of innocent passage. Later the concept of straight baselines found its way into state practice, and a right (or exception) of innocent passage was recognized where it had not previously existed. Later came the resource claims, first the continental shelf, then the narrow and later the broader fishing zones, all ostensibly not "adversely affecting" the freedom of the seas. More recently, we have seen the development of broader twelve-mile territorial sea claims together with a straits navigation regime called transit passage that is not supposed to "adversely affect" the freedom of the seas. The list goes on to include the archipelagic states principles, together with the regime of archipelagic sea lanes passage. And, finally, there is the exclusive economic zone, and if you find the approriate cross-referenced passage in the 1982 Convention you will find that the exercise of jurisdiction in that zone, also, is not supposed to "adversely affect" the freedom of the seas.

The freedom of the seas seems to be lost in a welter of coastal state jurisdictions.

I remember a cartoon from *The New Yorker* magazine about the time the Third UN Law of the Sea Conference was beginning. It showed a group of diplomats around a conference table. Standing in the doorway at the back of the room was Neptune. One diplomat was speaking and the caption said something like, "Before we begin our conference on dividing up the sea there is a gentleman here who wishes to be heard."

Well, would you say that from Neptune's perspective the Third Conference was a success or failure? A lot of ocean and resources got divided up by the coastal states at that Conference. The Conference's attempt to deal with the resources beyond coastal state jurisdiction failed to achieve the agreement of all states. And the promotion and protection of the freedom of the seas, under the Convention the Conference developed, may only be found by proper legal interpretation of subtle points and phrases.

Why is this so? Why could not the maintenance and preservation of the freedom of the seas be expressed in categorical terms throughout the Convention text? Why were so many points disguised?

Perhaps the reason is that there is no one group of states for which the freedom of the seas is that group's exclusive interest in the law of the sea. There are no exclusively maritime states. All the maritime states are coastal states, as well. They must balance their interests. One aspects of their national interest must be balanced against the other. Yet, it is this group of states that are the principal users of the sea -- for coastal resource exploitation and for international navigation. From the practice of this group of states the customary law of the sea emerges. Thus, the freedom of the seas -- the freedom that presumably Neptune would have us preserve -- has no advocate that does not have other interests and responsibilities.

The Third Law of the Sea Conference was called, in part, because of the interest of the United States and the Soviet Union in stopping further erosion in the meaning of the freedom of the seas. The Conference didn't halt it -- look at what happened during the Conference -- but it may be said to have stabilized matters for a period. But for how long? If the freedom of the seas is not to suffer further setbacks in the wake of the Third Conference, the maritime states must do two things and do them well.

The first of these is not to be afraid to assert the freedom of the seas in their activities around the globe. The rights and freedoms of the sea will be lost over time if they are not used. There may from time to time be political costs in exercising such rights; but these costs cannot be avoided if the right is to be preserved. Deference to coastal states in the exercise of rights will only make it more difficult to exercise the right in the future, since the political cost of using the right will increase in the absence of usage.

In this regard, it is particularly important that the maritime states utilize the rights set forth and identified in the 1982 Convention. Many of the rights making up the freedom of the seas are somewhat obscured by the coastal states' orientation of the Convention text. If the maritime states do not remind others from time to time of the existence or meaning of the significant commas, phrases, and words found in the text, the freedoms they represent will be lost to sight.

The second thing that must be done by the maritime states is they must keep their own house in order. If they let their coastal state personality get the better of them, the freedom of the seas will founder. The danger I see is that there is a tendency for each state to see the waters and circumstances off its coast as in some way unique. In this way the coastal state justifies assertions of new or broader forms of jurisdiction to satisfy its coastal appetite. This tendency -- which has been dubbed "creeping uniqueness" -- is the latest threat to the freedom of the seas. A maritime state will not do good service to the freedom of the seas if it gives in to calls to consider its coastal waters as unique, justifying a new and creative legal approach. Worse

still, if that creative legal approach goes beyond or severely strains the principles laid out in the 1982 Convention, thus destabilizing the balance between the freedom of the seas and the interests of the coastal state that are reflected therein.

How does the United States stack up in all of this? The United States does, after all, have a split personality when it comes to the law of the sea.

On the first point, the United States has been at the forefront in exercising the freedom of the seas in spite of occasional political costs. In particular, the Navy's routine assertion of rights program has received quite a lot of notoriety in recent weeks, given the events in the Gulf of Sidra. It is important to note that the program was developed in the late 1970s during the Carter Administration. Thus, it has a bipartisan character. Also, it is important to point out that the program was developed in anticipation of the successful conclusion of the Third Law of the Sea Conference. It was believed that, even with a widely ratified LOS Treaty to which the United States was party, it still would be necessary to exercise the rights set forth in the Convention in order not to lose them.

It goes without saying that it is even more important that we exercise our rights today. The 1983 Presidential Ocean Policy Statement commits the United States to this course. The exercise of rights -- the freedom to navigate on the world's oceans -- is not meant to be a provocative act. Rather, in the framework of customary international law, it is a legitimate, peaceful assertion of a legal position, and nothing more. If the United States and other maritime states do not assert international rights in the face of claims by others that do not conform with the present status of the law, they will be said to acquiesce in those claims to their disadvantage. What is particularly difficult in this situation is to understand that the more aggressive and unreasonable and provocative and threatening a claim may be, the more important it is to exercise one's rights in the face of the claim. The world community can't allow itself to be coerced -- coerced into lethargy in the protection of the freedom of the seas.

On the second point, as well, the United States gets good marks -- but perhaps not straight A's. In general, the United States has taken a conservative approach to its coastal state claims. In making its claims, it has made clear that there is no intention to "adversely affect" the navigation rights of other states in the waters off the coast of the United States. Both the 1945 Proclamation on the Continental Shelf and the 1983 Proclamation of the Exclusive Economic Zone make clear in specific language in the proclamations themselves that the resource claim is not intended to affect the international rights and freedoms of other states.

The United States has maintained its narrow territorial sea at three miles' breadth. It has chosen not to draw straight baselines. It conservatively exercises its right under Article 7 of the 1958 Territorial Sea and the Contiguous Zone Convention to claim juridical bays less than twenty-four miles wide at the mouth. It has only a very few small spots of historic waters, which are of no consequence to the international community and which could have been incorporated in a straight baseline system had it chosen to do so. Contrary to what some foreign press reports have said, the United States has not drawn baselines between the islands of the Aleutians or of Hawaii. Foreign vessels of all states -- commercial or military -- navigate off the

U.S. coast routinely and consistent with their rights under international law.

The United States has taken a conservative approach to its maritime claims for several reasons, one of which is the desire to lead by example. By its action it hopes to encourage similar conservative approaches by others.

But the United States has been known to put its coastal state hat on from time to time. For the most part, though, it has resisted the creation of rules to meet its unique concerns. As the United States moves into the implementation of its exclusive economic zone, it must bear this in mind. We must recognize that one cannot slice the pie too thin. We must stand for principles -- recognizable principles that are not riddled with self-serving exceptions.

The present challenge before the freedom of the seas is that its traditional defenders have begun to think of the oceans as a resource rather than as the world's highway. Science and technology have opened to us the ocean's resources. We must not expect that mankind will be denied the opportunity to exploit them. As mankind does so, satisfying its needs and using its capabilities, the freedom of the seas will continue to come up against coastal state demands. If the freedom of the seas is to survive -- not to be subject to further inroads -- we must be energetic in its promotion and protection. As we face the challenges that science and technology bring us, we must meet them bearing in mind the question: "Who *is* protecting the freedoms of the seas?"

Thomas Clingan: Thank you, John, for being with us here today and for those thoughtful remarks. Myron?

Myron Nordquist: John, I understand that the ninth round of talks in the South Pacific ended last week. Do you have any report on those and could you tell us how you view them in terms of support?

John Negroponte: The talks ended on Friday, and I only have a sketchy report so far, Myron. The issue has to do with access for our tuna vessels to the coastal areas of the South Pacific countries, and we have had nine rounds of talks in the last two years to try and devise some kind of agreement whereby there would be a regional licensing scheme for access by our fleet. A number of issues still divide us and the South Pacific countries; perhaps the most important one is the issue of the size of the license fees. The coastal states have asked for something on the order of $20 million a year for access by our fleet to the convention area, which is essentially the coastal zones of the South Pacific countries, a dozen or so I believe, plus the high seas enclaves that would be enclosed if you drew a circle around those countries. Our tuna industry has offered a significantly lesser amount than that. I'm hopeful that with the necessary political will on both sides we can eventually come to some kind of agreement that would result in a more stable situation. At the moment our vessels either have no arrangements for access at all or fish in violation of the 200-mile zones of the countries in question. If they are apprehended, various punitive aspects of our own fisheries legislation are triggered, including an embargo on the import of tuna products from the country that conducted the seizure. So if only to put the relationship on a more stable footing we certainly hope that we can reach some kind of accommodation.

Abdul Koroma: I would like to congratulate you on what I consider a very constructive speech. I would also like you to know that your reference to the Gulf of Sidra has been most helpful here today, perhaps far more than I've ever heard. We've never heard this explanation that you've given here in our part of the world, and I would like you to know that. And certainly this will be reflected upon in my part of the world. Thank you very much.

John Negroponte: Thank you. I'm going to have to congratulate the author of my speech for having resolved all questions. Oh, there's one more.

Jon Van Dyke: You've commented that the U.S. maritime claims are conservative in nature. Does the United States claim exclusive economic zones around its islands that are uninhabited?

John Negroponte: I see so many people better equipped to answer that question than myself. I'm staring at one of them right now. Bernie, do you know the answer to that question? I propose that that be a theme for one of the discussion groups that meets after this conference. I'd just like to say how much I welcome this opportunity to appear before you and thank you for having been such an attentive audience.

PART II:

SELF DEFENSE AND THE NEW LAW OF THE SEA REGIMES

INTRODUCTION

Admiral Bruce Harlow, USN (Retired)
Poulsbo, Washington

It is a distinct pleasure for me to be here this afternoon to introduce a distinguished panel to you. I think the papers, commentaries, and discussion will be stimulating and will be of interest to all of you.

I've had the pleasure of a personal association with the Law of the Sea Institute since its inception in Rhode Island in 1966. Believe me, that year is etched in my memory because as a somewhat idealistic lieutenant commander I presented a paper that damn near got me fired.

Several weeks ago I reviewed the proceedings of that session for two reasons. One, I wanted to see the rate of survivorship of the charter members. I'm happy to report that membership does not endanger your health, as evidenced by the large number of old fogies around here. The second reason to review the proceedings of that first meeting was to see if there was any relevance to the organization. I was frankly surprised when I looked at those proceedings to see how many of the thoughts and discussion points raised and reported in the proceedings found their way into emerging customary law and indeed into provisions of the 1982 Convention. I think it is safe to say that over the years the Law of the Sea Institute has been one of the focal points for the discussion, albeit informal but authorititative, of important law of the sea issues. The organization has been relevant and I hope will maintain its relevance in the future.

I've been frequently asked, "What is the role of the organization in the post-negotiation phase? I think the contribution can be two-fold. One, to discuss means of effective and fair implementation of the balance envisioned in the navigation articles of the Convention. This morning, the issue was raised as to the relevance of the Convention absent the United States' signature or the Convention's formally coming into force. I believe its relevance is to be found more in the willingness and desire of nation-states to abide by the provisions as a potential blueprint for national conduct than in the issue of whether or not the treaty comes into force. Second, equally important is to discuss the interface of these new regimes envisioned in the Convention with important maritime activities that relate to the Convention but that were certainly not discussed in the context of the negotiations.

That is the thrust of the meeting this afternoon and indeed the entire week. I hope that the record of this meeting will likewise reflect emerging international law in the next twenty years as did the record of the first proceeding of the Institute.

This morning we talked in terms of human rights, crime at sea, and other important issues. This afternoon, perhaps equally contentiously, we will talk in terms of national security and self-defense issues and how they may relate to emerging law of the sea, not only in customary law, but as indicated in the balances envisioned in the 1982 Convention. I can't think of a better group of panelists to stimulate this discussion and to lead it off.

The first speaker is a close and dear friend of mine, Captain Richard Grunawalt, USN (Retired). He is the Stockton Chair-holder at the Naval War College, he has been counsel to the Chief of Naval Operations, and he has been deeply involved in national security

affairs and maritime affairs for many years. He was Fleet Judge Advocate at CINCPAC, the unified command in the Pacific arena, and so has been not only at the Washington level but also at the field level, working with these intractable issues.

The next speaker is a renowned author who has been involved in law of the sea issues for many years. He was a key advisor to the National Science Foundation beginning in the 1960s and indeed he was one of the key participants at the first Law of the Sea Institute meeting in 1966. He and I have corresponded for years, and we're still searching for agreement on some issues. Nonetheless, he's provided insights not only to me personally but indeed the United States Navy has come to expect an annual intervention on the part of Professor William Burke, flagging important issues and raising controversial subjects for the Navy to carefully think about. I am sure he will not disappoint the Navy or you this afternoon.

The next speaker is an international friend, The Honorable Colin Keating, Head, Legal Division, New Zealand Foreign Ministry. He played a vital role in the final phases of the Third United Nations Conference on the Law of the Sea as a member of the New Zealand delegation. He has had direct involvement in many maritime issues, particularly those involving the Central and South Pacific and the Indian Ocean. He will speak to you today with regard to nuclear free zones.

One of the best examples of effective diplomacy that I know of is Indonesia's program over several decades to obtain international recognition of its archipelagic claim. As a member of an informal discussion team, I visited Djakarta in 1969. I remember vividly the United States representative making the point that our government could see no way that we could recognize the Indonesian archipelagic claim. Here I am seventeen years later, acknowledging in public that an archipelagic claim undertaken consistent with the balances envisioned in the 1982 Convention is consistent with customary international law. Quite an accomplishment. The chief architect of this program and, believe me, a person that you want to keep as your ally if you're involved in maritime affairs internationally, is with us this afternoon. He is Ambassador Hasjim Djalal, Chief, Research and Development Agency, Indonesian Foreign Ministry.

Before our second commentary I will call Professor Burke back to the lecturn to tell us briefly about the impressions he gained from a recent trip to the People's Republic of China.

Our second commentator is Mr. Gao Zhiguo, who has come to this country to study international law of the sea. Mr. Gao is a lawyer with the State Oceanic Administration in China, which deals with ocean issues. He has agreed to comment on Chinese attitudes on the law of the sea.

Our final comment will be from Professor Van Dyke from the University of Hawaii's School of Law. He will make some brief remarks to link this afternoon's session to the Institute workshop he chaired last winter.

BELLIGERENT AND NEUTRAL RIGHTS IN STRAITS AND ARCHIPELAGOES

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I want to talk with you this afternoon about an issue that you regular practitioners in the area of the law of the sea probably do not have an opportunity or a need to spend too much time with. That is the general area of the law of armed conflict as it applies at sea, particularly the law of neutrality.

Our mission during this conference is to take a look and try to discern, with respect to the law of the sea, what lies ahead. What does the future hold? I think that the crystal ball is perhaps most clouded in the relationship between the emerging law of the sea and traditional concepts of the law of armed conflict.

Nations involved in the law of armed conflict are very often struggling for their very existence as sovereign entities. Consequently, the rules that have been developed over the centuries with respect to the law of armed conflict have had to be fashioned with that thought in mind. They have to accommodate the fundamental interests and concerns and requirements of belligerents. Indeed the whole law of neutrality is essentially one of a balancing of interests. Whereas the law of the sea, as it is contemporarily reflected in the navigational articles of the 1982 Convention, outlines a balance between the interests and requirements of coastal nations on the one hand and those of the international community of ocean users on the other, so, too, in the law of neutrality do we have a balance of interests. But in this instance it is between the fundamental requirements and interests of neutral nations and those of belligerents.

What are the basic purposes that underlie the law of neutrality? I think we would generally agree that the fundamental purposes are

(1) to contain, if possible, the spread of hostilities among nations,
(2) to the degree possible, to limit the impact of an ongoing conflict on those nations that are not so engaged, and
(3) to attempt to protect and preserve neutral commerce at sea as much as is reasonable, given an ongoing conflict in that arena.

The balance of interests that I've described is generally reflected in a system of reciprocal rights and responsibilities of neutrals and belligerents. Basically the rights of a neutral during armed conflict involve a right to claim the inviolability of neutral territory, which traditionally includes the territorial sea. A neutral also has the right to expect minimum impact on its neutral commerce at sea during armed conflict. Conversely, a neutral bears certain duties that flow from those rights. One is the duty to abstain from the conflict itself, and second is the duty to remain impartial toward the belligerents on either side of an ongoing conflict.

A belligerent simply has the reverse of that coin. Its rights include the right to insist that neutrals actually abstain from armed conflict and remain impartial toward its adversary and itself. Conversely, belligerents are duty-bound under the law to respect the inviolability of neutral territory and to refrain from unreasonable interference with neutral commerce at sea.

These traditional rights and duties tend to find expression in some basic rules that most naval officers are familiar with in the law of naval warfare. A belligerent is obliged to refrain from any acts of hostility in neutral territory, including territorial waters. However, a belligerent certainly retains the right of self-defense in the event of an attack which either occurs in or originates from neutral territory. A belligerent is forbidden to use neutral territory, including the territorial sea, as a sanctuary or as a base of operations during armed conflict. That is consistent with its obligation to observe the inviolability of neutral status.

A neutral nation may, if it chooses, close its ports and close its territorial waters to belligerents during armed conflict, but it is not obliged to do so. However, if it does elect to allow passage of warships, for example, through its territorial sea during armed conflict or to open its ports to belligerent vessels, it must do so on an even-handed basis. This requirement obviously stems from its neutral responsibility to be impartial in the conflict. The neutral nation also has a responsibility to ensure and to enforce the inviolability of its territory. It has a responsibility to ensure that the belligerents do not use its neutral territory in violation of this construct of balances. Along with that responsibility has evolved the concept of self-help, where the neutral nation either cannot, because of its capability, or will not, for political reasons perhaps, enforce the inviolability of its waters, its air space, and its land territory. Self-help is, in other words, the right of a belligerent under those circumstances to enter such neutral territorial space with the sole purpose of making sure that its adversary ceases to violate that neutrality.

Of course, as I mentioned, one of the fundamental rights a belligerent has is to interdict the flow of contraband at sea to its adversary. It exercises this right, as you know, through visit and search, a concept which applies to neutral shipping at sea. On the other hand, the neutral has a right to engage in neutral commerce during the course of an armed conflict and has the right to be free of unreasonable interference with that commerce by belligerents.

Basically, the law of naval warfare and the law of neutrality flow around those general concepts. It is important to point out that these traditional rules were developed during the era of sail, of wooden hulls, and of the cannon-shot rule. They were codified in the 1907 Hague regulations at a time when aviation was in its very infancy, when the submarine was not really developed or recognized as a formidable weapons platform. But more importantly, these rules, concepts, and balances were essentially designed during the era when a very narrow band of water comprised the territorial sea. At that time the capabilities and the responsibilities of a neutral nation to enforce the inviolability of that band of water were fairly well in balance.

I'd like to approach the question, "What lies ahead?" from a very practical point of view and in an operational sense. The issues before the house on this question are: Are these traditional rules viable in view of the seaward reach of coastal nation sovereignty out to twelve nautical miles and the vast expanses of ocean that could be incorporated within the concept of the archipelagic sea? Are they still viable in light of modern technology? Nuclear-powered warships, particularly submarines, supersonic aircraft, over-the-horizon missile systems are part of the construct as we examine whether these traditional rules are still viable.

I have been involved, during the last year or two, in working with some others within the Department of the Navy on developing doctrine and policy for guidance to our operational commanders at sea. One of the areas that we're trying to wrestle with is this very question that I've just outlined to you today. Basically the issue has been the need to ensure that our commanders at sea are knowledgeable about what the law expects of them. And it is not a hypothetical concept. We witness today, for example, an ongoing conflict between Iraq and Iran in the Persian Gulf where both these nations are exercising, in their view, belligerent rights. On the other hand, the importance to the rest of the world of the flow of oil through the Persian Gulf is a classic example of the need to ensure that an ongoing conflict does not unreasonably hamper neutral commerce. So our commanders out there really have to have some kind of guidance in hand. What does the law expect of them? You may have read about some of the problems associated with visit-and-search by Iranian warships of U.S. flag vessels in the area. These problems involve traditional concepts of the law of neutrality as it applies in the modern context of the broader reaches of the territorial sea.

The threshhold questions that we are trying to address will show you how fundamental these concepts are. Is the expanded coastal state's sovereignty as reflected in the 1982 Convention -- in other words, the twelve-mile territorial sea and the archipelagic sea -- applicable to the law of neutrality in time of armed conflict or are we really still talking about a much narrower band of water? If the law of armed conflict now embraces this broader reach, the question then becomes: are the traditional rules of neutrality still viable? In other words, is that balance that we talked about still of use? Is it still something that belligerents will maintain in time of war? And if these rules are no longer viable, what rules do govern the activities of belligerents in coastal waters of neutral nations, and in particular what governs belligerent conduct in international straits and archipelagic sea lanes?

We had to examine these rules in the context of reality; any rules that are to develop within the law of armed conflict and the law of neutrality in this area must take into account that the strategic and tactical mobility of belligerents requires access to and the rights of passage through straits and archipelagic seas and other choke points. If they don't accommodate that need, the rules simply will not be of long life, because those are fundamental requirements of belligerents.

In guiding our commanders, we have to take the law as we understand it now, recognizing that it is in the process of development. Recognition of those changes is one of the things that guided us. I would venture to say that where we're ending up and where we're coming from on some of these basic issues -- and I leave this open to discussion for later in the presentation from the floor -- is that the 1982 Convention with its conception of the expanded reach of the territorial sea and of the archipelagic sea is basically compatible with the traditional rules of neutrality. I think that the developing law will recognize that the twelve-mile territorial sea and the archipelagic sea will continue to have the status of neutral territory and be inviolate in the future. However, balanced against that, I think that neutrality can only be maintained if the right of transit passage of straits and the right of archipelagic sea lanes passage remain available to belligerents at all times in neutral waters. In interpreting what that kind of passage would consist of, I think it has to be recognized that

belligerents in those waters will be at high risk, given the systems that may be arrayed against them in the modern world. They must therefore be able to transit in a manner which is consistent with the security of the force that is in fact passing through. This would include, in my view, screen formation steaming, launch and recovery of aircraft, operation of surface and air search radars, that sort of thing.

I also think that we need to re-examine very critically and to interpret more realistically the whole precept of self-help. A number of island nations now have huge expanses of sea which may be enclosed within archipelagic baselines. Very few of these nations have the technological capability to patrol those waters to ensure that belligerents do not use them as a sanctuary or as a base of operations. So I think the self-help concept requires clearer expression and perhaps broader application. Otherwise, it's very difficult to maintain the balance that is so critical in this area.

The point I'm trying to make is that these are real issues we're wrestling with. Other nations are, in one way or another, trying to address these questions as they clarify and articulate the guidance to their own operational commanders at sea. It's an ongoing process, and I think it's a very difficult one. Some very good work has been done in this area; Admiral Harlow and Commander John Bennett, for example, collaborated on a paper a year or two ago. But I think we need more of that. We need some real soul-searching in this area, more expression of views, particularly from the academic community, which is never reticent about how the Navy ought to conduct its business. I just pose this as an area of future concern for the development of the law of the sea, one which is of critical importance to all nations, and one where the rule of law must survive. To survive, the rules that we design for belligerents and for neutrals during time of armed conflict must reflect a fair balance between their respective interests.

CONTEMPORARY DEVELOPMENTS AFFECTING NAVIGATION RIGHTS IN THE LAW OF THE SEA

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My major purpose is to raise questions about some recent developments relating to freedom of navigation. Some principal comments and questions focus upon very recent actions by the two major naval powers involving innocent passage. Reference will also be made to issues involving open registry and baselines, each of which also relates to navigation rights.

Open Registry

The perennial controversy about genuine link or flags of convenience, or open registry as it now is labelled, has again inspired international attention and action, this time in the form of a proposed international agreement, the Convention on the Conditions of Registration of Ships.[1] After years of studies by UNCTAD and three years of active negotiations, the Convention was adopted in Geneva last February. The thrust of the negotiations was to seek the termination of open registry, the practice by which some states realized income by allowing other nations and nationals to register their vessels while minimizing the costs and burdens of vessel ownership, management, and operation. The attempt was to make the concept of a genuine link meaningful by treaty-imposed requirements concerning national management, national crews, and effective national jurisdiction and control over administrative, social, and technical matters concerning the vessel.

As is well known, the provision of the 1958 Convention on the High Seas declaring that ships must have a genuine link with the state of registry proved to be no more than a paper restraint. It had no effect whatsoever in state practice and over the years since then the tonnage of vessels in open registries increased several times.[2] The 1982 Convention repeats the rhetoric about the need for a genuine link, also without defining it, and is not likely to have any impact. This latest effort does not appear to add much to the attack on open registry.

The new agreement on registration of ships raises a number of questions which can only be touched upon here lightly. It appears to offer no inducement to shipowners to register vessels in states that become party to it. Nor is it clear why states whose nationals use open registries would accept this agreement, since they themselves see benefits coming from such registry.

Perhaps the agreement is thought to be more or less innocuous because the provisions which seek to specify a meaning for genuine link do not appear to impose meaningful obligations. The key provisions are Articles 7 to 9. Article 7 requires that a state of registration must comply either with Article 8 on ownership of vessels or Article 9 on manning. While this is the language of legal obligation, the burden of it is considerably attenuated, if not obliterated, by the slippery language of the cross-referenced articles.

Article 8 provides that flag states' laws and regulations "shall include appropriate provisions for participation by that State or its nations as owners of ships flying its flag or in the ownership of such ships and for the level of such ownership. These laws and regulations

should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag." The loose terms here are "appropriate provisions for participation," "nationals," and "should." If owners are artificial persons, then clearly beneficial ownership may reside elsewhere. The mandate of this provision is also less than peremptory in view of the use of the term "should" instead of "shall."

Article 9 on manning is no more rigorous. The principle is that a "satisfactory" part of the officers and crew be nationals, domicillaries or permanent residents of the flag state. What is "satisfactory" is not disclosed, but the term appears to leave considerable room for appreciation. Furthermore, the concepts of domicile and residence are notorious for their ease of manipulation if a state is sufficiently interested to do so.

In any event, it may be unimportant that this effort fails. The purpose of the attack on open registry was to encourage the development of national fleets by developing nations, the theory being that open registry was an obstacle to this which should be removed. The difficulty is that no one has demonstrated that developing state fleets would emerge as a result of the demise of open registry. There appear to be good reasons for believing that a phase out of open registry would not result in the transfer of flags to developing nations or somehow cause the emergence of national fleets in developing nations. The factors that lead in that direction do not seem significantly related to open registry. Whether a national fleet should be created or encouraged ought to be a product of factors more closely connected to comparative advantage than to the concept of open registry.[3]

However one analyzes this development, neither this agreement nor the genuine link concept in the 1982 treaty pose much, if any, threat to freedom of navigation. It seems most unlikely that either of these instruments will provide a basis for the unilateral rejection of vessel nationality that might constitute such a threat.

Innocent Passage

Turning to issues more central to navigation, both the United States and the Soviet Union, as all are aware, were intensely interested in the fate of navigation rights during the Third Conference on the Law of the Sea. The USSR, in particular, drastically modified its previous positions on international law relating to the passage of warships through the territorial sea. On the question of military vessels the USSR had, historically, opposed the notion that such vessels were entitled to the right of innocent passage in the territorial sea, but in the negotiations the Soviet Union affirmed such a right. Although, before World War II, the United States also had questioned this right, its position affirming the right for warships has been steady at least since that war. The two powers also joined in insisting upon special, separate provisions establishing a right of passage through straits newly (according to the United States) enclosed within the territorial sea.

Since the adoption of the 1982 Convention, the views, attitudes and positions of the two superpowers on these issues understandably attract special interest. [Subsequent references to specific incidents are based on facts as they appear to me. Perhaps my knowledge is insufficient or inadequate and I invite clarification from any present who have a different view of relevant facts.] Some recent actions of both countries evidence a distinct lack of regard for the international

law pertaining to innocent passage through the territorial sea. The most obvious activity by the USSR indicating its unwillingness to abide by well-established law regarding use of another state's territorial sea is the pattern of unauthorized intrusions by Soviet submarines into the territorial sea of Sweden and, probably, Norway. These instances are now well recorded and documented and need little discussion. For its part, too, the United States is known to use submarine entry into foreign territorial waters, both territorial sea and internal waters, for intelligence purposes.

Other recent legal actions by the USSR, the promulgation of its Law on the State Frontier of the USSR (24 Nov. 1982)[4] and the 1983 Rules for Navigation of Warships,[5] are worth comment in relation to innocent passage. I note as an initial observation the vague, question-begging provision on passage by warships and a second considers whether a complete and coherent Soviet position on this issue is spelled out.

Article 8 of the Law on the State Frontier provides that the regime of the state frontier includes navigation through the territorial sea and that this regime is defined by the Law on the Frontier, by other legislative acts of the USSR and by international treaties concluded by the USSR. The open-ended reference to other legislative acts causes some uncertainty about just what restricitons or limitations there might be upon passage through the Soviet territorial sea. More specific provision is made in Article 13 on innocent passage which reads in relevant part:

> Foreign warships and underwater vehicles shall enjoy the right of innocent passage through the territorial waters (territorial sea) of the USSR in accordance with the procedure to be established by the Council of Ministers of the USSR.

But this clarifies nothing and leaves the implication that the recognition of the right of innocent passage is simply formal, retaining the authority to qualify or discard the right as the Council sees fit.

The uncertainty created by the Law on the State Frontier appears to be substantially, but not completely, diminished by the adoption in 1983 of the Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) of the USSR and the Internal Waters and Ports of the USSR. Article 1 declares that the Rules

> establish the procedure for the effectuation by foreign warships, as well as by underwater means of transport, of innocent passage through the territorial waters (territorial sea) of the USSR . . .

Article 8 provides for the right of innocent passage in the following terms:

> Foreign warships within the territorial waters (territorial sea) of the USSR enjoy the right of innocent passage on condition of observing the present rules, the laws and rules of the USSR relating to the regime of the territorial waters (territorial sea) of the USSR, as well as of international treaties.

This does not entirely dispel the uncertainty mentioned above because, again, there is a reference to other unspecified laws and rules, provisions of which might be obstacles to the exercise of innocent passage.

Other provisions of the 1983 Rules seem to suggest that the subject of innocent passage for warships is dealt with completely. Article 11, entitled "Conditions of Innocent Passage," implies (at least) that it is an exhaustive statement of the requirements of innocent passage. Paragraph 1 repeats verbatim the provisions of Article 19 of the UNCLOS III entitled "Meaning of Innocent Passage," including the sticky subparagraph, "any other activity not having a direct relationship to passage." I note that Article 19 is not entitled "A Meaning of Innocent Passage" or "Partial Meaning of Innocent Passage" and that Article 11 of the Soviet Rules is not entitled "Some Conditions of Innocent Passage." Article 11(2) reinforces the appearance of exhaustive requirements:

> The passage of a foreign warship shall not be innocent if it commits the actions prohibited in accordance with point 1 of the present Article.

On the other hand, the list of prejudicial acts does not necessarily mean that still other conditions are inconceivable or completely excluded. But the way this article is worded, in both paragraphs, makes it more difficult, and probably unacceptable, to contend that there are still other conditions or requirements in Soviet law that justify declaring a particular passage is not innocent. I believe the primary purpose of Article 19 was not to widen state discretion regarding passage, but rather to narrow it and to tie judgments about the character of passage to conduct that could be objectively observed.

There are, however, observers who continue to write that Article 19 creates uncertainty because it might reasonably be interpreted both as giving the coastal state a very considerable discretion to decide what passage is innocent and, specifically, that it does not limit the test of innocent passage to activities or conduct.[6] Considering the evolution of the doctrinal statements on innocent passage for the past fifty some years, from the 1930 Codification Conference through the International Law Commission and the 1958 Conference to Article 19 of the 1982 treaty, this interpretation seems completely unsupportable. This matter was dealt with by Professor Oxman in an informal session of Committee II where he made a detailed statement about the inadequacy of the 1958 formulation. It was made very clear to delegates that the intention underlying Article 19 was to reverse the blunder made by the United States in 1958 in deleting the words "committing any acts" from the article recommended by the International Law Commission on this point.[7] Perhaps he recalls this sufficiently to comment, either refuting my characterization of the probable intent on this point, qualifying it or confirming it. I think this issue is particularly important. It also bears on some comments I make later concerning U.S. actions.

These comments and questions on Soviet law on innocent passage appear as mere quibbles in comparison to questions that are raised by recent U.S. actions. First, one need not devote prolonged commentary to the efforts of the Reagan Administration to disrupt normal international shipping activities by unlawful mining of the ports in Nicaragua. On its face this is a form of state terrorism, intended to frighten and to coerce other unidentified and unidentifiable nations into withdrawing from trade with Nicaragua as a means of pressuring the Sandinista government. Few, if any, believe the mining was designed to interdict transfer of weapons from Nicaragua to El Salvador. It seems

to be very doubtful that even the current Administration in the United States would disagree that mining a port of a state with which one is not at war is an interference with navigation which is wholly unlawful in normal conditions. The legal argument apparently is rather that this action becomes justified because it is a measure of "self defense" against a regime that is providing assistance to undermine the governments of neighboring nations. It seems most unlikely that self-defense, if relevant at all in this context, can be used to justify uncontrolled and undirected violence, which does harm and threatens injury wholly by chance to whomever happens to be unlucky enough to encounter a mine.

I have not seen the opinion of the International Court of Justice in the case of Nicaragua v. United States and am not aware of the specific decision and holding on this part of the case, except that the United States action was held illegal.[8] I doubt very much if any legal outcome was ever easier to predict than this one. The tragedy of it is that neither the United States Congress nor the Administration seems to give a damn that the nation is clearly labelled a violator of international law. In this connection, a recent article offers an excellent and comprehensive examination of the whole range of domestic and international law involved in the mining question.[9]

More recent actions of the United States of interest include recent incidents involving Libya and the law of the sea. One is the Gulf of Sidra incident in March of this year which was another in a series of tests carried out by the United States Navy to assert right to navigation in areas where they have been or might be challenged.[10] Recent statements by the Department of State indicate that such tests of navigation or flight rights occur at the rate of thirty-five to forty annually and, since 1979, to test the "objectionable claims of over 35 countries..."[11] In one sense this particular incident is not worth much discussion on its own merits, since I believe the law of the sea issues are very clear cut and wholly favor the United States. I am referring to the Libyan claim to a closing line across the Gulf of Sidra. I know of no legal basis for this claim and the United States action to make use of the area within the Gulf seems to me to be soundly based on long accepted principles of the law of the sea. Professor Mallision was quoted in the newspapers as proposing legal bases for the Libyan actions; and while I do not recall the details of this report, I recall having the distinct impression that none of the legal propositions cited had any authority in international law. Whatever the merits of the Libyan claim, one would certainly like to know more details about the test program, partly for reasons noted below.

One other implication of this incident merits some comment on a point that has not been mentioned to my knowledge. The March Gulf of Sidra incident was not simply a test of "passage," as such. It was also a test of military exercises specifically as an instance of the exercise of freedom of navigation.[12] What might be noted here is that these exercises apparently occurred in an area that would be exclusive economic zone if Libya claimed such a zone from legal baselines. I believe it is accurate to say that the U.S. position on the lawfulness of military exercises would be the same if Libya had an EEZ and had taken the position that the United States could not conduct such exercises within it without Libyan consent. It is worth emphasis that U.S. references to this incident refer to it as part of a global Freedom of Navigation program.[13] The freedom of navigation concept applies in the EEZ as well as on the high seas.

There is another facet to United States actions against Libya that deserves mention and that is the air attack that took place in April as a means of punishing or deterring or defending against terrorist actions allegedly perpetrated by or with the assistance of Libya. I was unable to follow the news on this attack in any detail at the time, being out of the country and not having access to reliable comprehensive news reports. The point I want to remark on, however, is widely known. Some of the attacking aircraft were based in England and because overflight was denied they were forced to fly from their bases to Libya by a route bypassing the European continent. Secretary of State Schultz has stated that the entire flight to Libya was over water.[14] I take this to mean that they flew into the Mediterranean by way of the Strait of Gibraltar. Unless I misunderstand the situation, this appears to be an exercise by the United States of its claimed customary right of transit passage which, it is asserted, is a right established by customary international law independent of the 1982 treaty which the United States has rejected.

So far as is known to me, and I could be uninformed on this, this overflight occasioned no protest from the affected states, either Spain or Morocco. If this is the case, it appears to me that this incident may add credence to the United States claim that such overflight is protected by customary law -- although so far as I know there is no basis in past state practice on overflight of the territorial sea upon which to base such a claim. In time, if these instances recur without protest, the United States position on the customary law regarding transit passage will be strengthened and eventually established.

Another recent instance of test passage is reported to have occurred last March when the United States sent a destroyer and a cruiser to enter and pass through the Soviet territorial sea in the Black Sea. This instance is noteworthy because it was reported in *The New York Times* to have been ordered by the Joint Chiefs of Staff in the name of the Secretary of Defense (which may be normal operating procedure) and because, attributing this to unnamed Pentagon officials, the purpose of the passage was to gather intelligence as well as to assert the right of innocent passage.[15] The response of the Soviet Union to this was unmistakably clear: the passage was considered a violation of Soviet territorial waters which "was of a demonstrative, defiant nature and pursued clearly provocative aims."[16]

Insofar as I understand the law of the sea on this, and assuming the unnamed Pentagon officials were accurately quoted, the Soviet protest is supported by international law. It is difficult to believe that an entry into another state's territorial sea, particularly one regarded as an adversary, could ever be considered to be innocent passage when the proscribed activities are observable and observed by the coastal state and later confirmed by the flag state. It must have been known beforehand that a passage considered to be an intelligence operation and detectable as such would be considered offensive and prejudicial to the interests of the coastal state. As such it cannot be considered to meet the requirements of innocent passage whether one relies on the 1958 Convention of the Territorial Sea and Contiguous Zone or on the 1982 LOS treaty.

While it is true that the former treaty, to which the United States is party, does not have a detailed definition of innocent passage, the concept it does contain is generally considered to give the coastal state a wide discretion to label a particular passage as prejudicial to coastal interests. Indeed, it was just this feature of the

1958 treaty which the United States and others, including the Soviet Union, I believe, objected to when the law of the sea came to be renegotiated in the 1970s. Article 19 of the 1982 treaty, reproduced in the Soviet Rules regarding warships' navigation in its territorial sea, clearly provide that passage is not innocent if the passing vessel engages in "any act aimed at collecting information to the prejudice of the defence or security of the coastal state..." There can hardly be any question that a military vessel which is detected as probing radar defenses or monitoring radio transmissions might be regarded as acting to prejudice coastal state interests. According to the news account on this incident, the unnamed Pentagon officials took the position that these activities were compatible with innocent passage, apparently considering them as passive activities rather than affirmative measures to which a coastal state might object. In view of the specific provision of Article 19 prohibiting collecting information, it seems to me difficult to establish that these passages were inoffensive in nature or, in any event, would not be so regarded by the USSR when the latter was capable of detecting what was done.

One other development of recent vintage I mention only to ask about what is happening. A year ago the United States icebreaker *Polar Sea* used the Northwest Passage to travel from Greenland to a destination in the United States, Point Barrow, Alaska. At the time this episode created a very large stir in Canada, alleging affronts to Canadian sovereignty, on the ground that the routes of the Northwest Passage are internal waters of Canada. The United States contended then, and still does, so far as I know, that the waters of the Northwest Passage are straits used for international navigation and, therefore, subject to (at the least) a nonsuspendable right of innocent passage and, at the other end, the right of transit passage.

In the time since then, apparently Canada has moved to regularize its perception that the Northwest Passage comprises internal waters by establishing a straight baseline system that extends around the entire Arctic archipelago. I am not clear on exactly what Canada has done in this regard nor what the United States has done or is doing in response. If Canada does assert that the Arctic islands are "a fringe of islands in the immediate vicinity" of the Canadian mainland justifying the use of a straight baselines system under Article 4 of the 1958 Territorial Sea Convention, then it might also appear to follow that Canada recognizes a right of innocent passage through such waters in accordance with customary law. But the immediate question is what has Canada done, on what grounds, and what is the United States response, on what grounds, and at what stage of the situation are we now? To put it mildly, this situation has a great many angles.

My final comments stem from a recent visit of several weeks to Peking University where I had the opportunity to talk about the law of the sea with Chinese scholars and government officials. Mr. Gao will address some LOS issues and I do not intend to pre-empt his statement. My perception is that despite some differences of opinion among various government agencies, China will end up ratifying the LOS Convention, perhaps in the foreseeable future. The differences arise because, like everywhere else, various constituent groups within China have differing interests that each sees served more or less well or badly by the treaty. Among the provisions that are uncomfortable are those on innocent passage for warships which are inconsistent with Chinese law as it now stands. Those of you with memories of sufficient length may understand why this may be a sensitive issue in China. A little over a

quarter century ago China was greatly concerned over American planes and warships in the vicinity of the Quemoy and Matsu islands off the mainland in the Taiwan Strait. My recollection is that China claimed well over 400 violations of its territorial waters and airspace at that time by American ships and aircraft, mostly in this area but elsewhere as well.

Of course, China is by no means the only nation concerned over the disposition of the warship-innocent passage issue by the Third UN Conference on the Law of the Sea, but this is one problem they have. For China the problem appears to arise because of its self-perception as a coastal navy power most interested in protection of coastal interests and less interested in doctrines and practices safeguarding naval mobility. Weighing heavily in this calculus is the notion that the Chinese Navy is a coastal navy, even though it is considered to be the third largest in the world. Even if this perception of Chinese interests is valid for the time being, one wonders why it appears to be assumed that this will endure for very long. China is one of the great powers and over time it hardly seems likely to have interests that are localized to its own coastal waters.

NOTES

1. 7 Law of the Sea Bulletin 85 (April 1986).
2. For the evolution in state practice see Osieke, Flags of Convenience: Recent Developments, 73 Am.J.Int'l L.604, 608 n.14 (1979); Bergstrand and Doganis, The Impact of Flags of Convenience (Open Registries), in The Law of the Sea and International Shipping: Anglo-Soviet Post-UNCLOS Perspectives 413 (W. Butler, ed. 1985).
3. Ibid.
4. 4 Law of the Sea Bulletin 24 (February, 1985).
5. IV Collected Legislation of the U.S.S.R. and the Constituent Union Republics (William E. Butler, ed.).
6. Lowe, Some Legal Problems Arising from the Use of the Seas for Military Purposes, 10 Marine Policy 171, 174-75 (1986).
7. For discussion of this episode, see McDougal and Burke, The Public Order of the Oceans 258 (1962).
8. The operative part of the Court's judgment directed specifically at the mining issue decides by 12 votes to 3 "that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce; . . ." The three dissenters were Judges Oda, Schwebel, and Sir Robert Jennings. International Court of Justice, Press Release No. 86/8, 27 June 1986.

   Paragraph 8 records that by 14 votes to 1, the Court decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph (6) hereof, has acted in breach of its obligations under customary international law in this respect;. . ." Only Judge Oda dissented, but apparently in this instance as in others only on jurisdictional grounds. Ibid.

9. Church, The Briar Patch of Reality: A Legal Analysis of the Mining of Nicaragua's Harbors, 16 N.Y.U. J. Int'l L. and Politics 169 (1985).
10. Letter from Pres. Reagan to the Congress, 26 March 1986, 86 Dept. St. Bull. 72 (June, 1986).
11. Id. at 79 (May, 1986).
12. See letter from the President, supra note 10.
13. Id.
14. "Worldnet" Interview with Secretary Schultz, 16 April 1986, 86 Dept. St. Bull. 10 (June, 1986).
15. Halloran, 2 U.S. Ships Enter Soviet Waters off Crimea to Gather Intelligence, N.Y. Times, 19 March, 1986, P.1 (National edition).
16. Schmemann, Soviet Lodges a Protest, p.4, id.

THE NUCLEAR FREE ZONE IN THE SOUTH PACIFIC

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I propose to focus my comments on the recent South Pacific Nuclear Free Zone Treaty which was opened for signature at the South Pacific Forum of 6 August 1986.[1] It is relevant not only in the law of the sea context -- because it is the first major multilateral instrument to pick up and reproduce the transit language of the 1982 United Nations Convention on the Law of the Sea -- but also in the disarmament and arms control sphere. It is a somewhat chilling thought that this Treaty is the first international arms control agreement concluded since the ill-fated Salt II Accords of 1979.[2]

Why should the countries of the Pacific be so concerned about nuclear weapons? For many people, particularly those of you in the northern hemisphere, I suppose the South Pacific is seen as a peaceful -- if not idyllic -- place, far removed from the East-West struggle and the problems of deterrence.

The reality is otherwise. The problems which give rise to the policy of nuclear deterrence may have their origin in the northern hemisphere, and it is certainly the countries of the northern hemisphere who are the primary beneficiaries of deterrence. But it is the countries of the Pacific region whose territory has been used for or affected by the testing and development of the weapons systems that support the nuclear deterrent. Three nuclear powers have tested weapons in our part of the world, and France is still doing so today.

I was in Europe a couple of months ago at the height of the scare about the fall-out from Chernobyl. People were afraid to drink water or milk. They worried about eating vegetables and meat for fear of radioactive contamination. Their fears were understandable, but it was a unique and totally new experience for Europeans. If only they knew that for many years this sort of thing was a constant problem for the peoples of the Pacific.

I recall quite clearly as a child the official weekly reports in New Zealand, after every atmospheric test, of high levels of Strontium 90 in rainwater, milk, and other products. I also recall years later, during my first diplomatic posting in a South Pacific country, the regular broadcasts over the radio each time there was a nuclear test, warning the local people not to eat fish taken in the lagoon because of possible radiation danger.

One of my colleagues, David McDowell, our Ambassador to the United Nations in New York, summed up the situation very well in a speech earlier this year to the Smithsonian Institute in Washington.

> The nuclear experience is not just a distant abstraction for the Pacific peoples. I remember a dark night in Western Samoa in the early 1960's, a beautiful tropical evening. The sky was suddenly lit with a deep red glow to the north which spread over the whole of the heavens. Those of us in the know were aware that it was a nuclear test, hundreds of miles away. We were still shaken by it. Those villagers who did not know what it was were convinced it was

the end of the world. Bible readers all, some felt the wrath of God was about to descend. It is small wonder that there is a deep resistance throughout the region to things nuclear.[3]

The response of the Pacific governments has been clear, consistent and unanimous: a universal condemnation of nuclear testing without discrimination, a determination to eliminate testing in the region by outsiders, and a total rejection of nuclear weapons in their territories.

Many of you will recall that New Zealand and Australia in 1973 took France to the International Court of Justice on the question of nuclear testing.[4] Those proceedings succeeded in stopping atmospheric tests in the Pacific.

The idea of a nuclear free zone developed at about the same time. It first came up at the South Pacific Forum in 1975. The Forum is the South Pacific regional organization. It meets annually at prime ministerial level and now comprises thirteen countries.

The Forum governments looked to the edge of their regional boundaries. To the south was the Antarctic Treaty[5] area, a demilitarized and denuclearized region -- in effect the world's first nuclear free zone. To the east was the Latin American Nuclear Free Zone established under the Treaty of Tlatelolco.[6] Accordingly, that year, in 1975, the Forum agreed in principle to explore the concept of a South Pacific Nuclear Free Zone. The first step was to seek the endorsement of the United Nations General Assembly; and on 11 December 1975 the UN adopted a resolution[7] introduced by Fiji, New Zealand, and Papua New Guinea, endorsing the idea of the establishment of the Zone and inviting the countries of the region to carry forward consultations with a view to bringing it to a reality. The resolution was adopted by 110 votes to none with twenty abstentions.

It think it is probably fair to say that many of those who abstained on this resolution (and it was predominantly the Warsaw Pact and NATO members) did so in part for reasons relating to the law of the sea. It was apparent to all that, unlike the Treaty of Tlatelolco, the vast bulk of the area to be covered by the Pacific zone was ocean and there were real concerns about high seas freedoms.

The nuclear free zone initiative slowed down in 1976 after a change in government in New Zealand. In that year the Forum resolved that, in developing the Zone concept as endorsed by the United Nations, there should be no incompatibility with existing security arrangements in the region and the principles of the freedom of navigation in the high seas should be respected in the Zone.

In the years that followed much of the focus on nuclear free zones was in the United Nations. Subsequently, the South Pacific countries were able to build on the considerable body of United Nations expertise. An *ad hoc* group of government experts was established by the United Nations. It commenced its work in 1974,[8] and in its report it endorsed the value of nuclear weapon free zones but noted that their visibility and contribution to the enhancement of security could differ from region to region.

This working group, which included all the nuclear powers, adopted by consensus some basic criteria for nuclear free zones:

1) the zone must remain effectively free of nuclear weapons;
2) the initiative must come from the states in the region;
3) all militarily significant states (and preferably all states) in the region should participate;

4) there must be an adequate system of verification;
5) the zone should be of unlimited duration.

The final impetus to conclude the South Pacific Nuclear Free Zone Treaty came in 1983 and the major push came from Australia. An intensive legal drafting exercise took place and a draft treaty was submitted to the Forum in 1985. The Treaty was adopted by consensus and opened for signature by states in the region. It has now been signed by nine states. It will come into force after eight ratifications, four of which have already been lodged.[9] New Zealand and Australia both have legislation to permit ratification currently before their Parliaments.

What Does the Treaty Do?

Firstly and most importantly it obliges states parties to renounce nuclear weapons. The parties undertake in Article 3 not to possess, acquire, or have control over nuclear explosive devices anywhere in the world. They also undertake not to assist or encourage others to acquire nuclear weapons, and in Article 6 there is an undertaking to prevent the testing of any nuclear weapon in their territories.

It is true that, in some respects, these obligations duplicate the provisions of the Non-Proliferation Treaty[10] and the Test Ban Treaty.[11] But not all of the countries in the region are party to those agreements. More importantly, the South Pacific Nuclear Free Zone concept goes much further. It has a detailed verification system which I will describe later.

The most important new obligation contained in the Treaty is the undertaking in Article 5 to prevent any other state from stationing a nuclear explosive device in the territories of the parties. "Stationing" is defined as "emplantation, emplacement, transportation of nuclear weapons on land or inland waters, stockpiling, storage, installation and deployment." "Territory" is defined as "internal waters, territorial sea, archipelagic waters, the seabed and subsoil beneath, the land territory and the air space above them."

These provisions raise some very interesting law of the sea issues which I will deal with one by one.

Firstly, you will note that the Treaty does not seek to limit passage and transit in the high seas areas within the zone or the EEZ. Article 2 applies the Treaty, except where otherwise specified, only to "territory within the South Pacific Nuclear Free Zone." The obligations only extend beyond territorial limits for the parties to the Treaty in respect of their own flag vessels. The only exception to this relates to nuclear testing, a point which I will cover in greater detail later.

Secondly, in the territorial sea and archipelagic waters, the Treaty prohibits stationing only. Transit rights and innocent passage are preserved. The concept of stationing is clearly incompatible with innocent passage or transit. Interestingly, as I mentioned earlier, the Treaty picks up and uses the language of the 1982 Convention on the Law of the Sea, in particular the terms "archipelagic sea lanes passage" and "transit passage of straits." Clearly the effect of this is to further cement in customary international law the provisions of the 1982 United Nations Convention.

Thirdly, with respect to internal waters, the prohibition on stationing is again applicable. The Treaty makes it quite clear, however, that a port visit is not to be regarded as stationing. It is specifically stated that it is a matter for each party to determine in accordance with its sovereign rights whether to allow visits by foreign warships and aircraft.

There is an interesting curiosity in this context. You may have noted that the definition of the term "stationing" included "transportation of nuclear weapons on land and inland waters." The term "inland waters" has raised some eyebrows. It is probably a new term in international law and it has been used in this Treaty in contrast to the term "internal waters." It is intended to cover transportation on lakes or rivers and it clearly reinforces the correct interpretation of the stationing clause, that port visits do not constitute stationing within the meaning of the Treaty.

I would also like to say a few words about verification because it has become a critical element in arms control negotiations generally and because what we have established in the South Pacific is a binding, effective verification system which is only matched by the unique on-site provisions in the Antarctic Treaty. The verification or "control system" as it is called in Article 8 comprises, firstly, regular reporting obligations. Secondly, the Director of the Forum Secretariat may at the request of a single party initiate consultations to review any matter arising in relation to the Treaty. Thirdly, there is a requirement to apply IAEA safeguards to any nuclear materials in order to ensure verification of their non-diversion to weapons purposes. Fourthly, there is provision for a consultative committee to consider specific complaints by any party. A single complaint can trigger a meeting, and the committee may by two-thirds majority decide to inspect the territory or facility which is the subject of the complaint. Parties are required to give inspectors full and free access together with jurisdictional immunity and inviolability.

As I have said, this advanced and extensive verification system mixes together the best of all the present arms control agreements and includes in addition a complaints system and on-site inspection procedures.

The Protocols

A very important element in the South Pacific Nuclear Free Zone concept from the very outset has been the relationship between the Zone countries and the nuclear powers.

As I have said, the Zone Treaty is carefully designed so as to impose obligations only on the countries of the region, and it does so by excluding nuclear weapons from their territories. However, as with the Treaty of Tlatelolco, it was considered vital to ensure that the Zone was respected by the nuclear powers. Three of them, the United States, France, and the United Kingdom, have territory within the Zone. A protocol was therefore drafted for discussion with and accession by the nuclear powers with territory in the region seeking their agreement to apply the prohibitions on manufacture, stationing, and testing as well as the verification system to their territories. The United States and the United Kingdom have become party to a similar obligation with respect to the territories in the Latin American Nuclear Free Zone under Additional Protocol I to the Treaty of Tlatelolco.

There is a second protocol, equivalent to Additional Protocol 2 of Tlatelolco,[12] which is directed at all the nuclear weapons states. In it they would undertake not to use or threaten to use nuclear explosive devices against parties to the treaties or territories within the Zone. The undertaking puts in legally binding form the "negative security guarantees" which have already been given in general terms by the nuclear weapon states.

Finally there is a third protocol, with no counterpart in the Treaty of Tlatelolco. It is interesting in the law of the sea context because it prohibits testing anywhere within the Zone, including on the high seas.

In practical terms this protocol is really only significant to France and China, because the United States, the United Kingdom, and the Soviet Union have already undertaken under the partial Test Ban Treaty not to test under the waters of the high seas or territorial seas or in any environment outside their territorial limits.

These three protocols were prepared in draft form and taken by a mission from the Forum countries to the capitals of the nuclear weapon states for a round of consultations earlier this year. Based on these consultations and the suggestions made in the various capitals, proposals will be put to the South Pacific Forum when it meets in Fiji in two weeks time to formally adopt and open for signature three protocols to the Nuclear Free Zone Treaty.

There is one final aspect of the Treaty which is of some interest in the law of the sea context and that is its provisions that relate to the dumping of nuclear wastes in the oceans. Various proposals for the dumping in the Pacific of radioactive wastes have aroused severe opposition. Under the auspices of the South Pacific Commission there have been negotiations over the last few years on a separate Convention for the protection and development of the natural resources and environment of the South Pacific region. It is hoped that those negotiations will lead, if successful, to a Convention which *inter alia* contains a generally accepted prohibition on dumping. The Forum countries therefore chose not to deal comprehensively with nuclear waste dumping in the Nuclear Free Zone Treaty. Instead they undertook as between themselves an obligation not to dump radioactive waste anywhere in the Zone and to prevent the dumping of such waste by others in their territorial seas. Accordingly, although there was power to do so under Article 210, subparagraph 5, of the Law of the Sea Convention, this obligation does not apply to the exclusive economic zone. Instead the parties have undertaken an obligation to support the conclusion as soon as possible of the proposed Environmental Convention with the aim of concluding dumping at sea of radioactive wastes and radioactive matter by anyone anywhere in the region.

I think it is fair to say that the South Pacific Nuclear Free Zone Treaty meets the criteria established by the United Nations for a viable nuclear free zone. Equally importantly, the countries of the region have gone to considerable lengths to ensure that the zone is compatible with the international law of the sea. Transit is preserved and care has been taken to ensure that the Zone does not unbalance existing security arrangements in the region.

Article 2(2) of the Treaty provides that nothing in it shall "prejudice or in any way affect the rights or the exercise of the rights of any state under international law with regard to the freedom of the seas." The *travaux preparatoires* also make interesting reading in this regard. The Chairman of the Working Group in his report to the Forum on this question noted "the countries of the South Pacific are themselves major beneficiaries of these rights. . . . Any attempt to ban transit through the high seas . . . would be legally impossible."

In global terms it is a small arms control measure, but in a decade where the momentum of arms control negotiations slowed to the point of virtual collapse it is significant simply because there are no others. It is proof that progress is possible, that existing balances

can be preserved and navigation rights respected. Perhaps most importantly it represents emphatic support for tough verification measures.

Nuclear Free Zone Legislation

I mentioned earlier that there was legislation before the Parliaments of both New Zealand and Australia to implement the Treaty.

I would like to conclude with a few words about the New Zealand Nuclear Free Zone Disarmament and Arms Control Bill. It is much misunderstood and misrepresented. In essence the Bill implements the Convention and will permit ratification. It prohibits the manufacture or acquisition of nuclear weapons in New Zealand or by New Zealanders. It prohibits the stationing of nuclear weapons in New Zealand and follows precisely the wording of the Treaty. It prohibits nuclear waste dumping in the oceans around New Zealand and it provides for jurisdictional immunities for inspectors under the Treaty.

The Bill specifically preserves the rights of innocent passage through the territorial sea and the right of transit passage through or over straits.

Ships in distress are exempted from the provisions of the Bill and the immunities under international law for foreign warships and aircraft and members of their crew are maintained.

Careful attention has been paid therefore to international law and to the rights of the international community. What has given rise to controversy, however, are the provisions relating to internal waters.

The Bill prohibits entry into internal waters of nuclear-powered ships and provides that the Prime Minister must be satisfied that warships will not be carrying nuclear explosive devices upon their entry into internal waters. You will recall, when I was discussing Article 5 of the Nuclear Free Zone Treaty, I mentioned that there was specific provision in Article 5 relating to stationing that each party to the Treaty remains free to decide, in the exercise of its sovereign rights, whether to allow visits by foreign ships and aircraft to its ports and airfields. New Zealand in accordance with this provision and in accordance with general principles of international law has chosen to exclude nuclear-powered ships and nuclear weapons.

It needs to be made quite clear, however, that while the New Zealand Government's policy is that there should be no nuclear weapons in New Zealand, it does not seek to challenge the policy of its allies who neither confirm nor deny the presence of nuclear weapons. It is totally false to suggest, as some of the press has done, that New Zealand requires certificates that ships are not armed with nuclear weapons. The Government has stated quite the contrary. It intends to make its own assessments based on its own information about the weapons status of foreign warships. Furthermore, New Zealand showed itself ready to enter into discussion and negotiation with its allies on the implementation of its policy and the drafting of the legislation.

What is clear beyond any doubt, however, is that this New Zealand policy does not conflict with the international law of the sea. It does not conflict with any alliance obligation which New Zealand has undertaken and it certainly does not represent a decision by New Zealand to walk away from or turn its back on its participation as a committed member of the Western Alliance structure.

NOTES

1. There are thirteen member states of the South Pacific Forum: Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu, and Western Samoa. The Federated States of Micronesia is an observer.
2. Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms, Vienna, 18 June 1979.
3. Addresses by Mr. D. McDowell, the Permanent Representative of New Zealand to the United Nations, on 19 February 1986 to the Smithsonian Institute, Washington, D.C. in a lecture series on New Zealand.
4. 1974 ICJ Reports New Zealand v. France Judgement of 20 December 1974.
5. The Antarctic Treaty, Washington, 1 December 1959.
6. Treaty for the Prohibition of Nuclear Weapons in Latin America, Mexico City 14 February 1967.
7. Resolution 3477 (XXX) of 11 December 1975.
8. Official Records of the UNGA; Thirteen Session Supp. No. 27A (A/10027/Addl) Annex 1.
9. Ratifications have been deposited by the Cook Islands, Tuvalu, Fiji, and Niue.
10. Treaty on the Non Proliferation of Nuclear Weapons, London, Moscow, and Washington, 1 July 1968.
11. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Moscow 5 August 1963.
12. Ratified by China 1974, France 1974, UK 1969, USA 1971, USSR 1979.

COMMENTARY

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The topic this afternoon is "Self Defense and the New Law of the Sea Regime." One certainly may say a lot about self defense: for instance, that self defense is having the trouble as far as possible from your own territory. In devising the concept of archipelagic states, we have tried very hard not to have the conflict inside our archipelago or our strait and, if it should happen, to let it happen somewhere else. This notion was very prominent when we negotiated the law of the sea. We have found in our history that Indonesia's geographic formation has not been conducive to security unless we hold the notion of unity of land, water, and air space; security is a motivation for maintaining this concept.

Looking further than that, I would like to mention that the notions of belligerence and neutrality are basically not concepts of the law of the sea but of the law of war. The Law of the Sea Convention in our minds is the law of peace. I have tried to find the word "belligerent" in the more than 300 articles of the Convention, and I can hardly find one instance. The same thing with the word "neutrality." We don't find it unless we scrutinize the Convention word by word. When we devised the Law of the Sea Convention, we were motivated by the idea of peace and cooperation and not so much by the idea of war.

But this does not necessarily mean that the Law of the Sea Convention has no effect on the law of war. It does have an effect in at least two areas. First, the Law of the Sea Convention has changed the notion of territoriality. Second, it has changed the notion of the state's jurisdiction as well as the state's power over the resources.

The archipelagic concept is a concept of territoriality, because an archipelagic state is recognized to have sovereignty in the archipelagic waters. The archipelagic concept is like the concepts of territorial sea and internal waters, with sufficient differences in terms of navigation. It is very clear that no belligerent act can take place inside the archipelagic waters, just as no belligerent act can take place inside the territory of a state, unless that state is itself involved in an act of belligerence. In Indonesia we cannot visualize that a passing ship, for instance, would conduct any activities that would endanger the safety and security of our state or that would entail any belligerence *vis-a-vis* third parties or other countries. While the Law of the Sea Convention is full of provisions that give the right to the coastal states, to the archipelagic states, to take measures, it also contains many provisions that insist that others respect those rights, those laws and regulations that may have been enacted in accordance with the Convention. Consequently, the coastal states -- the archipelagic states and strait states -- are obliged not to meddle or to create situations where belligerent acts could be invoked against them. I certainly agree in this particular case with what Mr. Grunawalt was saying this afternoon.

We like to say in Indonesia that the idea of archipelagic states broadens the area of peace and cooperation by avoiding any conflict in the waterways and letting it take place somewhere else, if it should have to take place, although in our mind it should never take place.

When we devised the concept of archipelago, basically we were talking about internal waters because we wanted to have some control over passing ships. But it is difficult to persuade other maritime powers that archipelagic waters should have the status of internal waters. We have come to the conclusion that some accommodation is essential with regard to the right of passage.

Here I would like to disagree with what has been said this morning that transit passage and archipelagic sea lane passage as envisaged in the Law of the Sea Convention text are actually customary international law. There are people who say that the regime of passage as actually agreed upon in the Convention was a negotiated idea, a compromise idea; it was not originally in the tradition but was achieved after lengthy negotiation. I think this is important for us to underline. That we came to agreement on it does not necessarily mean that it was a traditional notion of the law of the sea. Ships may have passed through the straits and the archipelago for centuries, but now that passage is regulated as such in the Convention people begin to argue about whether it is or is not customary international law. I for one would think that it is not. But be it as it may, we are very happy that we have finally come to an agreement on that regime of navigation in the Convention and we believe it will strengthen and broaden the possibility for peace and cooperation in the area.

The other thing that I would like to mention is that we are very sympathetic towards the idea of nuclear-free zones in the South Pacific. We thought that the zones should be nuclear-weapons-free rather than nuclear-free, but this is a matter of detail. We in Southeast Asia are working also for the creation of a nuclear-weapons-free zone. We don't quite know the details yet, but we are studying it as an attempt to broaden the area of peace by including all Southeast Asian countries. The South Pacific has paved the way for one of the most important aspects of the nuclear-weapons-free zone, namely the regulation of passage of nuclear ships. This is the first time that the South Pacific has included this in their text, and it is quite in line with the Law of the Sea Convention. The Southeast Asian countries, especially the ASEAN, are looking into whether this would not be one way to create the nuclear-weapons-free zone in our area. We would like to see this idea develop much more meaningfully and therefore we would like to understand how other countries think on this issue.

I would now like to comment on what has been said this afternoon by some speakers before me. We don't know very much about what has taken place in the Gulf of Sidra because we are not privy to all the information. But we are worried by some of the implications. If a country is doing something wrong to you and you consider it your right to bomb that country, especially if you relate that right to the law of war and self help as described today, we are quite worried. We are on the route of everyone, you see, and anyone could simply claim later on that we had done something wrong to them and we would be bombarded because of some hazard to navigation or some action that we had taken against somebody on the basis of our own territorial sovereignty. So here is a fundamental problem to us, a difficulty in ascertaining the limits. Under the doctrine of law it is difficult for us to agree on the Gulf of Sidra case without discussing whether Libya has done something wrong or not. But this is information that we do not have. Even if we assume that they have done something wrong, the response to that wrong is somewhat frightening to us because Indonesia is passed every

day by so many powers, and we certainly cannot justify any act along that line.

I would also like to comment on the economic zone. Is it a freedom of the sea to conduct belligerent actions in the economic zone? I have serious doubts about that. I cannot agree, as I said earlier, that other countries have a right of belligerency in the archipelagic waters, in the territorial sea, in internal waters, and I am not in a position to agree that there is such a right of belligerency in the economic zone. We recognize that the Law of the Sea Convention stated that there is freedom of navigation and overflight in the economic zone, but I think it would be stretching it a little bit too far to say that there will be a right of belligerency and therefore the right to conduct warfare in the economic zones of other countries. The coastal state has various rights, various installations, fisheries, economic activities and so forth, in its economic zone, and if another country is free to conduct a belligerent act there, it will certainly put in jeopardy the rights of the coastal state in that economic zone. The Law of the Sea Convention specifically stated that states should respect the coastal state's exercise of its rights in its own economic zone. I cannot recall any exceptions that would admit the right of belligerency in the economic zones of other states.

My final comment is on the relationship between the nuclear-weapons states and the states in the nuclear-weapons-free zone. I heard today that there is a need for guarantees by the nuclear powers; otherwise the nuclear-weapons-free zone has no meaning. We have some serious doubts about that. In Southeast Asia we are struggling to determine whether a "guarantee" by a nuclear power toward a nuclear-weapons-free-zone is essential. We do believe that respect by the nuclear powers is essential, but to go a little bit further than that by saying that a guarantee is essential is not quite in our minds. Requiring a guarantee may invite intervention; the outside powers may simply ask that in order to guarantee that the nuclear-weapons-free zone is implemented in accordance with the text of the nuclear-weapons-free zone treaty, they would have the right to intervene, to put it right if there is something wrong with its implementation. We therefore have some reservations on that particular issue.

Those are some of the things I wanted to mention this afternoon. Thank you.

CHINESE PERCEPTIONS OF THE LAW OF THE SEA

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I spent most of the spring quarter in Peking delivering lectures on the law of the sea. I had the opportunity to talk to people there who were knowledgeable about the Law of the Sea Treaty, and what is of most interest is the Chinese attitude toward ratification of the treaty. At that time, they had been scheduled to begin discussion of the pros and cons of ratification of the treaty in the Chinese Society of International Law. I said that I would sure be interested to read the transcript when it was available, and I was immediately assured that there would be no opportunity to do that, that there would be no transcript available. At any event, they postponed that discussion, and I don't know where the situation stands at the moment.

Apparently, the Chinese view the treaty with considerable favor, though there are differences of opinion within various agencies of the Chinese government about ratification. My impression, however, was that the general attitude was that China was going to ratify the treaty and wanted to be the first of the great powers to do so. The reservations apparently within China have something to do with the questions I talked about earlier, particularly the question of innocent passage for warships.

Chinese legislation as it now stands is inconsistent with the provisions of the treaty -- which I believe are fairly clear -- that military vessels have the right of innocent passage. There was substantial opposition to that position in the negotiations, though it was not presented expressly at the end for fear of turning off the major naval powers from accepting the treaty at all. So there are substantial reservations about it. The wording that remained, however, was fairly clear. My perception is that this is how the Chinese see it also: their law would conflict with the provisions of the treaty.

China apparently views itself as primarily a coastal power, even though the Chinese navy is the third largest navy in the world and has nuclear weapons, submarines in considerable number, and the prospect of development into a distant water navy of some consequence. Each time I mentioned this, it seemed to me that the Chinese perception of their interests was a little skewed in light of what appeared to be the evolution of their naval strength. That they would ever have any interest other than as a naval power interested only in coastal issues was generally regarded with disbelief. It is because they're interested in coastal state defense that they are concerned about the question of innocent passage for warships. One other factor that may bear on this concern is, as you may remember, that in the late 1950s there was considerable military activity on the borders of the People's Republic of China in connection with disputes over the strait near the islands of Quemoy and Matsu. At that time, if my recollection is correct, the Chinese protested approximately 400 times on intrusion into their air space from U.S. aircraft and military vessels. That legacy may have some impact on these matters still. In any event, it is still a question of some apparent delicacy within the Chinese government and the various agencies, particularly the military.

CHINA'S NAVIGATION POLICY IN ITS TERRITORIAL SEA

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China is a coastal state on the west coast of the Pacific and is surrounded by the semi-closed China seas. Its mainland coastline totals 18,000 kilometers and crosses three climatic zones. China also has about 5,000 islands with a combined coastline of more than 14,000 kilometers. Throughout human history, China has been very active in using the seas. One of the four most important inventions in Chinese ancient times was the compass used for navigation. In the late Ming Dynasty (1405-1433), the famous Chinese navigator Zheng He led a sailing fleet to Western seas on seven occasions. Since Liberation (1949), New China is very much concerned about navigation in its territorial sea because of the tension in the Taiwan Strait.

Today I am going to talk about some problems related to China's navigation policy: the territorial sea regime, China's position on navigation in the territorial sea during the Third United Nations Conference on the Law of the Sea, China's present navigation policy, and the possible adjustments to navigation policy in the future.

The People's Republic of China was founded in 1949. There weren't any laws and regulations about the territorial sea until the Declaration on China's Territorial Sea of 4 September 1958. But that didn't mean that China had no territorial sea. In fact, the competent authorities were in charge of a fairly wide territorial sea.

The first official statement, the Declaration on China's Territorial Sea, touched on almost all of the major problems of the territorial sea. It claimed for the first time that the breadth of China's territorial sea shall be twelve nautical miles measured from the straight baseline. This measurement of breadth applies to all the territories of China, including Taiwan and its surrounding islands. In terms of innocent passage, the Declaration provided that no foreign military vessels and no foreign aircraft may enter the Chinese territorial sea and the airspace above it without the permission of the Government of the People's Republic of China. Any foreign vessels navigating the Chinese territorial sea must observe the relevant laws and regulations. The Declaration also claimed the Qiong Zhou Strait as internal water. The Declaration didn't say anything about the coordinates of the baseline and the location of the outer limit of the territorial sea. Six years later, the State Council of the People's Republic of China promulgated Regulations Concerning the Passage of Foreign Non-military Vessels through Qiong Zhou Strait. According to the Regulations, no foreign military vessels are allowed to pass through the Strait. Foreign commercial vessels may pass through the Strait if they request permission fortyeight hours in advance, and they may only do so in daytime.

This is the Chinese territorial sea regime established by the 1958 Declaration and 1964 Regulations. The regime is still in force.

In 1958 the United Nations adopted four conventions on the law of the sea. As regards innocent passage, Article 14 of the Convention on the Territorial Sea and Contiguous Zone reads "Ships of all states shall enjoy the right of innocent passage through territorial sea." There is much controversy about "ships of all states." China's opinion

is that only non-military vessels are entitled to the right of innocent passage; warships and government ships are not. Many other states share the same view with China. Under their domestic laws, they don't allow foreign military vessels to pass through their territorial waters.

The People's Republic of China resumed its seat in the United Nations in 1972 and took an active part in the Seabed Committee and the Third United Nations Conference on the Law of the Sea. During the Conference there were two totally different views about navigation in the teritorial sea. Many developing countries insisted that under customary international law free passage applies exclusively to merchant ships and that warships must obtain prior notification or authorization. But some countries declared that coastal states should not make innocent passage of particular categories of foreign ships dependent on prior consent or notification. Throughout the Conference, China supported the developing countries and insisted that it is the right of coastal states to take measures to safeguard their interest in peace and security, including the measure of requiring prior notification from or authorization for warships wishing to exercise the right of innocent passage through the territorial sea. In China's opinion, straits within territorial waters, whether or not they are used for international navigation, should be subject to regulation by the coastal states. Foreign commercial vessels may enjoy the right of innocent passage through them, but foreign warships must obtain prior authorization.

The new Convention's definition of ships that enjoy the right of innocent passage is exactly the same as that of the 1958 Convention. Upon signature of the Convention, many states, including China, made declarations on innocent passage through the territorial sea. Some even asserted that they would continue to apply the present regime to the passage of foreign warships in their territorial seas. So innocent passage of foreign warships through territorial waters is still a question not only in theory but also in state practice. It will remain a problem even if the Convention comes into force.

China's navigation policy remains unchanged, as we can tell from the recent laws and regulations. Article 10 of the Maritime Traffic Safety Law of the People's Republic of China, which was made public in 1983, provides that "Non-military vessels of foreign nationality may not enter into inland waters or ports of the People's Republic of China without the permission of its competent authorities." "No military vessels of foreign nationality may enter the territorial seas of the People's Republic of China without being authorized by the Government thereof." Article 15 provides that "Vessels are prohibited from entering or passing through forbidden areas unless specially authorized by the competent authorities."

Speaking of Qiong Zhou Strait, although some foreign literature indicates that the Strait is included in the 106 straits used for international navigation, the 1958 Declaration says clearly that it is China's internal water. So foreign military vessels are not allowed to exercise the right of innocent passage through it.

From the proceeding historical examination, it is clear that foreign vessels used for commercial purposes may enjoy the right of innocent passage through China's territorial seas and through Quing Strait and some forbidden areas under some conditions, but foreign warships are not entitled to do so.

China signed the new Convention and is now weighing the advantages and disadvantages in accepting it. I think China will ratify the Con-

vention in the near future. Nevertheless, the innocent passage provision in the new Convention is a thorny problem to cope with, because under the Convention, no "picking and choosing" or reservations are allowed.

Along with the adoption of the opendoor policy, China is more and more interested in marine affairs. Accordingly there are some changes in its marine policy. Now China is cooperating with foreign countries in offshore oil exploration and exploitation, sending fishing fleets to Africa and Alaska, and sending research vessels to the Central Pacific to investigate manganese nodules. China established the Great Wall Station in the Antarctic. The general trend of its marine policy is to open its doors towards the world ocean. So China's navigation policy may change in the future, but this change will take a long time and will not change radically.

As China considers the ratification of the 1982 Convention, it is felt that certain restrictions in the right of innocent passage of foreign warships in the territorial sea are needed.

I think there are three possible ways China can deal with the problem of innocent passage through the territorial sea. The first one is to adhere to the present navigation policy -- that is to say, no innocent passage for foreign warships. The second one is to alter the present policy. The third one is to accept the innocent passage provision in the new Convention. Of the three, the second choice will probably be chosen -- that is to say, to adjust the present navigation policy. In my opinion, prior notification, instead of prior authorization, will be required for foreign military vessels wishing to pass through China's territorial sea. It seems to be a more flexible policy than the present one, and it should be regarded as a movement towards the new Convention.

In conclusion, I would like to say that the views expressed here in my speech are solely my own and don't necessarily reflect the views of the Chinese government.

COMMENTARY

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The Law of the Sea Institute, in addition to these annual meetings, has had a series of workshops. We had one in January, 1984, looking at U.S. ocean policy in general and the implications of the United States' decision not to sign the Law of the Sea Convention. Among the issues that were identified during that meeting, the navigation issue seemed foremost in terms of the types of issues that may present immediate confrontations. And so the decision was made to hold a follow-up workshop, which we held in January, 1986, on navigation, and we are in the process of editing the proceedings of that workshop into a book that will be entitled, *International Navigation: Rocks and Shoals Ahead?*

The workshop participants identified the following as unsettled questions needing further attention:

First, is transit passage a customary right or is it based solely on the 1982 Convention?

Second, is permission or notification ever required prior to the exercise of innocent passage? We have heard the Chinese position just now and we heard it in detail also in January. I am curious myself whether the United States ever challenges the Chinese position in its global "freedom-of-navigation" program which we heard about in Professor Burke's speech.

Third, are nations limited in their ability to carry out military maneuvers in the exclusive economic zone of other nations? Ambassador Djalal referred to this problem in his commentary, and it is a crucial issue in understanding the confrontation between the United States and Libya in the Gulf of Sidra.

In the area of archipelagic waters, a number of issues remain unsettled. What are the rights and responsibilities of the archipelagic nations and the other nations that use those waters? How are archipelagic sea lanes to be determined and what is the role of the International Maritime Organization? What is the relationship of the innocent passage right within archipelagic waters to the right of archipelagic sea lanes passage? These questions are of particular importance, of course, for military vessels. Commercial vessels will undoubtedly be allowed to transit in situations because of the economic importance of trade, but the military vessels are the ones that create the problems.

A fifth issue was how baselines are to be drawn, and again we have heard in Professor Burke's talk this afternoon about the Arctic situation. Baselines present potential problems in many other parts of the world.

We also discussed in January the nuclear-free zones, about which we have heard an excellent presentation this afternoon.

And a final question is how to balance the environmental responsibilities of coastal states with the freedom of navigation, and how conflicts can be avoided in this arena. The loss of the dispute-resolution procedures of the Convention for those nations that do not ratify it, of course, is a significant one and again thinking of the Libya situation one might have possibly avoided certain of the confrontations

if the dispute-resolution procedures had been in place. We will talk more on Thursday morning about some of the issues that are related to the violence at sea situation in the Mediterranean region.

The January workshop revealed that the International Maritime Organization, although it was happy to be identified with so many responsibilities under the 1982 Convention, in fact had not as yet developed an approach toward addressing many of the issues raised by the Convention. And so a good deal of discussion was focussed on the potential role of the IMO in identifying the archipelagic sea lanes and working with the coastal states. The IMO representative at the January meeting took an approach of deference to the archipelagic states and we spent a fair amount of time looking at Article 53(9) and (12), to think through what the relationship really should be between the IMO and the coastal nation. And the representatives at our January workshop from Indonesia and the other delegates discussed how Indonesia was going about selecting its sea lanes and whether different rules might apply to different vessels going through the archipelagic sea lanes. This is a controversial point and the Indonesians seem to have taken the approach that at least certain vessels might be treated differently from other vessels with regard to archipelagic sea lanes passage.

The themes that emerged throughout the discussions that we had in January were that coastal states were likely to try to continue to make expansive claims that will have the effect of limiting navigational freedoms, and our luncheon speaker (Ambassador Negroponte) gave us a ringing denunciation of such coastal state activity, denouncing what he called the "creeping uniqueness" when nations make claims based on what they think of as their unique geography. He conceded, though, that the United States is sometimes at fault in this same area and the issue of uninhabited islands, I think, is one that remains troublesome in that arena.

The conclusion of the workshop was that we needed more work on many of these issues, and so the Executive Board is now planning a second meeting on navigation that will focus more on Atlantic and Mediterranean and Middle Eastern and Arctic issues, which we were not able to address at our Pacific meeting.

Bruce Harlow: As Jon points out, we're certainly not suffering from a lack of issues. Now I'd like to open discussion to the floor. Brian Hoyle.

Brian Hoyle: I'd like to respond to Professor Burke's questions. First, Bill, you asked about the freedom of navigation program, specifically in relation to the Crimea. Let me just say this. All freedom of navigation exercises are carried out consistent with Presidential directive, embodied both in NSDD and in the President's Ocean Policy Statement of 10 March 1983. In the President's Ocean Policy Statement, the President stated that the United States would exercise its rights of navigation consistent with international law. All freedom of navigation programs to date under this program have been planned and carried out consistent with international law. It is the policy of the United States not to comment on specific questions regarding intelligence, but I will say that as a matter of policy and law, the exercise through the Soviets' territorial sea in the Crimea was carried out in a manner consistent with international law.

The article in the newspaper referred to a Department of Defense spokesman. That spokesman was not an official spokesman for the Department of Defense nor was he involved in the program for the particular exercise. I don't know where he got his information, but it certainly wasn't directly from the program.

As far as particular restrictions are concerned, it is the policy of the United States to exercise its navigation rights consistent with the Convention. That means we will challenge restrictions on innocent passage such as advance notification and permission requirements of coastal states, excessive territorial seas in excess of twelve miles, burdens on navigation in the economic zone in excess of what is permitted in the 1982 Convention, historic water claims that are inconsistent with what we believe the international law of historic waters to be. I would add that the freedom of navigation program has a large diplomatic component in it. If any state feels aggrieved with the United States' exercise of rights, we are prepared at any time to sit down with that state and talk about its claim and try to better understand what its claim is. But I think coastal states should recognize that we will exercise our navigation rights consistent with international law and will not accept excessive claims.

In this regard, I will turn now to the claim made by Canada. I believe there are two Canadian professors here whom I will let explain to you what the Canadian view of its claim, asserted on 10 September 1985, is. Suffice it to say, as far as the United States is concerned, that the Northwest Passage was and continues to be a strait subject to the straits transit regime. In the late 1960s and early 1970s, the United States told the government of Canada that we considered the Northwest Passage to be an international strait. We continue to believe that the Northwest Passage is an international strait. In this regard, we believe that certain friends in the European Community, friends of both Canada and the United States, have advised Canada that they share a similar view based on representations they made to Canada in 1969 and 1970 at the time that the Arctic Waters Pollution Prevention Act was enacted into law by Parliament. At the same time, we recognize that under Article 134 Canada does have special rights in the Arctic and special responsibilities. But these shouldn't simply be exercised with-

out regard to the rest of the Law of the Sea Convention. We are prepared and continue to be prepared to work out a practical arrangement with Canada that does not prejudice the interests nor the legal position of either country. But we are not prepared to accept that the baselines drawn by Canada are consistent with the law of the sea, either treaty or customary, nor are we prepared to accept that all the waters inside those baselines are internal waters. Bill, I hope this in some way clarifies our position. If it doesn't, ask another question.

Bruce Harlow: Did you have a comment, Jack?

Jack Grunawalt: Yes. I'd like to echo what Brian has said. I understand that the awful news release on the Black Sea was a classic case of a spokesman who had a brief sheet that listed a number of things and who didn't appreciate the significance of putting them in their proper context. I think that the United States Navy engaging in Black Sea operations has had a variety of purposes for a number of years. The first is to demonstrate the right of the international community under the Montreaux Convention to simply enter the Black Sea. Secondly, ships there have the right, when they are beyond the territorial sea, to exercise the high seas freedoms of navigation and overflight, which would include intelligence-gathering and things of that sort. Thirdly, while they are there, ships have the right of innocent passage in the territorial waters that surround the Black Sea. The spokesman mixed up all of those things, and unfortunately it came out as though the United States was purporting to exercise a right of intelligence collection within the territorial sea. Brian, I agree with you 100 percent. That simply was not the case.

Bruce Harlow: Ambassador Djalal, and then Burke.

Hasjim Djalal: I would like only to comment with regard to Professor Van Dyke's remarks on the January workshop. I understand it has created some confusion with regard to whether Indonesian policy is going to pursue different rules for different ships in sea lanes. I'm not representing the Indonesian government at this meeting here, but from what I know, this conclusion perhaps is the result of the confusion with regard to the regime of innocent passage in the territorial sea and the regime of archipelagic sealane passage in sea lanes. We all know that, in the regime of innocent passage in the territorial sea, there are different rules for different types of ships. To satisfy the rules of innocent passage, submarines are obligated to travel on the surface and show their flags while navigating the territorial sea. The Indonesian government ratified the Law of the Sea Convention last December and therefore it is safe to assume that in the archipelagic waters the regime of navigation through sea lanes is clearly defined without differentiating in categories of vessels. Navigation in accordance with the Convention is and will be respected by Indonesia when the Convention comes into force and when Indonesia enacts provisions dealing with navigation.

My other comment is in regard to designation of archipelagic sea lanes. This is a very clear process because Article 53 (9) said that we have to discuss it with the appropriate international organization. We did ask at one stage whether IMO has the power to determine the sea lanes. We were told that IMO can be consulted with regard to the establishment of traffic separation schemes but not necessarily with regard

to the establishment of sea lanes. Maybe, in the days to come, we will know with whom we are going to consult on this particular issue. Definitely we will be consulting with those who are parties or with those who have signed the Convention. We will probably ask them how they interpret that particular paragraph. Is the establishment of sealanes within the competence of IMO? I don't know.

Bruce Harlow: Burt?

Burdick Brittin: A few comments directed to Professor William Burke. In Washington there are three kinds of information. One comes from a source, another comes from a reliable source, and the third is from a very reliable source. What I have to say now about the Gulf of Sidra comes from a reliable source. It has to do with the origin of the Libyan Line of Death. In the 1950s the dominant foreign power that had a large say in the activities in Libya was the United States. At that time, beside Wheelus Air Base, our oil people were there in large measure. And, as this reliable source indicated, what occurred was this: A couple of the oil people from the United States thought it would be a good idea, because they expected there would be petroleum in the Gulf of Sidra, for Libya to draw a line, as it is now drawn, in order to protect those resources. That's the origin according to that source.

Concerning the mining of Nicaraguan harbors, I certainly agree in the conclusion but I suspect, Bill, that perhaps a preferable way to present it, rather than state a conclusion, would be to take a look at the United States' mining of Haiphong Harbor in North Vietnam, which was a classic correct way to do it, and contrast the two. They were completely opposite; one was a disaster, one was highly satisfactory.

Thirdly, some 20-25 years ago the Argentinians ran across very strong soundings that a submarine was submerged in Argentina's territorial waters. As I recall, for about two or three days they had intermittent contact with that submerged submarine. And finally they depth-bombed to a large extent. I think that they must have sunk the submarine, because nobody protested. Last year and the year before, up in Sweden, the Swedes had a different solution: they negotiated with the Soviets. If you were in a position of authority in Washington, Bill, which course of action would you have preferred?

William Burke: I understand that the Swedes have developed a weapon, which they drop, that will poke a hole in the submarine and make it rise to the surface. I don't know whether it throws air into it or what, but I would expect that is an acceptable policy. I understand that the Argentines beached a whale, and I wouldn't recommend that. I didn't realize that there had been any specific outcome. Maybe you're right; if no one protests, you've destroyed a submarine. Though that practice has been followed, it has also been questioned whether or not it is lawful to attack a submarine that has intruded into one's territorial sea without permission. I think it is. That is, a submerged submarine there without permission is not in innocent passage, and it can be prevented from continuing its activities, and I don't know how one does that other than by disabling it if it doesn't leave. But my understanding was that the weapons the Swedes were developing were not lethal. They were not designed to destroy the submarine but to damage it and force it to the surface.

Bruce Harlow: John?

John Bennett: I'm currently assigned to the Organization of the Joint Chiefs of Staff in a policy position. Partly I'm just up here to get some information.

Captain Grunawalt called for more studies of the neutrality issues, and I'd just like to bring your attention to two starting points. First, many of you will have heard or seen Admiral Harlow's paper on conflict management in straits, which was presented at the 18th annual meeting of this body and is reprinted in Volume 15 of *Ocean Development and International Law*. Second, a less well-known source would be the work of the International Society of Military Law and Law of War, which examined these issues and many others in connection with the law of naval warfare at their October, 1985, congress in Garmisch, Germany. The proceedings are currently being edited for publication in the Society's *receuil*. At that meeting, most experts agreed that belligerents could engage in belligerent acts in a neutral's EEZ. The reasoning is that, quite apart from the invalidity that Captain Grunawalt suggested in other neutrality questions of simply extending 1907 Hague Rules to newly-expanded areas of coastal state territory, the EEZ is simply not territory. The coastal state has certain resource-related rights and other jurisdictions in those waters, not sovereignty.

A more appropriate functional analysis would be to balance the rights of neutrals and belligerents to come to some conclusion, and under this approach it is clear that the rules traditionally applied to the narrow territorial sea would not apply in the EEZ. A neutral coastal state's rights in the EEZ are basically economic. Other nations, including belligerents, retain high seas rights of navigation in the broad sense. Additionally, the neutral's economic rights must be balanced against the belligerent's security interests. Depending on the nature of the conflict of the area involved, something possibly as weighty as a belligerent country's very survival may be at stake. At most the LOS Convention, assuming it applies at all, requires belligerents to conduct their activities in the EEZ with due regard for the rights of coastal states and other states. The regard that is due to the rights of neutrals and other states in armed conflict need not be the same level of regard that would apply in peace time or in the absense of conflict, just as war time rights of belligerents, *vis-a-vis* opposing belligerents and neutrals on the high seas, have always represented a lesser standard than what would have applied in peace time.

Bruce Harlow: Colin?

Colin Keating: I'd just like to comment very briefly on the question that Burt addressed to Bill about what you do when you believe somebody has infringed upon the rights of innocent passage. It seems to me it's not a very satisfactory solution to say, "We'd bomb the hell out of them." And I think one of the things that has been missing from the discussion throughout the whole of this afternoon has been the relevant provisions of the United Nations Charter. I think one has always got to go back to that and look at the circumstances in which the use of force is justified. You can't just look at the law of the sea, form a conclusion that a breach of the law of the sea has occurred, and then immediately resort to the use of force. That's not what the Charter says. There may be circumstances in which the use of force may be justified, but it's very important to underline that those are very much the

exceptions and that the whole basis of international law is to get away from the use of force in resolving those kinds of problems.

Bruce Harlow: One more comment.

Miranda Wecker: At a recent University of Rhode Island symposium on the future of the oceans, round table panelist Stansfield Turner raised many eyebrows when he recommended that the U.S. reevaluate its commitment to the treaty banning emplacement of nuclear weapons on the ocean floor. He argued that our marine deterrent forces will continue to be the least vulnerable and therefore most important element of the nuclear triad. He advocated strong and active opposition to the spread of nuclear-free zones. Obviously some people fear the spread of nuclear-free zones as others fear the spread of nuclear weapons. I direct this to Mr. Keating: Is there a basic incompatibility between nuclear deterrence theory and the nuclear-free zone movement; and, if so, why do you think that the nuclear-weapons states would choose to enter into such agreements to limit their own options?

Colin Keating: That's a fairly large subject. I'll start it from the end and work back. The nuclear weapons states have entered into agreements limiting their options in Antarctica, in the Latin American nuclear-free zone, and one can only assume that they've done so because they believe it is in their overall national interests to trade off the freedoms that they might have to station nuclear weapons in other parts of the world against the enhanced security that is derived from preventing the horizontal proliferation of nuclear weapons. That calculation has been made in the past and I think it is still valid; it is still a major imperative of most, if not all, of the nuclear-weapons states that their number should not be increased. They have committed themselves to building down, to eventually eliminate their nuclear weapon stockpiles. Those commitments are enthusiastically endorsed by the rest of the world; the basic concern of the rest of the world is only that it's not happening fast enough.

I don't believe that there is any essential inconsistency between deterrence and nuclear-free zones. If the nuclear-free zone, like the one we have tried to construct in the South Pacific, for example, does not undermine existing security arrangements or the rules of international law relating to transit, I'm confident and hopeful that it, like the Latin American one and the one in Antarctica, will not only be respected but also supported by the nuclear-weapons states.

Bruce Harlow: Bill, the last word.

William Burke: I just want to comment on the submarine question. It seems to me that it is necessary to distinguish between the kinds of situations that arise. In the Swedish case, the problem wasn't casual entry into Swedish waters by a submarine. The problem was a pattern of planned intrusions by tracked vessels operating on the bottom of the ocean. They didn't wander in there by accident. Consequently, if one is not permitted to use force to require those vessels to surface or to leave, one is virtually conceding the use of the area for military purposes by another country. In that kind of situation, there's every justification for the coastal state to take forceful action to control its own territory, including its own internal waters.

But that situation differs from others that one can imagine, including probably the one off Argentina where you may have an incidental intrusion, where the premium would be to force it to leave. Under some circumstances there is certainly justification for the use of force. In other circumstances, again, disabling, forcing it to the surface, far lesser measures are warranted. The operation in Sweden, if I understand the documentation on that, was very well planned, carried out over a considerable period of time, involving specialized vehicles, some of which were regular submarines and some of which were submerged vessels operating on the bottom in tracks. But I certainly wouldn't forbid, and I don't think Mr. Keating said that he would prohibit, the use of force under all circumstances.

Bruce Harlow: We've come to the end of the session. I thank you all for your attention. Please join me in thanking all of the panelists for their very frank and stimulating discussions.

PART III:

MANAGEMENT OF TRANSBOUNDARY RESOURCES: PROBLEMS AND SOLUTIONS

INTRODUCTION

Gordon Munro
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University of British Columbia

The topic for this morning's panel is "The Management of Transboundary Resources: Problems and Solutions." One of the major problems to have emerged as a consequence of extended jurisdiction is the management of transboundary resources. We see this particularly in the case of fisheries. As a consequence of extended fisheries jurisdiction, a large amount of fishery resources that heretofore were international common property have come under coastal state jurisdiction. Since fish by and large are mobile, it was inevitable that many of these resources would prove to be transboundary either in the sense that they move between the exclusive economic zones of two or more coastal states or that they move between the exclusive economic zones and the high seas. The Law of the Sea Convention gives us very little guidance on the appropriate management of such resources. Articles 63 and 64 admonish the relevant states to cooperate in the conservation and management of these resources, but they don't say how they should go about cooperating.

The fishery resource that is the transboundary resource *par excellence* is, of course, tuna. So it's appropriate that we have two papers on this topic, one from a western Pacific perspective and the other from an eastern Pacific perspective. And I might add that the complexity of the problem of tuna as a transboundary resource is greatly enhanced by the fact that it is targeted by major distant water fishing nation fleets.

Our first speaker today is Dr. Alberto Szekely. He holds a Ph.D. in Law from the University of London and did postgraduate work at the Fletcher School of Law and Diplomacy in Boston. He is with the Mexican foreign ministry and is a professor of international law at the University of Mexico and at El Colegio de Mexico. He's also a member of the Permanent Court, International Arbitration, The Hague, and he was a member of the Mexican delegation to the Third Conference on the Law of the Sea. He has published widely.

Our second speaker is Judith Swan. A transplanted Canadian, she received her B.A. from McGill University, LL.B. from the University of Alberta, and LL.M. from the University of London, London School of Economics. She has been on the law faculties of the Universities of Melbourne, Toronto, Ottawa, Windsor, and Carleton University. After serving on the law reform commission in Canada and as the international relations officer for Canada's Department of Fisheries and Oceans, she accepted a post, in 1985, as the legal officer of the South Pacific Forum Fisheries Agency in Honiara and is fresh from the ninth round of tuna negotiations with the United States.

As a commentator we have an economist, Lee Anderson, who is a professor at the College of Marine Studies at the University of Delaware. He is the author of a best-selling textbook on fisheries economics, and he has recently been appointed to the Mid-Atlantic Fisheries Management Council.

Fisheries are not the only resources that prove to be transboundary under extended jurisdiction. Offshore seabed resources also fall in this category, hydrocarbons in particular. Our last speaker for

the morning is Professor Ian Gault from Dalhousie University, where he's a professor of law and an associate with the International Institute for Transportation and Policy Studies. Ian is originally from Britain and studied both at Dundee and Cambridge. He's particularly well qualified to talk on hydrocarbons; as well as having done extensive scholarly work on this issue, he has served as a consultant to several major oil companies, the governments of Canada and the Northwest Territories, and to the United Nations. He served on the Canadian Royal Commission that investigated the *Ocean Ranger* disaster, the sinking of a major oil rig off Newfoundland.

TUNA IN THE EASTERN TROPICAL PACIFIC

Alberto Szekely
Ministry of Foreign Affairs
Mexico City, Mexico

I must begin with the typical disclaimer which is inevitable because of my official position in the Mexican foreign ministry. I'm directly involved in the tuna negotiations, and therefore I have to say that these are exclusively my views, as probably will show all too much.

I would also preface my comments by saying that I'm not dealing with the very specific details of the negotiations in the eastern tropical Pacific no matter how menial or important those details are. Rather, I would like to show that there is in that region, at least on the part of the coastal states, a great devotion to conservation, and therefore we're not that interested in mere access to the fishery. And that is mostly the result of the history of this species and this region.

Nothing could be more challenging, and at the same time fitting, than to embark on an analysis of the grave problems being faced now with tuna in the eastern tropical Pacific and to do so in the light of, and within the framework of, the doctrine of transboundary resources. For tuna is indeed a most typical transboundary marine resource. In this paper I will submit that perhaps only with such an approach may workable solutions be found to those current regional problems, and not on the deceptive notions either that (1) highly migratory species may be at the hands of an unrestricted exercise of absolute sovereignty, or conversely that (2) they were left, when the new law of the sea was negotiated, in a sort of legal limbo that makes it necessary to resort to an *ad hoc* and/or *sui generis* regime to be agreed on a case-by-case or region-by-region basis. Moreover, I will attempt to persuade you that any of the three disparate legal positions currently held by the different interested parties in the eastern tropical Pacific will only prevail and provide a real lasting regional solution if it can meet the emerging principles of the international law of transboundary resources.

One of the most recognized experts in this field, Professor Julio A. Barberis, opened the way for the development of a doctrine for what he then called "shared resources." His initial contribution, however, has been largely supplemented and even overcome, since from it more comprehensive concepts and approaches have already been developed, especially in international state practice, to produce an emerging new branch of international law which focuses on two inevitably interrelated and not at all antagonistic principles, namely that of the individual and indivisible property over those resources, which find themselves located in a transboundary fashion, and the one dealing with the international duty to cooperate for their adequate conservation and utilization, and all of the above within a more integral territorial sphere of obligation, as Kelsen would put it.

Barberis spoke of shared resources, not those that belong to a single state or to the international community as a whole, but those that are found within the jurisdiction of two or more states. Such a definition was far from either correct or complete. For those who, even when inescapably admitting the natural unity of a given resource,

maintain that the sovereignty of a state over its territory and over the natural wealth that it contains cannot be fragmented and much less shared, the portion of a transboundary resource in its own side of the boundary belongs only to that state and is thus to be regarded as its property. For them it is a totally different, albeit an essential, consideration, the notion that for economic and ecological reasons, it makes a lot more sense for a state -- and it is indeed its duty -- to cooperate with its neighbor in the conservation and adequate utilization of a resource through joint and planned action. But even then, such elementary and unavoidable consideration is not to put in doubt the property of a state over the resources within its borders, whether they are solid, liquid, gaseous, living, non-living, and renewable or non-renewable. Thus, even if they are to be regarded as shared from a purely geographical point of view, legally they are certainly not. That is why, if these resources are to be qualified on the basis of their location, a more appropriate term which does not prejudice the question of their property would precisely be "transboundary resources," as so properly they have been described in the program of this conference of the Law of the Sea Institute, a term which has been gaining wider acceptance in state practice and in various international fora.

Barberis' definition was also eventually incomplete because it did not take into consideration many other vast natural resources that find themselves situated in a transboundary fashion, and not only those transected by the political dividing line between two sovereign states. They are also found in the boundaries between the marine jurisdiction of a state and a marine zone legally open to the international community of states as a whole, that is, the high seas, and between the marine jurisdiction of a state and the submarine zone reserved to mankind as part of its common heritage, namely the international area of the seabed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction. In the above sense, stocks of marine living species, marine waters, currents and winds, which provide energy that may be utilized for economic purposes, and minerals and hydrocarbons in the seabed or its subsoil, will necessarily be transboundary resources if they are located or move around in spaces or areas that are crossed by the delimiting boundary between the territorial sea or the exclusive economic zones or their equivalent, or the continental or insular shelves of two states with adjacent or opposing coasts, between the exclusive economic zone or its equivalent of a state and the high seas, or between the continental or insular shelf of a state and the International Seabed Area.

If all of the above elements are to be taken into account, a more complete definition of transboundary resources may be formulated as follows: There are those natural resources located in an area through which a territorial, fluvial, lacustrine, or maritime boundary runs, separating sovereign states or a state and a marine zone beyond the limits of its national jurisdiction but adjacent to them. Those volumes or portions of such resources located within the territorial or marine sovereignty or jurisdiction of the state are in general legally subject to unilateral and exclusive appropriation by that state. Those that are in the high seas, that are mainly but not exclusively living resources, are subjected to the customary freedom of fishing by each of the vessels flying the flag of any state recognized as a member of the international community. Those that are in the exclusive economic zone or in the continental shelf of a state are subject to the sovereign rights of that state for the purpose of their exploration and exploitation,

conservation, and management. Finally, those that are in the International Seabed Area belong to mankind and can only be exploited through the regime and mechanism internationally agreed upon at the Third United Nations Conference on the Law of the Sea. Only the above notions can be fully compatible with the historic resolution of the United Nations General Assembly, adopted on 14 December 1962, on the permanent sovereignty over natural resources, which states that the exploitation of natural resources in each country shall be carried out in accordance with its national laws and regulations. Such provision was repeatedly and subsequently reiterated through other important General Assembly resolutions, notably Resolutions 21, 58, and 26 and 92 of 1966 and 1970 respectively, all of them originating in Resolution 626 of 21 December 1952 on the right to freely exploit national resources and wealth. They are also well inscribed in Article 2 of the United Nations Charter of Economic Rights and Duties of States and in several multilateral instruments such as the 1966 International Covenants on Human Rights, in force since 1976. Thus, it is only in that light that the first General Assembly resolution that addressed the matter directly here at hand should be interpreted, Resolution 3129 of 1973, even when it terminologically referred to them as common natural resources. The International Law Commission itself, which for a number of years has been working on the codification and progressive development of the rules applicable to the non-navigational uses of international water courses, has recently abandoned the use of the term "shared natural resources" in referring to the systems of such water courses in the face of clear opposition by member states voiced through the General Assembly's sixth committee, because of its prejudicial effect over proprietary rights. Additionally, member states have all objected, and on exactly the same basis, to the use of the concept of common resources in some of the documents under study in dealing with the item in the sixth committee's agenda relating to the development and strengthening of good neighborliness within states. It is precisely here that we return to Barberis, who rightly describes as principles constituting the rights of neighborhood the following, and this is of course applied to transboundary resources:

1. The right of each state at either side of the boundary to exploit its part of the resource, conceiving it as a natural unity.
2. The duty to abstain from producing a sensible harm. In this respect the formula which appears in Paragraph 3 of Article 58 of the Montego Bay Convention, which in another version was also adopted in the First UNCLOS in 1958, gives more concrete substance to this principle, as it provides that, in exercising their rights and performing their duties in an exclusive economic zone, states shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal state.
3. The principle of equitable and rational utilization. In this respect, the so-called Castaneda formula incorporated in Article 59 of the Montego Bay Convention also gives greater substance to this principle, as it provides the bases for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclu sive economic zone, which are equity and all relevant circum stances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

4. The duty to undertake [previous] consultations.
5. The duty to exchange information on a permanent basis.

One could even go further by introducing other principles recognized as applicable to the use and conservation of the transboundary resources and which will undoubtedly seem quite essential, especially in the case of highly migratory species. So we go on to Principle 6.

6. The principle of international cooperation, which seems to have found its way among those already generally recognized and accepted by the community.
7. The principle of good faith, which shall be present in all inter national dealings.
8. Most importantly, the principle of abuse of rights, which has been most explicitly enthroned in the Montego Bay Convention, originat ing in a Mexican proposal and incorporated in its Article 300, together with the principle of good faith.
9. Lastly, it is essential to incorporate in this preliminary listing the principle which is the legal corollary of all of the above, namely the state responsibility and its consequential duty of compensation, which in the field of transboundary resources gives an important role to doctrines such as the one dealing with created risks.

The Convention recognized the special situation of transboundary marine living resources in several instances. In so doing, in no case did it affect the sovereignty or the sovereign rights involved, but instead aimed at framing them within the bounds of precisely the same type of principles of cooperation listed above for transboundary resources in general. In the field of transboundary marine living resources, Article 63 of the Convention refers to stocks occurring within the exclusive economic zones of two or more states, or both within an exclusive economic zone and an area beyond but adjacent to it that is the high seas. In these cases, coastal states have the duty to seek, directly or through the appropriate subregional or regional organizations, agreements on the necessary measures to coordinate and ensure their conservation and development. Similar schemes are provided by the Convention in its Articles 66 and 67 in dealing with anadromous and catadromous species.

Article 64 provides that, in the case of highly migratory species, the coastal states and those whose nationals fish for them in a region shall cooperate directly or through the appropriate international organizations, with a view to insuring their conservation and to promote the objective of their optimum utilization, both within and beyond the exclusive economic zone. A second paragraph to this article provides quite unequivocally that the above rules applied together with the other provisions of that part of the Convention, the principle of which is found in Article 56 which establishes that coastal states enjoy sovereign rights over all living resources in their exclusive economic zones for the purposes of their exploration and exploitation, conservation, and management. It is thus understandable that for coastal states in the eastern tropical Pacific, as surely do those in other regions, there is no question that they have sovereign rights over the highly migratory species in their exclusive economic zones. However, recognizing their transboundary nature, they are willing to also recognize that without prejudice to those rights, their explora-

tion and exploitation, conservation, and management shall be submitted to the already described applicable principles of cooperation which are so generally enunciated by Article 64 itself.

Some of those coastal states in the same region, which are known for their so-called territorialist law of the sea positions and which belong to the Permanent Commission of the South Pacific, are not that much inclined to fully and adequately apply in practice such principles of cooperation, fearful that they may encroach on their property over the said resources. Consequently, they are less prone to the adoption of authentic collective measures, especially management ones, through an international organization. On the other hand, among those states whose nationals have fished for highly migratory species in the Eastern Tropical Pacific, it is possible to find those who hold the position that, because of their migratory nature, it is not possible to submit those species to the sovereign rights of the coastal states, thus contradicting not only paragraph 2 of Article 64 but also acting inconsistently with their own delegations at the Conference, which joined in the consensus for the final drafting of that whole article. Thus, they have adopted a selective approach to meet their convenience and interests, accepting the first paragraph and not the second. The legal consequence of such an approach would be indeed to deny coastal states their sovereign rights. If that were really the case, Article 64 would then not have been located in Part V of the Convention, which deals with the regime of exclusive economic zone, but in Part VII, pertaining to the regime of the high seas.

It is not surprising that those who hold either the territorialist or the selective approaches are not precisely among those who supported the Convention by voting for its adoption on 30 April 1982, signed it, and much less ratified it. In contrast, among those who have strictly adhered to what was agreed on the matter by consensus at the Conference and to the loyal interpretation of Article 64, it is possible to identify a more definite and unreserved support for the Convention.

Despite all of the above, in the different rounds of negotiations which, at all levels, have been held over the last ten years in the region, it is possible to identify an effort by all interested states, coastal or not, to come together to a middle ground that may lead to a regional agreement. As was already said, in my opinion such an agreement will only be possible depending on the extent to which all states concerned are in the end willing to remain within the framework of the principles of cooperation applicable to transboundary resources in general.

It may be that a lot was already accomplished and advanced in that regard. In 1985 a negotiating group of coastal states of the Eastern Tropical Pacific, sponsored by the newly created Latin American Fisheries Development Organization, or OLDEPESCA, adopted in Mexico City fourteen general principles which should guide any effort to establish a regional tuna regime and mechanism. It is interesting to note that those fourteen principles represent the accumulation of negotiating experience over a decade of conflict, which took place through an interminable series of rounds of talks. They all started as a result of a warning, given by Mexico to the members of the Inter-American Tropical Tuna Commission during its annual meeting in Paris in 1975, that the emerging consensus of the Law of the Sea Conference on the right of the coastal state to establish an exclusive economic zone would have profound effects on that organization and on the regime that had evolved from its work for the conservation and utilization of tuna

species in the region. At the 1976 annual meeting of the Inter-American Tropical Tuna Commission, Mexico invited all other member states to initiate the negotiation of a new regime and mechanism that would be adequate with the new legal realities of the new law of the sea emerging from the UN Conference. Such invitation led, after careful and serious preparatory work, to the holding of two highly important conferences of plenipotentiaries, with the participation of all those states invoked by Article 64 of the Law of the Sea Convention.

Even when the conferences were not then able to agree on a new regional convention, all participating states were in agreement on practically all but a handful of its possible contents. It is also important to note that despite their differences, over the next five years, after the plenipotentiary conferences and up to date, none of the interested states has abandoned the negotiating effort. Consequently, and once again in my personal opinion, the so-called Mexico Principles, adopted in 1985, do represent already a possible solution to the several antagonisms and disputes which have stemmed from the varying interpretations given to Article 64 of the United Nations Convention on the Law of the Sea.

It is then useful to end the present paper by submitting the contents of those principles with the specific purpose of being able to better judge if they truly respect and correspond to those principles which, as described above, are applicable to transboundary resources in general.

The fourteen Mexico Principles are the following:

1. Sovereign rights of coastal states over all fishing resources in the jurisdictional waters, including the so-called "highly migratory species" for the prioritary benefit of their peoples and so that their rational exploitation may be developed with the objective of insuring their conservation.
2. The conservation, protection, and optimum utilization of the resource must be the fundamental objectives of a regional convention on tuna.
3. For the purposes of the eventual convention, optimum utilization shall be understood as meaning the rational exploitation of the resources with the aim of insuring their maximum sustainable yield.
4. Tunas are highly migratory species which cover a wide area of migration in the eastern tropical Pacific, thus in order to insure their conservation and regulate their exploitation, it is necessary to promote the creation of a regional organization to that end, with a council empowered to adopt its decisions by consensus.
5. The regional organization must have the necessary mechanisms to obtain and to exchange among its members the required scientific data to satisfy its objectives, especially the one relating to the conservation of the resource.
6. The area of obligation of the Convention shall be the pattern of migration in the eastern tropical Pacific of the regulated species, both within the jurisdictional waters of the member states as in the areas of high seas adjacent to them.
7. The highly migratory species regulated by the Convention shall be prioritarily those whose catch volumes make it necessary to under take their conservation, on the basis of the best available scienti fic information.
8. All coastal states of the eastern tropical Pacific shall be able to participate in the Convention, as well as those states which have

been fishing those resources in the region. The council shall decide on the admission of other members through accession to the Convention, but respecting the principle of the saturation of the fishery when applicable.

9. In application of the sovereign rights which pertain to the coastal states over the above-mentioned resources, they shall be able to issue access licenses or fishing permits to the surpluses in their jurisdictional waters aiming at a regional conservation regime.
10. The coastal states shall communicate to the regional organization data on the surpluses that it makes available to other states. The organization to be created by the Convention shall issue the access licenses or fishing permits for the utilization of these resources in international waters. (As you can see, only two out of fourteen principles are access principles.)
11. In order to insure the conservation of the resource, there shall be the need to determine a global quota of permissable catch in the area of application in accordance with the best available scientific information. The global quota shall incorporate the respective national quotas in accordance with the concentration of the resource in each zone.
12. Always with the objective of insuring the conservation of those species, coastal states shall report on the volumes of catch made in the respective zones. Through the appropriate schemes, information shall be gathered regarding catches in international waters.
13. Any regime to be agreed shall have concrete provisions on supervision and control.
14. The referred Convention shall give due attention to the need to promote the development of the fishing capacity in those coastal states which have not yet been able to catch the concentration of existing resources in their waters, taking into consideration the needs of the disadvantaged vessels.

As you can see, these principles are witness to the great devotion to conservation prevailing among coastal states in the eastern tropical Pacific.

TUNA MANAGEMENT IN THE SOUTH PACIFIC

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Management of tuna, as with other species, is based on legal, economic, social, and scientific considerations. Legally, tuna is distinguished from most other species of fish by being classified as a highly migratory species, as included in Annex I of the United Nations Convention on the Law of the Sea (LOS Convention).[1] Tuna is subject to key LOS Convention articles,[2] including those which are related directly to highly migratory species.[3] There are both international and domestic legal mechanisms relating to tuna management in the South Pacific.[4]

The extension of coastal state jurisdiction to 200 miles gave the fourteen Pacific island member states of the South Pacific Forum Fisheries Agency (FFA) sovereign rights over much of the richest tuna fishing grounds in the world. Their EEZs are over six million square nautical miles, and 30-35 percent of the world catch of the major commercial tuna species are taken from these waters and the relatively small areas of adjacent high seas. This left the island states with two major tasks in relation to the resource, which plays a major role in their economies: (1) to establish controls over and to seek benefit from the fleets of more than 1200 vessels which fish for tuna in these waters, and (2) to develop their own fishing industries. Local fishing industries are still relatively small; over 90 percent of the total catch from the area is still being taken by foreign vessels and landed in foreign ports.[5]

Scientifically, a satisfactory understanding of the major resources has to be developed. Some important preliminary scientific work has been undertaken on skipjack through a major tagging project, noted below, and a very good regional tuna database, still in its early stages, is being established. However, there is still much to be done.

The above considerations indicate that tuna management in the South Pacific is in the early stages of development, and it is apparent that some of these considerations currently play a stronger role than others. Those relating to international legal aspects have developed quickly and uniquely, due to substantial effort and cooperation by Pacific island states, and will be examined in relation to the economic and scientific development.

Background: International Law

Progress towards implementation of the LOS Convention has proceeded quite smoothly in the South Pacific. All FFA member states have now declared 200-mile exclusive economic or fishery zones, and many have amended their fishery laws or commenced review of those laws to achieve harmonization with the LOS Convention. There has been virtually complete acceptance of the new coastal state regimes by the vessel operators and governments from over ten flag states fishing in the region. Some important areas which will require attention are transit reporting, collection of high seas data, and research cooperation relating to the establishment and operation of regional or international organizations.

The only real dispute in the region arises because the United States government is apparently prevented by its tuna industry from sharing the customary understanding that the rest of the world has in relation to highly migratory species and, consequently, Article 64 of the LOS Convention.[6] Article 64 requires coastal states and other states whose nationals fish in the region to cooperate "directly or through appropriate international organizations with a view to ensuring conservation and promoting the optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone." Further, in regions where no appropriate international organization exists, the coastal state and other fishing states are obliged to establish such an organization and participate in its work. Finally, the article declares that its provisions apply in addition to the other provisions of Part V of the LOS Convention, which relate to rights and duties of states in the exclusive economic zone.

The dispute is based in the United States position that coastal states do not have jurisdiction over highly migratory species and that Article 64 is evidence that customary international law precludes the coastal state from establishing sovereign rights over tuna and requires cooperation "through an international organization." An argument usually adduced in response is that, since Article 64 provides that it must be read in addition to others in Part V, the proper interpretation is that the fundamental provision is contained in Article 56, which gives coastal states sovereign rights over natural resources in their EEZs. Article 64 should also be read as cushioned and colored by other comprehensive articles in Part V relating to conservation and management and optimum utilization and by Article 116, which refers to the right to fish on the high seas, subject to "the rights and duties, as well as the interests of coastal States provided for . . . in . . . Article 64 . . ."

Further, the duty to cooperate is to be discharged either directly or through appropriate international organizations. There is no requirement that distant water fishing nations must be members in the international organization. It would appear that the duty to cooperate could be discharged by furnishing a regional organization with information, such as catch statistics, on which management decisions could be taken. Also, unlike more precise references to cooperation in the LOS Convention,[7] there is no requirement that the cooperation achieve results.

It should be noted that the differences arise out of the policy of one state, based on a strong domestic lobby and reinforced by legislation[8] which encourages U.S. vessels to pursue highly migratory species into coastal state waters without a license. However, this policy and domestic legislation should be considered in a broader framework which also includes the Canada-U.S. agreement on albacore tuna, 1981, and the U.S. willingness to discuss a multilateral fisheries agreement with sixteen South Pacific states, which suggest a departure in practice from U.S. insistence on their becoming members of an international organization. These developments are also significant because they at least imply recognition of coastal state jurisdiction over highly migratory species and because conflicting domestic legislation is rendered inoperative[9], thus affecting any claim to "persistent objector" status which might otherwise have been made.

Apart from giving rise to the above differences in juridical positions, Article 64 contains some language which is not yet customary international law because it is not in domestic legislation nor consi-

dered to be obligatory in international practice. Further, as noted above, although it can be considered customary international law that coastal states have sovereign rights over highly migratory species, other language of Article 64 requires careful interpretation. State practice, together with *opinio juris*, will be needed to work towards a common understanding of the scope and nature of cooperation which is required and the role of international organizations.

In particular, the following considerations relating to the language of Article 64 should be addressed.

a. "Region" could give rise to different interpretations. It could refer to a geographic region (such as the South Pacific), or that part of the region where most or all of the fishing activity takes place. It should be noted that other articles (*e.g.*, 63 and 69) refer to "appropriate subregional or regional organizations."

b. "Cooperation" is required "with a view to" ensuring conservation and promoting the objective of optimum utilization. Since the nature of cooperation (communication, consultations, treaty, etc.) is not indicated, and there is no express duty to ensure conservation or achieve the objective of optimum utilization, the language suggests that a minimum standard of cooperation would be acceptable. Also, many other LOS articles require more specific forms of cooperation.[10]

c. Since it is arguable that there is a minimum standard of cooperation, it would follow that the discharge of the duty would also fall within the same standard.

d. Cooperation is to take place either "directly," which indicates bilateral cooperation, or "through appropriate international organizations." There is no indication that the states are required to be members of such an organization. The following sentence requires the fishing countries to "participate in the work" of such an organization, which could be interpreted to refer to participation, not membership.

e. Reference to the high seas in Article 64 should be read with the preferential status given to the coastal state by Article 116.

f. The apparently conflicting provision referring to the establishment of an international organization can be read: (1) so as not to require the establishment of an organization, but the cooperation to do so; and (2) with reference to the first sentence of Article 64 and state practice, which would allow a choice in the manner of cooperation to the state exercising sovereign rights.

The language of Article 64 can therefore be interpreted as requiring a minimum standard of cooperation and suggesting participation, but not necessarily membership, in the work of appropriate international organizations. There is no duty for all fishing states to actually agree on conservation measures, since this important area remains ultimately within coastal state jurisdiction pursuant to Articles 56, 61, and 116.

Regional Considerations -- the South Pacific -- the Fishery and the Scientific Work of the South Pacific Commission

Within the South Pacific, there is an extremely strong commitment to the need for international cooperation in the management and conservation of tuna. For now, this is centered on the work of the South Pacific Commission (SPC) and the FFA.

The South Pacific Commission, established approximately forty years ago, includes the metropolitan states in its membership (the United States, France, and Great Britain) and is mandated to carry out

work of a technical rather than political nature. It would be useful at this point to describe briefly the resources and the work of the SPC.

The only important fisheries resources commercially exploited in the South Pacific are the tuna resources and related species.

The major species by far in terms of volume of catch is skipjack, which is taken by pole-and-line and purse seine vessels. The next most important is yellowfin, which is taken both at the surface by purse seiners (which usually take smaller fish) and at greater depths by longline vessels.

In addition, there are significant amounts of bigeye and albacore tunas which are taken by longliners. Billfish species, especially blue marlin, are caught incidentally by purse seiners and longliners.

Scientific research on tuna and related species in the South Pacific is largely undertaken by the South Pacific Commission. There have been two major phases to that work.

In the early 1970s, with booming demand for skipjack for canning, catches rose substantially as local pole-and-line fisheries were developed and the distant water pole-and-line fleet moved south. In response to the lack of knowledge about skipjack resources and concern over the increase in fishing, the SPC undertook through the late 1970s a skipjack Survey and Assessment Programme involving a large-scale tagging project. The Programme concluded that the standing stock of skipjack was very large and that the turnover was very high. This conclusion implied that catches across the area could be increased at least several times over the catches during the study period, and this is probably still true. This does not mean that there is no concern about overfishing.

The skipjack fishing is highly concentrated in the western equatorial area, so that there could well be concerns that interactions between fleets fishing in that area could lead to catch rates that are less than optimal, while there is no overall concern about resource depletion.

In its second stage, the SPC turned its focus towards establishing a regional statistical tuna database, which collected data from local fleets and from a standard regional logsheet used by all foreign fleets. This work is now relatively mature and has a relatively high level of coverage. Its limitations result from gaps in collection of data on high seas and from the fact that some states have been less effective at submitting data than others.

The current directions of SPC plans include broadening cooperation between the Programme and fishing nations such as Japan, Korea, and Taiwan, which are not members of SPC, and with neighboring coastal states such as Indonesia and the Philippines. To facilitate this cooperation, an SPC Standing Committee on Tropical Tuna is to be established with this broader membership.

The SPC is also committed to a major yellowfin tagging project. Relatively little is known about Western Pacific yellowfin stocks, which are a target fish for longliners and which have recently been taken in increasing numbers by purse seiners. For now, analyses suggest that the tenfold increase in yellowfin catches has not affected the catch rates of purse seiners, and the data available is insufficient to indicate whether longline catch rates of yellowfin have been affected by purse seine catches. These are important questions for future research.

There is also ongoing research on stocks of: bigeye, which appear to be relatively fully exploited by longliners; albacore, which has

been relatively fully exploited by longliners in recent years, though these fleets are declining and there is interest in the development of a surface albacore fishery; and billfish, especially blue marlin, where the size of the incidental catches by purse seiners and longliners have apparently kept the stocks of several species well below levels that would sustain maximum catches.

The South Pacific Forum Fisheries Agency

The South Pacific Forum, which has as its members all the independent countries of the region and is mandated to address policy and political matters, adopted a convention in 1979 establishing the South Pacific Forum Fisheries Agency (FFA).[11] The Convention is appended. The preamble and Article VII of the Convention make it clear that the parties are concerned to secure maximum benefits from the living marine resources of the region for their peoples and for the region as a whole. Particular and frequent reference is made to highly migratory species in both places and in Article III, which is a declaration of coastal states' rights.

The FFA primarily collects and disseminates information and provides advice, information, and assistance. The information relates to statistics and biology, management procedures, legislation and agreements adopted by other countries both within and beyond the region, marketing, and technical matters. The Convention also refers to advice on technical matters and assistance in the development of fisheries policies and negotiations, the issuance of licenses, the collection of fees, and surveillance and enforcement.

In addition to the services provided by the FFA secretariat, based in Honiara, Solomon Islands, the member governments also develop cooperative policies on the management of the region's tuna fisheries. Their process of informal and *ad hoc* exchange of information and comparison of experiences was strengthened by moves which led to the adoption of a set of regional standards, agreed upon in 1982 by Heads of Government, with which all governments must comply. These standards govern such areas as reporting (including the use of common formats and logsheets), observers, gear stowage, vessel identification, and licensing procedures.

As this process develops, increasing attention is being given to wider arrangements, including the regional licensing type of arrangements now being discussed with the United States, and to increased cooperation between the Pacific island states in the development of their own fishing industries. At some point, this process can be expected to extend to decisions on regional effort limitation being taken by the Pacific island states through the FFA.

This model of somewhat separate pursuit of the legal and economic interests of coastal states through coastal-state-oriented organizations like the FFA, with parallel scientific and research programmes in broader based organizations like the SPC, seems likely to develop in various forms in other tuna fisheries. Examples can be seen in the establishment of OLDEPESCA by the Latin American countries and in increased institutional cooperation among coastal states in West Africa, the southwest Indian Ocean, and the Caribbean. The several initiatives under way in these areas seem designed to ensure a greater emphasis on the interests of coastal states in decisions on tuna management. These new cooperative arrangements are also designed to stand alongside the scientific work undertaken in organizations such as ICCAT, IATTC and the FAO Regional Fishery Commissions.

The greater emphasis on cooperative arrangements to serve coastal states' economies is also consistent within the overall balance between the world free market demands and the abundance of tuna resources. The best available scientific evidence suggests that, at current prices, the total world demand for the products is less than half of the yields available. With some exceptions, notably the longer lived and more highly sought species such as bluefin, world tuna stocks are generally not likely to be overfished. This view is strengthened by the increasing ability of fleets to shift fishing grounds if they become depleted in the short term. The tropical tuna stocks, which are the main source of tuna products, are also for various reasons relatively resilient.

This doesn't mean that there is no need for scientific research. It remains critically important to develop good databases and to advance our understanding of the size, composition, and behavior of the stocks. In the short term, there will also be issues relating to possible interpretations between fishing fleets in individual fishing grounds and to the need to protect local small scale and subsistence fisheries, and developing local industrial fisheries which are critical for particular coastal states or foreign fleets. But economic rather than scientific factors will be the major forms of management of the fisheries.

Experience in the South Pacific suggests that it is possible to develop this kind of structure effectively. The major difficulty relates to the collection of data on fishing operations, especially in high seas areas. This information is used both for coastal state interests, including surveillance, access negotiations, and developing local industries, and for wider scientific and research interests. These interests conflict, and while necessary data can be derived through access arrangements, for example, some other form of cooperation with fishing states is required, especially in relation to high seas data.

Bilateral, Sub-Regional and Multilateral Arrangements

Having examined international law relating to tuna management and the work of regional organizations in the South Pacific, it is now appropriate to examine the bilateral, sub-regional, and multilateral arrangements which implement such management in relation to tuna fishing by foreign fleets.

Many Pacific island states have bilateral access agreements with distant water fishing nations and industry. Japanese, Korean, Taiwanese, and Russian vessels, among others, fish pursuant to these agreements, which are premised on coastal states' sovereign rights over the resource and usually contain provisions acknowledging such rights. Provisions relating to economic and technical cooperation and assistance are usually standard, as are requirements on compliance with coastal state laws, flag state enforcement provisions, and compliance measures. These treaties do not normally specify the total allowable catch, due to scientific considerations noted above, but limitations can be expressed in terms of vessel numbers and duration of the agreement.

The objective of the FFA member governments in managing foreign fleets by treaty is quite clear -- they have sought to maximize the net gains to their countries from the operation of foreign fishing vessels. They have adopted one of the most positive attitudes anywhere to non-reciprocal access rights for foreign fishing in their waters, in pursuit of such benefits as access fees, technology transfers, development

assistance, employment, and information which well-managed foreign fishing operations can provide.

On a sub-regional basis, the "Nauru Group," which initially met to consider the harmonization of access issues among its members, has contributed towards the development of tuna management in the entire region. Its most notable initiative, subsequently adopted on a regional basis, is the institution of a Regional Register of Foreign Fishing Vessels. By its terms, any foreign vessel fishing in the waters of any FFA member state is required by its terms to maintain good standing on the Regional Register administered by the FFA secretariat. Good standing is accorded on application, and withdrawal of good standing results in a "blacklisting," which denies the vessel entry into the waters of any FFA member state.

Strict criteria and procedures have been agreed upon in "blacklisting." First, a serious offense must have been committed. Then, if there has been a conviction which the coastal state has been unable to enforce, or if evidence exists which would have resulted in a conviction had it been possible to bring the vessel operator to trial, the criteria for withdrawal of good standing are met. (Note: these criteria are under review by FFA member states with a view to including civil offenses). If either criteria is met, ten countries must agree with the proposal to "blacklist," and none must disagree. In addition, there is a high standard of evidentiary requirements for withdrawal of good standing.

Currently, more than 1500 vessels are listed on the Regional Register, and, since its establishment in 1983, blacklisting procedures have been initiated for only one vessel. The Regional Register is not a unique concept; it was first discussed in the Committee on Fisheries of the Food and Agriculture Organization in the late 1970s. However, it is the first such register to be implemented and will likely provide good precedent for other regions, or perhaps eventually for a global register for tuna vessels. Its value as a regional compliance mechanism for tuna management is outstanding, and its contribution to evolving customary international law on tuna is significant, since it embodies a reciprocal regional enforcement standard to which distant water fishing nations must submit.

On a regional basis, discussion of tuna management in the South Pacific would not be complete without reference to the multilateral fisheries agreement presently being negotiated between the FFA member states and the United States government. It will allow the U.S. tuna boats to have fisheries access on a regional basis and is the first agreement of its kind in the South Pacific.

The proposed agreement is still being negotiated and details cannot therefore be disclosed. However, the general nature of the agreement can be considered, together with its relation to Article 64 of the LOS Convention.

Although there have been bilateral and subregional agreements between Pacific island states and the American tuna industry after U.S. tunaboats started to fish the western Pacific in the early 1980s, this is the first time that the U.S. government has been involved. In return for access to the rich tuna fishing grounds, the FFA member states are seeking agreement that the U.S. will not invoke Section 205 of the Magnuson Act, which effectively embargoes fish products from countries which have seized U.S. tunaboats for illegal fishing. This provision has been invoked twice in the South Pacific, against Papua New Guinea and the Solomon Islands, and has seriously affected the American image

in the region. Since the fishery resource is a mainstay of island economies, FFA member states are also seeking economic benefits, including fees. Various regional standards will also be included in the agreement, which will contribute to the interpretation of Article 64 of the LOS Convention.

The negotiations are carried out by exchanges of written statements to which FFA member states agree by consensus. This structured process allows a clear development of both sides' positions on all the issues of this complex agreement.

Conclusion

The various aspects of tuna management are developing rapidly in the South Pacific and will likely provide precedent for tuna management in other parts of the world. Legally, it has been based on bilateral, subregional and multilateral arrangements, including two regional organizations, which provide a substantial contribution to the development of customary international law.

NOTES

1. The following are included in Annex I: albacore, bluefin, bigeye, skipjack, yellowfin, blackfin, little, and southern bluefin.
2. Note especially Articles 55-58, 61-64, 87, and 116-119.
3. Articles 64 and 116.
4. The term "South Pacific" is intended to include the waters over which all members of the South Pacific Forum Fisheries Agency (FFA) claim jurisdiction, including the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau. Other FFA members are: Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.
5. For a detailed discussion of economic development and management of fisheries in the EEZs of the Pacific Basin, see L. G. Clark and A. J. Slatyer, "Economic Development and Management of Fisheries in the Exclusive Economic Zones of the Pacific Island States," in *The Developing Order of the Oceans*, eds. Robert B. Krueger and Stefan A. Riesenfeld (Honolulu: The Law of the Sea Institute, 1985) pp.608-13.
6. For interpretation of Article 64, see Burke, "Highly Migratory Species in the New Law of the Sea," *Ocean Development and International Law* 14, no. 3 (1984). The text of Article 64 is:

> Article 64
> Highly Migratory Species
>
> 1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate 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. In regions for which no appropriate inter-

national organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

7. *E.g.*, Article 70(4) requires cooperation "in the establishment of equitable arrangements," Article 97 "in the conduct of any inquiry," and 108 in the "suppression of any illicit drugs."
8. The Fishermans' Protective Act allows compensation to the owner for any vessel seized while fishing contrary to the laws of the coastal state, including compensation for value of the vessel, fines, catch, lost fishing time. Such compensation is deducted from U.S. aid to the coastal state. The Magnuson Act allows the U.S. to automatically embargo fish products from the seizing state. It is worth noting that Canada succeeded before the GATT panel in a case involving a U.S. Magnuson Act embargo after nineteen U.S. tuna boats were seized in Canadian waters for illegal fishing.
9. United States law provides that treaties are the "supreme law of the land." U.S. Constitution, Article VI, and *Missouri v. Holland* (USSC) (1929) 252 US 416.
10. See footnote 7.
11. This followed a Declaration on the Law of the Sea and a Regional Fishery Agency by Forum in 1977, and a decision to exclude distant water fishing nations from membership. For a thorough review of the Convention, and events leading up to it, see Van Dyke and Heftel, "Tuna Management in the Pacific," *University of Hawaii Law Review* 3 no. 1 (1981).

Article from the *International Herald Tribune*, 29 June 1986:

U.S. IS OFFERING 11 PACIFIC NATIONS $5.5 MILLION FOR TUNA FISHING RIGHTS

By Michael Richardson
International Herald Tribune

MANILA -- The United States is offering a $5.5 million-a-year fisheries proposal to South Pacific island nations to counter Soviet penetration of the region.

The chief U.S. negotiator, Edward J. Derwinski, said that the government was prepared to provide $4 million in economic assistance. The American tuna fishing industry would provide another $1.5 million to the 11 nations in return for access rights for American fisherman, he said.

In the past, American operators have fished the South Pacific waters without any payments to the countries.

Mr. Derwinski said Thursday that Washington wanted a South Pacific tuna treaty not "just because of Soviet dabbling in the area."

The treaty, he said, was also designed to sustain a long history of good U.S. relations with the region and recognize the islanders' sensitivity over their fishing interests.

The U.S. offer falls short of the $20 million initially requested by the 11 South Pacific island states, most of them heavily dependent on revenue from tuna fishing.

Analysts said the offer may be insufficient to dissuade more island states from accepting Soviet offers of fisheries and trade agreements.

Mr. Derwinski said the money would would be handled in a lump sum to the South Pacific islands and they would decide how it should be spent.

Officials of Papua New Guinea said the initial reaction of Pacific island representatives was to reject the U.S. offer as inadequate.

The U.S. secretary of state, George P. Shultz, said Friday that the growing Soviet presence in the South Pacific "has to be recognized by everyone as a problem."

Mr. Schultz said that foreign ministers of the Association of Southeast Asian Nations, with whom he has been meeting, "as well as others, had voiced concerns" about the extension of Soviet influence into the South Pacific.

Last August, Kiribati became the first South Pacific country to sign a fishing accord with Moscow. Australian officials said the one-year agreement gave Soviet trawlers the right to fish for tuna in Kiribati's 200-mile (320-kilometer) exclusive economic zone in exchange for payment of about $2 million in license fees.

The agreement, which did not give the Russians landing rights, is likely to be extended, possibly for an increased fee despite depressed prices for tuna on world markets.

Two other South Pacific island states also have opened talks recently with Moscow on fisheries agreements that would give the Russians access to their land.

Australia's foreign minister, Bill Hayden, who visited most of the South Pacific countries last month, said Thursday that he understood Vanuatu was discussing with Soviet representatives an agreement that included port access for Soviet vessels, provision of harbor facilities

for repair work and landing and crew rotation rights for Aeroflot, the Soviet airline.

Mr. Hayden said that Fiji was interested in getting the Russians to take over operation of a fish processing plant from Japanese interests planning to abandon the venture because it was unprofitable. Fiji has had close ties with the United States and has allowed visits by U.S. Navy vessels.

An official in Suva said Monday that Fiji had agreed to discuss with the Russians prospects for trade and technical cooperation, including a fishing agreement.

A Fiji newspaper quoted the prime minister, Sir Kamisese Mara, as saying in Hawaii last week that he would allow Soviet trawlers into Fijian waters on suitable terms.

Sir Kamisese has previously adopted an anti-Soviet stance including a ban on use of Fiji's ports by all Soviet ships. The ban was recently lifted for Soviet cruise liners operating from Australia.

Legu Vagi, the foreign minister of Papua New Guinea, cautioned here Tuesday that if the United States and American tuna fishing boat operators did not provide adequate compensation for fishing in the exclusive economic zones of Pacific island states "we will definitely look elsewhere."

Mr. Derwinski, who is a senior State department official and adviser to Mr. Shultz, said he did not think agreement on the proposed treaty could be reached at the next round of talks in the Cook Islands in July. But he said he hoped an accord could be reached in the session that followed.

In addition to the Cook Islands, Papua New Guinea, Kiribati, Vanuatu and Fiji, the other island states included in the U.S. offer are Nauru, Niue, the Solomon Islands, Tonga and Western Samoa.

Article from the *Wall Street Journal* (pre July 24, 1986)

ISLAND LEADERS SAY U.S. TUNA POLICY IS MADE BY ASSOCIATION IN SAN DIEGO

By a *Wall Street Journal* Staff Reporter

AUCKLAND, New Zealand -- Most people think that American foreign policy is made in Washington and carried out by State Department diplomats. But they think otherwise in the island microstates of the South Pacific.

U.S. policy, island leaders charge, is made in San Diego, the home of the American Tunaboat Association, and carried out by poachers who are protected by Washington.

Tuna is the island nations' most important economic resource, and U.S. fishing policy angers them in two ways. First, Washington doesn't recognize their 200-mile economic zone claims as far as tuna is concerned. Second, the Fisheries Protection Act of 1967 provides that if any nation seizes a U.S. fishing boat, Washington must impose an embargo on all fish products from that nation. The same law also requires Washington to reimburse the boat owner for the costs of the seizure and of recovering the boat and to pay him the amount he would have made fishing if the boat hadn't been stopped.

"The buccaneering behavior of the American Tuna Boat Association" infuriates island countries even more than French nuclear weapons testing in French Polynesia, says the region's new magazine, Pacific Islands Monthly.

But U.S. tuna fisherman say they couldn't compete with cheap foreign imports without Washington's protection. August Felando, the president of the American Tuna Boat Association notes that 21 of the 33 boats in the U.S. tuna fishing fleet are currently tied up in bankruptcy proceedings.

Partly because of chicken's increased popularity, tuna prices to fisherman have dropped to about $700 a ton from $1,100 a ton four years ago, he says. Fast, modern purse-seiners, with on-board helicopters to locate tuna schools, cost $10 million five years ago; Mr. Felando says they are for sale at half that now.

Other tuna fleets, from Japan and South Korea, for example, pay island nations annual fees to fish. The U.S. fleet has had similar agreements with a few island nations in the past but has none now. After a visit to the region last summer, Secretary of State George Schultz ordered a speedup of talks on the issue.

The president of Kiribati, Ieremia Tabai, says that anger over U.S. fishing policy is what propelled his tiny nation to sign a fishing agreement last August with the Soviet Union --Moscow's first ever in the region.

Kiribati is a nation of 62,000 people on 33 tiny islands, including Tarawa, which cost some 3,000 U.S. Marine casualties to take from Japan during World War II. It lives off a tiny copra crop, foreign aid and fishing agreements.

The one-year Soviet accord allows 16 trawlers to fish in a maritime zone of about 1.4 million square miles. The Soviets paid about 20% more than the going rate for the agreement. Cost: $1.7 million. In contrast, it cost the U.S. taxpayers an estimated $3.5 million after a single U.S. tuna boat, the Jeanette Diana, was seized on poaching charges in June 1984 by the government of the Solomon Islands.

Article from *The Wall Street Journal*, 5 March 1986:

LONG IGNORED AS SAFE, SOUTH PACIFIC ISLANDS NOW VEX WASHINGTON

A Troubled Area Is Resentful Over U.S. Fishing Policy, French Tests Of Weapons

The Russian Bear Is Flirting

By James P. Sterba
Staff Reporter of *The Wall Street Journal*

AUCKLAND, New Zealand -- Think of the South Pacific. Paradise usually springs to mind. Lush, idyllic vacation spots like Tahiti and Fiji. Cute little countries like Tonga, with a King who takes up two first-class airline seats, and Tuvalu, which earns its way in the world mainly by selling postage stamps to collectors.

There is Papua New Guinea, with its vast, exotic jungles. But you have to squint to find the others on an average-sized globe: Kiribati,

Vanuatu, Western Samoa -- in all two dozen microstates, five million people, some 1,300 islands, most of them so tiny and far away from the world's troubles that it is difficult to conceive of their causing trouble or being troubled themselves.

That has been Washington's view, too. The affection that the U.S. gained by pushing Imperial Japan out of the region four decades ago seemed boundless. Diplomacy, what little seemed required, was put in the hands of generous campaign contributors who had to consult maps to discover exactly where they were going as ambassadors. With two staunch allies, Australia and New Zealand, looking after the region, it was an easy part of the world to ignore.

A 40-Year Policy

Not anymore. With U.S. policy in its 40th year of what a Heritage Foundation study calls "benign neglect," the Reagan administration has discovered that neglect has its price. The region is troubled economically and socially. It is angry over U.S. fishing policy and French nuclear weapons tests in the area. Anti-West Third World rhetoric is on the rise. The Soviet Union's flirtations are beginning to pay off.

On Dec. 29, the New Zealand Times summed up the trends in a article that began: "This may be remembered as the year the Pacific Ocean ceased to be an American lake."

That is overstating it, Western diplomats say. But U.S. strategists, for one, are disturbed by what they see. While the end of the presidential crisis in the Philippines would seem to improve the odds of America's holding on to its bases there, that can't be considered certain, and when these strategists look for backup positions in the Pacific, the view is no longer so pleasant. To have to worry about -- let alone contest for influence in -- a huge watery patch of the globe that has been uncontested since World War II isn't appealing.

Flirting Back

Most regional leaders don't savor the prospects of superpower competition, either, although they have discovered that the best way to get the Reagan administration's attention is to flirt back at Communists. They are doing so because today theirs is a region of resentment. U.S. tuna boats and U.S. support of French nuclear weapons testing on the Polynesian atoll of Muroroa have fertilized budding anti-Americanism and used up much residual good will.

Meanwhile, the Anzus alliance, a mutual-security pact between Australia, New Zealand and the U.S., is under strain, perhaps unravelling. And Australia and New Zealand, especially the latter, are under growing pressure -- from anti-nuclear groups, leftist trade unions, environmentalists and peace groups -- to abrogate the treaty, kick out U.S. military facilities, dismantle joint intelligence-gathering and communications sites, and even join the nonaligned movement.

These groups have helped organize islanders into anti-U.S. groups as well. Through some leftist new Zealand trade unions, Moscow dispenses money and support.

U.S. New Zealand Rift

Prime Minister David Lange of New Zealand carried out a popular 1984 campaign pledge of banning U.S. warships' port visits unless the U.S. certifies that the ships are nuclear free -- which it won't. Fearing that the New Zealand action might be copied elsewhere, the U.S. retaliated with strong denunciations and suspended all military cooper-

ation with New Zealand. The U.S. also cut New Zealand out of a secret and elite intelligence-sharing network that included the United Kingdom, Canada, and Australia and involves swapping secrets that the U.S. won't share, for example, with NATO.

The U.S.-New Zealand actions strained relations and rendered largely inoperative the 35-year-old Anzus alliance, which most island leaders viewed as a regional security blanket. The U.S. retaliation made it difficult for New Zealand to carry out what had been its primary intelligence-gathering mission in the five-power network: keeping a military and political eye on the South Pacific.

The region's nuclear allergy was aggravated when French agents bombed a Greenpeace environmental protest ship, the Rainbow Warrior, in Auckland harbor, killing a photographer. The ship had been en route to Muroroa to protest French testing, which has gone on underground since 1975 and was carried out in the atmosphere before that.

Eight nations of the 13-member South Pacific Forum, including Australia and New Zealand, meanwhile agreed to a treaty creating a South Pacific Nuclear Free Zone. Australia declined to cooperate with the U.S. in MX missile testing.

Of far more immediate concern, however, was Moscow's success, for the first time, in getting an economic-cooperation agreement with one of the microstates. The Republic of Kiribati, frustrated by U.S. fishing abuses, last summer opened its 1.4 million square miles of Central Pacific waters to a Soviet fishing fleet.

And last fall, Soviet cruise liners, banned from plying the region in retaliation for the Afghanistan invasion six years ago, were invited back in to help a sagging tourist trade. (On Feb. 16, one of them struck a reef and sank in New Zealand's Cook Strait.)

At least six financially strapped nations in the region --Fiji, Kiribati, the Solomon Islands, Tuvalu, Vanuatu and Western Samoa -- received fresh offers of Soviet aid and economic cooperation last year. Such offers have been spurned in the past. Now, some leaders suggest that they will wait and see how the Kiribati fishing arrangement works out before turning Moscow down. The accord nets Kiribati $1.7 million, about 10% of its national budget. Other aid-dependent islanders could use that kind of money, too.

Vanuatu and Hanoi

In the meanwhile, Vanuatu, already best friends with Cuba, has agreed to receive Vietnamese foreign aid in the form of a medical-aid team sent by Hanoi. And in New Caladonia, pro-independence forces acknowledge that one faction in their coalition sent a team to Libya for training in the fall of 1984. They say they haven't ruled out another visit.

Even Western successes have their qualifications. While the voters of Palau, for example, have just overwhelmingly approved a new political relationship with Washington that gives military concessions to the U.S., the arrangement also bars the use, testing or storing of nuclear weapons there.

While the Soviets increase their friendly overtures in the region -- for example, by passing out free airline tickets to visit Russia and offering scholarships to study there -- anti-American feelings are growing and regional diplomats blame the Reagan administration.

Mr. Reagan's first-term rejection of the 1982 Law of the Sea Treaty was viewed by islanders as an official endorsement for U.S. fishing vessels to steal their most valuable economic resource: tuna.

Under a 1976 U.S. law, tuna are exempt from claims of a 200-mile economic zone because they are a "highly migratory species." So U.S. tuna fisherman freely take catches in violation of the laws of the island nations involved. The Reagan administration also angers islanders by backing French colonial claims to French Polynesia and New Caladonia.

"The United States must stop stomping around the South Pacific like a heedless hippopotamus, following damaging policies dictated by North Atlantic interests," says an editorial in Pacific Islands Monthly, an Australian-based magazine that reflects regional thinking.

Military Concerned

All this hardly makes for the next superpower flashpoint. But a succession of U.S. Pacific military commanders, including Adm. William J. Crowe, who is currently the chairman of the joint Chiefs of Staff, have expressed concern and quietly lobbied the Reagan administration to clean up its act in the region. That process began last summer, after the Anzus crisis and the Kiribati-Soviet fishing agreement, when Secretary of State George Shultz toured the region.

A December 1984 study for the State Department's Office of Long Range Assessments and Research notes that "the bull is not yet amongst the china" but that the situation could quickly change. Good will toward the U.S. is large, the study said, but the "real question is how long can the reservoir be tapped without replenishment?" Discussing Soviet offers to trade aid for fishing rights, the study went on:

"The current U.S. fishing difficulties in the region do make the Soviet fisheries offers appear more attractive than perhaps they would otherwise. Secondly, the financial problems of the smaller atoll countries are perceived to be such that cash income even from the Soviet Union would be difficult to refuse."

Contrary to the travel brochures, most of the microstates are economically troubled. They have growing populations, rising numbers of restless unemployed youths, and spreading problems with urbanization, crime, suicide, alcoholism and drug abuse.

As a group, the microstates receive more foreign aid per capita than any other place in the world, although the amount is relatively small because total populations are tiny. But living space is tiny, too, and unhealthy.

Randy Thaman, who heads the University of the South Pacific's school of social and economic development, says the South Pacific is one of the world's most unhealthful places to live. other parts of the world may be slowly winning battles against diseases. Not this region. Malaria, hepatitis, meningitis, intestinal diseases, tuberculosis, anemia, syphilis and gonorrhea are growing health problems. There are no sewers, sanitary garbage removal or clean-water sources for most islanders. Thus, diarrhea has become a major killer.

SOUTH PACIFIC FORUM FISHERIES AGENCY

CONVENTION

THE GOVERNMENTS COMPRISING THE SOUTH PACIFIC FORUM

Noting the Declaration on Law of the Sea and a Regional Fisheries Agency adopted at the 8th South Pacific Forum held in Port Moresby in August 1977;

Recognising their common interest in the conservation and optimum utilisation of the living marine resources of the South Pacific region and in particular of the highly migratory species;

Desiring to promote regional co-operation and co-ordination in respect of fisheries policies;

Bearing in mind recent developments in the law of the sea;

Concerned to secure the maximum benefits from the living marine resources of the region for their peoples and for the region as a whole and in particular the developing countries; and

Desiring to facilitate the collection, analysis, evaluation and dissemination of relevant statistical scientific and economic information about the living marine resources of the region, and in particular the highly migratory species;

HAVE AGREED AS FOLLOWS:

Article I
Agency

1. There is hereby established a South Pacific Forum Fisheries Agency.
2. The Agency shall consist of a Forum Fisheries Committee and a Secretariat.
3. The seat of the Agency shall be at Honiara, Solomon Islands.

Article II
Membership

Membership of the Agency shall be open to:

(a) members of the South Pacific Forum
(b) other states or territories in the region on the recommendation of the Committee and with the approval of the Forum.

Article III
Recognition of Coastal States' Rights

1. The Parties to this Convention recognise that the coastal state has sovereign rights, for the purpose of exploring and exploiting, conserving and managing the living marine resources, including highly migratory species, within its exclusive economic zone or fishing zone which may extend 200 nautical miles from the baseline from which the breadth of its territorial sea is measured.
2. Without prejudice to Paragraph (1) of this Article the Parties recognise that effective co-operation for the conservation and optimum utilisation of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal states in the region and all states involved in the harvesting of such resources.

Article IV
Committee

1. The Committee shall hold a regular session at least once every year. A special session shall be held at any time at the request of at least four Parties. The Committee shall endeavour to take decisions by consensus.
2. Where consensus is not possible each Party shall have one vote and decisions shall be taken by a two-thirds majority of the Parties present and voting.
3. The Committee shall adopt such rules of procedure and other inter nal administrative regulations as it considers necessary.
4. The Committee may establish such sub-committees, including techni cal and budget sub-committees as it may consider necessary.
5. The South Pacific Bureau for Economic Co-operation (SPEC) may participate in the work or the Committee States, territories and other international organizations may participate as observers in accordance with such criteria as the Committee may determine.

Article V
Functions of the Committee

1. The functions of the Committe shall be as follow:
   (a) to provide detailed policy and administrative guidance and direction to the Agency;
   (b) to provide a forum for Parties to consult together on matters of common concern in the field of fisheries;
   (c) to carry out such other functions as may be necessary to give effect to this Convention.
2. In particular the Committee shall promote intra-regional co-ordination and co-operation in the following fields:
   (a) harmonisation of policies with respect to fisheries manage ment;
   (b) co-operation in respect of relations with distant water fishing countries;
   (c) co-operation in surveillance and enforcement;

(d) co-operation in respect of onshore fish processing;
(e) co-operation in marketing;
(f) co-operation in respect of access to the 200 mile zones of other Parties.

Article VI
Director, Staff and Budget

1. The Committee shall appoint a Director of the Agency on such conditions as it may determine.
2. The Committee may appoint a Deputy Director of the Agency on such conditions as it may determine.
3. The Director may appoint other staff in accordance with such rules and on such conditions as the Committee may determine.
4. The Director shall submit to the Committee for approval:
   (a) an annual report on the activities of the Agency for the preceding year;
   (b) a draft work programme and budget for the succeeding year.
5. The approved report, budget and work programme shall be submitted to the Forum.
6. The budget shall be financed by contributions according to the shares set out in the Annex to this Convention. The Annex shall be subject to review from time to time by the Committee.
7. The Committee shall adopt financial regulations for the admini stration of the finances of the Agency. Such regulations may authorise the Agency to accept contributions from private or public sources.
8. All questions concerning the budget of the Agency, including contributions to the budget, shall be determined by the Committee.
9. In advance of the Committee's approval of the budget, the Agency shall be entitled to incur expenditure up to a limit not exceeding two-thirds of the preceding year's approved budgetary expenditure.

Article VII
Functions of the Agency

Subject to direction by the Committee the Agency shall:

(a) collect, analyse, evaluate and disseminate to Parties relevant statistical and biological information with respect to the living marine resources of the region and in particular the highly migra tory species;
(b) collect and disseminate to Parties relevant information concerning management procedures, legislation and agreements adopted by other countries both within and beyond the region;
(c) collect and disseminate to Parties relevant information on prices, shipping, processing and marketing of fish and fish products;
(d) provide, on request, to any Party technical advice and infor mation, assistance in the development of fisheries policies and negotiations, and assistance in the issue of licences, the

collection of fees or in matters pertaining to surveillance and enforcement;
(e) seek to establish working arrangements with relevant regional and international organisations, particularly the South Pacific Commission; and
(f) undertake such other functions the Committee may decide.

Article VIII
Legal Status, Privileges and Immunities

1. The Agency shall have legal personality and in particular the capacity to contract, to acquire and dispose of movable and immovable property and to sue and be sued.
2. The Agency shall be immune from suit and other legal process and its premises, archives and property shall be inviolable.
3. Subject to approval by the Committee the Agency shall promptly conclude an agreement with the Government of Solomon Islands providing for such privileges and immunities as may be necessary for the proper discharge of the functions of the Agency.

Article IX
Information

The Parties shall provide the Agency with available and appropriate information including:

(a) catch and effort statistics in respect of fishing operations in waters under their jurisdiction or conducted by vessels under their jurisdiction;
(b) relevant laws, regulations and international agreements;
(c) relevant biological and statistical data; and
(d) action with respet to decisions taken by the Committee.

Article X
Signature, Accession, Entry into Force

1. This Convention shall be open for signature by members of the South Pacific Forum.
2. This Convention is not subject to ratification and shall enter into force 30 days following the eighth signature. Thereafter it shall enter into force for any signing or acceding state thirty days after signature or the receipt by the depositary of an instrument of accession.
3. This Convention shall be deposited with the Government of Solomon Islands (herein referred to as the depositary) who shall be responsible for its registration with the United Nations.
4. States or territories admitted to membership of the Agency in accordance with Article II(b) shall deposit an instrument of accession with the depositary.
5. Reservations to this Convention shall not be permitted.

Article XI

Withdrawal and Amendment

1. Any Party may withdraw from this Convention by giving written notice to the depositary. Withdrawal shall take effect one year after receipt of such notice.
2. Any Party may propose amendments to the Convention for consideration by the Committee. The text of any amendment shall be adopted by a unanimous decision. The Committee may deter the procedures for the entry into force of amendments to this Convention.

COMMENTARY

Lee G. Anderson
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Department of Economics
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I suspect you're interested in what an American economist is going to say about two papers by lawyers which were, indirectly in one case and quite directly in another, critical of U.S. policy. Well, I am, too.

One thing I've learned as an economist is comparative advantage, and because of that I will not make any comments on alternative interpretations of Articles 64 and 56, though others may usefully do so during the discussion from the floor. I will say that the United States position on highly migratory species is interesting. Anthony Calio, Director of NOAA, requested a blue ribbon committee to review the Magnuson Fisheries Conservation and Management Act, and their preliminary report is now available. One of their recommendations is that highly migratory species be placed under the Magnuson Act, which I think would eliminate some of these problems. I am not too sure how happy Dr. Calio was to receive that recommendation, however.

I propose to comment on highly migratory species issue from the point of view of an economist. We're all aware that different types of laws will affect the potential success of management and the distribution of the gains from management differently. To be frank, however, the fundamental issue today has been distribution. At the end of the day, who's going to pocket the money? Legal arguments are nice, but the bottom line is: who gets the biggest piece of the pie? I will look at each of the types of regimes, compare them, and give a brief economic analysis of the results that they are likely to produce.

One of the speakers divided the types of arrangements for highly migratory species into what he called "territorial approach" in which the state says, "We have sovereignty and we're not going to cooperate because it may affect our sovereignty," and "the selective approach," in which there is no granting of sovereignty in the zone while the highly migratory species are in it, but there must be cooperation. In between these two extremes are the cases that were talked about today, the OLDEPESCA and the FFA/SPC. I think it's fairly easy to dismiss the territorial approach, at least from an economic and management point of view; clearly as long as these stocks are going back and forth between the zones of different countries, the countries must cooperate or the potential success of management will be quite small.

The differences between the other approaches are not so great. Let me specifically compare the selective approach with the OLDEPESCA, as pointed out by the fourteen or so articles that were read at the conclusion of Professor Szekely's paper. In very rough terms, they are identical in that they agree that cooperation is necessary. They differ on what types of cooperation would be necessary, but the OLDEPESCA specified that a total quota would be set up based on the best information possible. The total quota then would be distributed to the countries involved on the basis of historical catch, the time the stock spent in that country's waters, etc. If you compare that approach with the selective approach, the only difference is the means of distribution. The selective approach is, "Let's get together and talk about how much we should catch, and then we'll argue about who can catch it."

In the OLDEPESCA there is no argument about who can catch it; there are sovereign rights and there is a specific formula for how those sovereign rights should be divided up. In their potential to get good management, the two approaches are quite similar. Because OLDEPESCA provides some specific rules about how the distribution will take place, it might lessen the chance for arguments and have a slightly better chance of producing good management.

What about FFA/SPC? A number of points come to mind. The first one is that, as it exists now, there will be no limits on catch. The demand for the catch is less than half of what is available, and so there is no need to have ultimate limits now, and I stress that Ms. Swan said "now." In the paper she stresses that there are means by which this limitation can be introduced when it is necessary. I'd like to know exactly how this will be done when and if it's necessary, and specifically how the distribution would be made. Potentially friendly people can get together and agree on what to do as long as the pie is big enough for everyone to have all he wants. When the pie gets small relative to the needs of the individuals, it will be interesting to see what happens to negotiations.

I would also point out that there can still be management problems even if the stocks are not in danger. How big can your fleet be before one boat affects the catch of the other and the overall returns that will be gained? If I were an economist hired by FFA, I would certainly look into that area.

The FFA should be praised for its willingness to look, without blinders, at the infant industry argument. The argument "the fish are there, and we're going to catch them, and the heck with everything else," is not always correct. There's certainly some advantage to technology transfer programs but countries can also benefit by licensing out those fishing rights. I would encourage a balanced view, keeping in mind that it may be more beneficial to license out the rights, assuming that negotiations with certain unnamed countries can be successful.

In summary, in their potential to get good management, if all of the countries can agree on which way to go, there is not much difference in the two approaches. If I were to rank them, I would put OLDEPESCA slightly ahead of FFA because it specifies how certain things will be done. But FFA is still just beginning. The obvious issue is the lack of agreement on which approach to take will cause animosity that may in turn create problems in the actual management of these fisheries. Again, fundamentally what we're talking about here is a distribution issue. Who gets it? The differences between the actual types of management is quite small.

Gordon Munro: Does either one of the speakers wish to comment?

Alberto Szekely: First of all, Ms. Swan said in her presentation that it was arguable that there was in Article 64 a duty for conservation, because the language there is only with a view to ensuring conservation. If I understand her correctly, my response is definitely "No." There is a duty for conservation, even for highly migratory species, and that duty is reflected in other articles of Part V of the Convention. That is where paragraph 2 of Article 64 becomes relevant and applicable. The duty of conservation is right there and it should be respected to the fullest possible extent.

Now, two comments for Professor Anderson. He invited others here to produce other interpretations of Article 64. I think what he really meant is the need to give substance to the other already existing interpretations. Then he said that what really matters is who gets the biggest piece of the pie. In my view, ultimately there is no doubt that in some conservation policy what you really want is a permanent opportunity to sustainably fish in the future, not only in the short or the medium but also in the long term. So what matters is really the degree of combination you give to the two central elements, conservation and access.

Finally, he said that the OLDEPESCA approach is also a selective approach, because the sovereign rights and the concentration of their resource are really distribution criteria. In my view the question here is really whether you distribute for immediate maximum economic gain or for sustainable gain for all concerned over the long run, for which immediate gain has to be moderated. If there is no recognition of sovereign rights, there will not be any regional agreement. With no regional agreement, there will be no conservation regime. At most, we will suffer attempts as with the 1983 San Jose agreement, to establish mere access regimes, which will be contrary to the conservation principle.

Gordon Munro: Judy, do you want to make a comment?

Judith Swan: Yes. At the risk of becoming entirely too repetitive and redundant on Article 64, yet to defend my honor, I just wish to clarify the interpretation that I was attempting to put on Article 64. I did not intend to deny that there was a duty to conserve; my point related to the language used, to the facts that there was an obligation "with a view to ensuring conservation" and that it's different from other and stronger language used in other parts of the Law of the Sea Convention which go directly to the purpose -- for example, "cooperate to suppress traffic in illicit drugs," "cooperate to hold an enquiry," "cooperate to make equitable arrangements." The language just seems that much weaker in this article. Notwithstanding this, there is a strong degree of cooperation, perhaps stronger than that interpretation would indicate.

RECENT DEVELOPMENTS IN THE COOPERATIVE DEVELOPMENT OF OFFSHORE PETROLEUM RESOURCES

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Introduction

Natural resource legal regimes evolve in response to the physical nature of a particular resource or the circumstances surrounding its exploration, production, and transportation. This seems obvious, but it is often ignored or forgotten, especially when a particular issue has two quite distinct legal aspects. The joint development of offshore areas, or of individual oil fields, is one such subject. Obviously, there is here an important oil and gas law component. But also, important questions of international law arise where the field or area is (actually or in theory) subject to the jurisdiction of more than one country.

The joint development of offshore areas and oil/gas fields has been extensively scrutinized from the perspective of new developments in international law relating to maritime jurisdiction, but much more rarely (and less accessibly) from the petroleum law standpoint.[1] I believe this to be unfortunate, except where a joint arrangement has been concluded for political reasons, or is otherwise of little practical significance. It seems to me that much can be learned about a joint development arrangement made in respect of an offshore area of real hydrocarbon potential if the functional underpinnings of the scheme are well to the fore.

Although I regard myself primarily as an international lawyer, I have been working quite closely in recent years with government, industry, and international organizations on offshore petroleum related matters. Unlike their colleagues in the early years of continental shelf petroleum operations -- from, say, 1945 to 1965, modern international lawyers have tended to see the evolution of legal rules respecting the continental shelf and its non-living resources in isolation from the functional purpose for which those rules were developed.[2] This leads to the conclusion that continental shelf doctrine is a regime which has as its primary purpose the extension of state jurisdiction in the offshore, rather than a functional response to the need to perform for offshore mineral operations the regulatory functions required onshore. Time and time again, continental shelf law has been driven, and continues to be driven, by the need to respond to the needs of the oil industry; it was not developed in isolation from its catalytic factors.

I think this point is important, since it seems to me that we can best understand the future development of the doctrine of the continental shelf if we keep this duality of nature well to the fore. My own focus on topics such as the joint development of offshore oilfields or areas is from the perspective of both international and oil and gas law. In this paper I want to discuss joint jurisdiction arrangements on the continental shelf, their nature and purpose, some recent developments relating to them, and to consider the future of such arrangements in the development of offshore minerals.

Joint Jurisdiction Considered

Any system of joint jurisdiction seems to run counter to the basic premise of the doctrine of the continental shelf -- that states have sovereign (and therefore exclusive) rights over the shelf for the purpose of exploring for and exploiting the non-living resources of the seabed and subsoil thereof.[3] And yet, this premise of exclusivity, admittedly the rule, is either inappropriate or impossible in certain circumstances. The first circumstance arises when a hydrocarbon field is divided by a maritime boundary in such a way that the field is exploitable, wholly or in part, from either side thereof. These fields are usually referred to as international cross-boundary petroleum fields.

The second circumstance in which departure from exclusivity is justified arises when two (or more) states wish to establish a joint development zone within which they will both control petroleum (and possibly other) development.

Cross boundary petroleum fields and joint development zones are therefore distinct phenomena and will be examined in turn.

International Cross-Boundary Petroleum Fields

An international cross-boundary petroleum field is divided by a continental shelf boundary so that the deposit can be exploited by either state with an interest in it. Any system of area delimitation which ignores the geomorphic configuration of the subsoil of onshore and offshore areas is likely to result in splitting mineral deposits. The phenomenon is common in onshore areas where rights to subsoil minerals flows from ownership of land. Thus, the various problems arising in the context of cross boundary deposits -- field engineering, conservation, protection of correlative rights -- arose first onshore, and in the American West in particular, in the last century. Solutions were evolved in U.S. jurisdictions, thus providing precedents for addressing the same problems as they arise in the international, offshore, context.

Onshore Precedents

The adverse consequences of the unilateral exploitation of divided oilfields was first identified by oil industry engineers and economists. If those with interests in a field are permitted to drill into it -- or refrain from drilling into it -- at will, then the principle of "good oil field practice" cannot be applied. Those principles call for the optimum placing of drilling units dictated by the configuration of each particular field, thus facilitating the utilization of field pressure and the conduct of operations in a way that ignores the existence of a boundary. This requires a high degree of cooperation between the interest holders, and, ultimately, the ability to impose decisions on reluctant parties.

The alternative to cooperation on a field basis is unilateral uncoordinated activities. Individual operations are unlikely to result in conservation of field pressure and indeed risk premature reduction of that pressure. Once pressure drops, the costs of recovering oil rises.

Unilateral exploitation of divided petroleum fields was the only solution available to a landowner facing drainage of a common pool. The Courts refused to prevent unilateral operations by one interest holder, and thus the others were forced to follow suit to prevent the migration of hydrocarbons from one tract to another. Since the legal system

recognized ownership as flowing from possession, it also encouraged competitive drilling. This in turn resulted in oversupply, low prices, and no incentive to spend money on secondary recovery methods once field pressure dropped. Thus, large numbers of fields were being abandoned as uneconomic, fields which could have remained in production had the rules of good oil field practice been applied from the beginning.

Since the courts were unwilling to act to protect co-relative rights, engineers urged the adoption of compulsory legislative measures which would oblige joint interest holders to accept a scheme for treating divided deposits as a single unit, making development and production decisions on a unit basis. This technique became known as unitization.

It is perhaps worth taking some time to examine this concept in some detail, because although it has important legal ramifications, its purpose is primarily conservation. Unitization is often confused with *pooling*, and the different between the two is discussed in the following definition of "unitization":

> A term . . . used to denominate the joint operation of all or some portion of a producing reservoir as distinguished from pooling, which term is used to describe the bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules.
>
> Pooling is important in the prevention of drilling of unnecessary and uneconomic wells, which will result in physical and economic waste. Unitization is important where there is separate ownership of portions of the rights in a common producing pool in order that it may be made economically feasible to engage in cycling,[4] pressure maintenance[5] or secondary recovery operations[6] and to explore for minerals at considerable depth.
>
> The best results in conservation can be attained only by unitization. Only in this way can appropriate use of reservoir pressures be made and secondary recovery operations utilized at the appropriate early stage in the exploitation of the oil deposits. Moreover, only with unitization of fairly sizable tracts is it economically feasible to utilize advanced methods of cycling for maximum extraction of liquid constituents from gas. . . .

And, perhaps most important of all in the present context, is the last part of the definition:

> Under a unitization program, input and production wells may be located in accordance with the best engineering practices and without regard to lease or property lines.

Several oil producing states (but not Texas) equipped themselves with powers to compel unwilling tract owners to unitize a divided field. When challenged on constitutional grounds, the states successfully defended the measures as legitimate exercises of their "police power," *i.e.*, defending the public interest.

Thus, co-relative interests were protected not for their own sake, but as a consequence of conservation measures.

Application to the Offshore

The Proclamation of 28 September 1945, issued by President Truman of the United States,[7], is generally recognized as the foundation stone of the doctrine of the continental shelf as a rule of international law. The Truman Proclamation was a highly functional document. It advocated the extension of limited state jurisdiction beyond the limits of the territorial sea for a number of reasons, all of which would have made sense to the oil industry and onshore regulatory agencies. These reasons were:

1. The shelf is reputed to be rich in hydrocarbons and other submarine minerals;
2. The world needs or will need these minerals;
3. The appropriate conditions should apply to ensure that these minerals are brought on stream;
4. The adjacent state is the logical agency to ensure that these conditions exist and are maintained.

In other words, state regulation was seen as being necessary to ensure conservation; to avoid what Lord Asquith in the *Abu Dhabi Arbitration* termed "a perilous scramble" for the resources.[8]

Accordingly, it is possible to argue that the doctrine of the continental shelf, in its "classical enunciation"[9] incorporated the principles of conservation already accepted as normal practice in onshore petroleum-producing jurisdictions. It is also suggested that the general principles of international law suggest that anti-conservation activities -- unilateral operations and competitive drilling -- is incompatible with good neighborliness and international amity.

However, what was to prevent unilateral operations of this sort? One solution suggested at the time was to abstain from drawing international offshore boundary lines through hydrocarbon fields, thus preserving the field as an integral whole. This idea crystallized in the concept of the "unity of the deposit".

The Unity of the Deposit

The most powerful case for preserving the unity of the deposit was put by Admiral Mouton in 1954 -- very early in the development of the doctrine of the shelf.[10] Briefly, the advocates of the preservation of unity stressed the risks to international peace which would arise if competitive drilling were to take place on the shelf. The aim was to prevent what Mouton described as "two straws in one glass."[11] The solution was to draw boundaries around oil fields: ". . . The concept of a protective perimeter is an indispensable adjunct to the idea of a demarcation of the areas allocated to the States interested in the same shelf."[12]

However, this solution would have led to further complications, which are not too difficult to appreciate. Oil fields are three dimensional -- they are encountered at various depths ("horizons"), so that part of one field may be located beneath another. Any allocation of oil fields would have to take account of this. Further, it is not always easy to identify the "extent" of a field until considerable development would has been completed. Who is to manage and license such work? Then there is the difficulty of one field being linked with another; the nature of the linkage may not be apparent for some time. So how would such a situation affect apportionment of fields?

And, of course, most crucial of all, on what basis would the apportionment of jurisdiction take place, bearing in mind the financial circumstances, and the uncertainties outlined above?

There are many difficulties with the idea of preserving the unity of the deposit, not the least of which would be development delays, uncertainties, and financial complications, all of which are anathema to the oil industry -- and government. The single application of the unity principle occurred in 1958, in the continental shelf boundary arrangement entered into between Bahrain and Saudi Arabia, which will be discussed below.

Preserving the unity of the deposit was also considered by the International Court in the *North Sea Continental Shelf* cases.[13]

Unitization, on the other hand, offers a ready alternative, but one not free from political, financial, and technical challenges, as we shall see.

Treaty Provisions

The first explicit provision for action to be taken in the event of the discovery of a cross boundary field was made in the U.K. - Norway Boundary Treaty of 1965.[14] The boundary line delimited therein employed the median principle, and in substantial ignorance as to the petroleum potential of the areas so delimited. Indeed, it was to make it possible for the oil industry to explore the northern North Sea that the Treaty was considered necessary in the first place.

Article 4 of the Treaty provides as follows:

> If any single geological petroleum structure or petroleum field . . . extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned.

This Article refutes the arguments of the proponents of the "unity of the deposit" theory, for Norway and the United Kingdom regarded the possibility of "two straws in one glass" -- in controlled circumstances -- with equanimity. The Article provides the basis for the unitization[15] of three international cross boundary hydrocarbon fields on the U.K. - Norway boundary line; the legal rules evolved for these operations will be discussed below.

Not all boundary treaties incorporate such "single geological structure" provisions, as they are known. Article 4 of the Norway - U.K. Treaty is broadly typical of the majority of the thirty-six or so similar provisions in other agreements, with minor modifications.[16] It will be seen that the single geological structure provisions were written into continental shelf boundary agreements between 1965 - 1980. Only four treaties deal with maritime boundaries, as opposed to seabed boundaries.[17] Apart from Tunisia, the list includes no African states, no Caribbean states, and new Pacific states; the interests of these countries is clearly elsewhere, i.e., living resources.

There are other approaches to the question of co-relative rights in a cross boundary field. Several of the agreements to which Iran is a

party incorporate a provision of which the following, from the Bahrain - Iran Agreement[18] is an example:

> Article 2
>
> If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral extends across the boundary line . . . and the part of such structure or field which is situated on one side of that boundary line could be exploited wholly or in part by directional drilling from the other side of the boundary line then:
>
> (a) No well shall be drilled on either side of the boundary line. . . . so that any producing section thereof is less than 125 meters from the said boundary line except by mutual agree ment between (the Parties).
>
> (b) If the circumstances considered in this Article shall arise both Parties hereto shall use their best endeavors to reach agreement as to the manner in which the operations on both sides of the boundary line could be coordinated or unitized.
>
> (Emphasis added)

The Iran - Saudi Arabia Agreement[19] incorporates a prohibition of drilling within 500 meters of the boundary line fixed therein,[20] the meaning of which is only revealed by a subsequent Exchange of Letters between the Parties in October, 1968. The Parties knew that their boundary divided the Marjan-Fereydoon Field, and the letters establish a regime for the protection of the field, and their respective co-relative rights therein. From this exchange it is clear that cooperation in exploitation, but not unitization of the field, is proposed.

It is difficult to be sure of the extent to which cross boundary petroleum fields, or deposits which may lie across an offshore boundary, have been discovered. Looking at the maps in the 1984 Petroleum Encyclopedia[21], it is possible to conjecture that apart from the known fields in the North Sea, and between Iran and Saudi Arabia, there may be fields in the boundary areas between Nigeria and Cameroon, Congo and Angola, Kuwait/Iran/Saudi Arabia, Dubai and United Arab Emirates, and Dubai and Iran, which are at least in the vicinity of boundaries. The African examples show that while a field clearly exists in the vicinity of a boundary line within the territory of one country, no activity appears to be in progress on the other side of the boundary in that area.

The problem exists; states show that they are aware of it by virtue of single geological structure provisions in seabed boundary agreements.[22] What legal conclusions can be drawn from these provisions?

What Obligations Have Been Accepted?

No Unilateral Operations

Single geological structure provisions represent a commitment to negotiate a means of exploiting a petroleum field which has regard to the principles of conservation, and to the co-relative rights of the parties with interests therein. In other words, abstention from unilateral operations, at least while negotiations are in progress.

Negotiations

International law lays on all states the duty to settle disputes or differences by peaceful means. Thus, states, in their dealings with each other are obligated to employ peaceful means to settle disputes, and to avoid injury to the rights of others. Thus, states with interests in a cross boundary petroleum field are obligated to negotiate whether or not they are parties to an agreement incorporating a single geological structure provision. Such a provision emphasizes the nature of the obligation.

Similarly, unilateral exploration or exploitation of a single geological structure is incompatible with the general rules of international law as being potentially injurious to the other interested state, and treaty provisions reinforce this general concept.

International law also lays on both sides the duty to negotiate in good faith. For lawyers, the term "negotiate" implies a serious attempt to reach a compromise agreement, rather than participating in a formal, but meaningless, exchange.

After Fruitless Negotiations

Are there circumstances when unilateral exploitation is inevitable? After fruitless negotiations, is a state which wishes to proceed with development to be forestalled by one which resolutely refuses to cooperate? No such circumstance is known to have occurred *vis-a-vis* a cross boundary petroleum field. Thus, a response to this question must depend on an analysis of the applicable rules of international law.

It is suggested that the inclusion of single geological structure provisions in most boundary treaties is evidence of a general feeling on the part of states that unilateral operations -- damage to the deposit or the rights of other interested parties -- are unlawful. But each state still has the rights in its respective shares of the deposit. To claim that lack of agreement on common exploitation procedures prevents any field development and effectively places the power of veto in the hands of one state. It is difficult to reconcile such a power with the doctrine of the continental shelf, and in the absence of evidence of supporting state practice. Thus, it might be suggested that failing agreement on joint measures, unilateral operations which did not prejudice the rights of the other state are not incompatible with international law. To take this discussion any further would call for mere speculation.

A Legal Regime for a Cross Boundary Gas Field:
A Case Study of the Frigg Field Exploitation

The Frigg Gas Field lies across the Norway - U.K. continental shelf boundary. It was discovered by a consortium led by Elf Aquitaine Norway in 1969. They considered that the field was likely to extend across the boundary, and work by British concessionaires on their side of the line proved this to be the case.

Article 4 of the Norway - U.K. Continental Shelf Boundary Treaty has been referred to above. The two countries awarded their first licenses for areas in the vicinity of the boundary, and it was for this reason that the Frigg Field was discovered so soon after exploration commenced in 1965. The domestic legislation of both states made provision for the terms of production licenses to be varied in the event that a field within a licensed area was found to cross the boundary. Thus, the two countries were well able to implement measures in fulfillment of their obligations under the treaty.

However, the first moves were made by the companies, but clearly with the knowledge of their governments. The British and Norwegian consortia signed a series of agreements which unitized the Frigg Gas Field,[23] set up a procedure for continuing work on a unitized basis,[24] and for the appointment of an expert to assess the recoverable resources of the structure and the percentages thought to be in place on each side of the boundary.[25] At the same time, some readjustment of the Joint Venture Agreements previously concluded between the members of the two consortia became necessary.

Norway and the United Kingdom confirmed these arrangements and placed the unitization of the field on the level of public international law through the Frigg Field Agreement, 1976.[26] This treaty confirms the application of the principle of the single unit for the development of the field, by a single operator, acting on behalf of all interested parties. Each state is to receive a percentage of the proceeds from the field which accords with the proportion of the deposit (in its natural state) within the jurisdiction of the respective parties. The costs of development are likewise shared in this proportion. This figure may be readjusted every five years.

Supervision of the whole operation is entrusted to a Commission established for the purpose by the Treaty.

Comment

The Frigg Field regime has been virtually duplicated with respect to the Statfjord and Murchison oil fields, which also lie across the Norway - U.K. continental shelf boundary. These legal regimes are complex, incorporating public international law, public law, and private law elements. But the legal arrangements are only manifestations of the mutual trust and consensus which are required for the proper functioning of an international offshore unitization. A superficial analysis suggests that the public international legal elements are dominant, and yet the chronology suggests that the licensees played a vital role in the determination of the applicable techniques and rules, albeit in the knowledge of the principles implicit in Article 4 of the Treaty.

The unitization of these hydrocarbon fields[27] is one model -- nothing more -- for other states. A strong degree of political consensus is a prerequisite for the implementation of such models. Even between Norway and the United Kingdom, there were differences: there are installations on both sides of the boundary on the Frigg Field, but since the British share of Statfjord is small, there was no good engineering reason to place a production facility there also. The British government at first insisted -- apparently for symbolic reasons -- that one field installation should be established in the area, and, in the words of one commentator, the project politically "came of age" when this demand was dropped.[29]

Conclusions

The above comment suggests that unitization is a process which will work best with the cooperation of all parties concerned, public and private. If this is forthcoming, the technique provides a means for control of the operation by all interested parties, exploitation of the field in accordance with good oil field practice, and the protection of co-relative rights.

It cannot be said that unitization is "required" by international law, as it is in most petroleum producing jurisdictions. Unitization is

a precise technical term and means more than mere cooperation between the parties interested in a field. A rule of international law cannot be constructed on the practice of two states alone. Of the various treaty provisions calling for negotiations in the event of discovery of a single geological structure crossing a continental shelf boundary, it can be said only that these evidence a recognition of the problems resulting from boundary making which ignores the location of oilfields, and a willingness to come to a peaceful and equitable result.[28]

While it is reasonable to expect the international legal system to come up with a "rule" applicable to single geological structures, it should be remembered that international law does not, in general, proceed on abstractions, but practice. There is not very much state practice in this area, and what there is, is confined to one area. It would be irresponsible to urge that precedents worked out in the particular politico-lego-economic climate of western Europe were applicable, say, to the South China Sea.

The Joint Development of Offshore Areas

Introduction

This topic has two aspects. The first is the joint development of the mineral resources of a specific area by two or more states within interests therein. The second is joint management of living resources within an area. There is rather more to be said of the first topic than the second.

Joint Development of Minerals

Joint development means, in effect, the pooling of sovereignty or sovereign rights exercised by two or more states over the mineral resources of an area. Such a definition presupposes that the parties to such an arrangement have rights over a part of such area. Continental shelf legal theory holds that sovereign rights to explore for and exploit the natural resources of the seabed and subsoil of all offshore areas within national jurisdiction[30] must vest in the adjacent state. Rules for the determination of that state were discussed above. Among the options open to a country is the pooling of its rights with those of a neighbor.

Joint development, as that phrase is used here, suggests that all governments concerned will play some role in licensing, administration, management, and decision making, at whatever remove.

Why Joint Development?

One of the commonest reasons for the establishment of a joint development zone is the avoidance of a boundary dispute. Coupled with this reason could also be a desire to establish closer political ties, and economic reasons also play a part. The boundary avoidance issue will be discussed first, then economic and political motives.

Settlement/Avoidance of a Boundary Dispute

As shown above, there are various ways in which boundary disputes may be resolved by special agreement between the parties. In the Arabian Gulf, for example, boundary agreements have incorporated articles resolving disputes concerning islands as well as specific petroleum discoveries. In the latter case, the adjustment of a boundary to place a particular field within the jurisdiction of one state or the other[31]

shows one alternative to joint development, either of the field in question or the area in which it is found.

The first continental shelf boundary to be concluded in the Arabian Gulf, and one of the first to be determined anywhere, that between Bahrain and Saudi Arabia in 1958,[32] resolved not only the question of the boundary line between the parties but also a dispute over a specific area. The 1958 Treaty delimits an irregular hexagonal area, which contains a known petroleum field. The zone is within Saudi jurisdiction, but Bahrain is to receive 50 percent of the new revenues accruing therefrom. Since Saudi Arabia retains control of the area, this arrangement does not constitute joint development as defined above. The special regime seems to acknowledge that Bahrain had indeed rights over the disputed area/field. But it may be that the sharing option -- some form of joint development of the field or the area -- was ruled out because of opinions being voiced at the time (just before the First United Nations Conference on the Law of the Sea), that cooperative ventures in the offshore were undesirable.

This preference for unilateralism has long since given way to more pragmatic considerations. Chief among these is the difficulty of obtaining a boundary within which unilateral operations can take place. Canada and the United States, countries which enjoy exceptionally cordial relations, had to resort to litigation to determine a boundary. The first of the continental shelf boundary cases involved European countries -- West Germany, Denmark, and France. Britain and France went to arbitration, Iceland and Norway to conciliation, over boundaries.

Southeast Asia affords an example of modern boundary problems in all their complexity. There are areas in the South China Sea which are contested by no less than four countries. The situation is complicated by disputes concerning sovereignty over occupied and unoccupied islands. Some countries in the general region, such as Thailand and Malaysia, have proved more tractable in their dealings with neighbors; Vietnam and China, on the other hand, have stood firm on their claims. One commentator has written recently that

> sovereignty and jurisdictional disputes in the South China Sea appear intractable. Given the political will, relatively simple jurisdictional disputes due to overlapping claims can be resolved through joint development arrangements, but such resolutions are unlikely where the dispute also involves conflict over the owner ship of islands. . . . such is the case with most of the disputes of the region.[33] (Emphasis added)

Thus, while joint development might resolve the marine jurisdictional questions, it cannot address or resolve disputes concerning sovereignty. It is also doubtful whether a joint development arrangement could be set up by several states, especially where the potential parties to such a scheme are deeply divided on ideological or other grounds. It is not just a question of political will.

But joint development may well be feasible for less complex situations, especially where countries can either pool their resources to regulate and manage petroleum or other activities, or where one party is stronger, or more experienced, as is the case with Iceland and Norway, for example.

Economics and Politics

Since 1958, joint development zones have been implemented in the Asian Pacific, the Red Sea, the Arabian Gulf, the Bay of Biscay, and the North Atlantic. In some cases, the parties have entered into such agreements to avoid, or to resolve, a boundary dispute, *e.g.* the schemes entered into between Japan and South Korea,[34] and Malaysia and Thailand.[35]

However, economic and political considerations appear to have been dominant in others, *e.g.* those between Iceland and Norway in the North Atlantic,[36] Saudi Arabia and Sudan in the Red Sea,[37] and France and Spain in the Bay of Biscay.[38] It should also be said that the Iceland/Norway and France/Spain joint development schemes were implemented in conjunction with continental shelf boundary delimitation agreements.

What follows is a brief examination of some of the most important aspects of these schemes. The Franco-Spanish Agreement is thought to be oil-field specific, rather than a regime for an unknown area, and so will not be examined.

The Kuwait/Saudi Arabia Neutral Zone

The neutral zone is an area established by the U.K., as protecting power of the region, to keep warring Bedouin tribes apart. The zone has a coast, and so the resources offshore that coast are of as much interest to the states interested in the area -- Kuwait and Saudi Arabia -- as is the land territory. Oil production from the zone commenced in 1949.

The partition of the zone in 1965 had been preceded by joint development and management of petroleum resources onshore and offshore. These arrangements survived partition. Resources and proceeds are divided equally between the two states.

Operations are carried out by two companies under the supervision of a Joint Operating Committee, comprising appointees from the two countries.

Clearly, this is a unique arrangement for a unique area.

Saudi Arabia/Sudan in the Red Sea

This zone lies between the coastlines of the parties in the Red Sea, and consists of marine areas between the 1000-meter isobath marks adjacent to their respective coasts. The Parties have equal rights in the Zone. Operations are supervised by a Joint Commission, comprising three representatives from each state. The regime of the zone applies to mineral development, especially metalliferous sediments.

Japan/South Korea

Japan and South Korea established their northern continental shelf boundary (*i.e.*, the boundary north of latitude 32°57.0') in the South China Sea by an Agreement concluded in February 1974.[39] The Agreement is based on the median principle, and contains a single geological structure provision by which the parties will seek to reach agreement on the effective exploitation of any cross boundary fields, with recourse to binding third party arbitration in the event of any failure to agree.[40] A Minute[41] appended to the Agreement provides in part that

> Upon the request of either Government, the two Governments shall hold consultations regarding questions which may arise in connection with exploration and exploitation of mineral resources in the area which is the subject of the Agreement . . .[42]

Petroleum operations in the southern part of the shelf area adjacent to the two states, south of latitude 32°57.0', is subject to a separate Agreement[43] which establishes a joint development/management regime for a polygonal area described by the Agreement,[44] but lying appreciably closer to Japan than to Korea. The north-westerly arm of the Zone is the southerly continuation of the median line delimited north of 32°57.0' in the delimitation Agreement.[45] Point 6 of the Zone is intended (by the parties) to be the trijunction of the China-Japan-Korea continental shelf boundary. The Joint Development Agreement marked the conclusion of disagreements between the two states as to the appropriate method for determining their opposite boundary; Korea had argued natural prolongation as opposed to Japan's espousal of the median principle.[46]

The Korean Submarine Mineral Resources Development Law[47] had divided the offshore area claimed by Korea into seven mining blocks with an area of some 300,000 square kilometers. These blocks occupied part of the shelf area claimed by Korea using the "natural prolongation" principle. The government of Japan objected to the Korean law on the grounds that Blocks V and VII were located in offshore areas claimed by Japan applying the median line principle. As the map shows, several blocks, including Block VII, reputed to be rich in hydrocarbons[48], lie somewhat closer to Japan that to Korea. Discussions between the two countries took place from June 1970 until September 1972, when a Korea proposal for joint development of the disputed areas was proposed and accepted. This agreement in principle laid the basis for further discussions throughout the remainder of 1972 and the first half of 1973. Details of what was to become the Joint Development Agreement were settled at these discussions. Korean consent to a delimitation of the shelf on the median principle was forthcoming, since the joint development plan guaranteed her an interest in fields lying to the east of such a line.

The Joint Development Zone comprises the original Korean Block VII; Korea abandoned its claim to Blocks VI-1 and VI-2. Block VII is divided into nine subzones,[49] the seventh and largest having, at least in the eyes of the parties, the greatest oil production potential.[50] Each Party may award an exploration or exploitation permit to a company of its choice. It is the intention of the Agreement that revenues from oil production in the Zone shall be shared equally between the concessionaires,[51] the Parties being entitled to the appropriate government share under the terms of their respective licensing regimes. Each Party is entitled to award an exploration license and an exploitation license in each subzone.[52]

The basic terms and conditions governing exploration and exploitation licenses are also prescribed in some detail by the treaty, as opposed to the scheme envisaged in the Franco-Spanish Agreement 1974, where domestic law governs all aspects of rights allocation. Exploration permits have a term of eight years calculated from the date of entry into force of the operating agreement concluded between the two groups of licensees, unless terminated by the grant of an exploitation permit in the meantime.[53] Exploitation permits have an initial term of thirty years, renewable for additional permits of five years at the discretion of the parties.[54] The term of a permit is not affected by transfers or assignments of rights.[55] Such transfers or assignment of rights require the consent of the granting Party, and of the other concessionaires in the subzone, and the new concessionaire must accept

the obligations imposed on him by the Treaty and the operating agreement with the concessionaires of the other Party.[56]

The right to exploit a commercial discovery will normally be granted promptly to the holders of the exploration permit by the Parties following consultations.[57] The holders of exploration rights may be required by the Parties to submit an application for exploitation rights in respect of a commercial deposit within three months of such a request.[58]

The Agreement calls for each Party to nominate one concessionaire for each subzone within three months of entry into force, notifying the other Party of the choice, and taking steps to appoint a new concessionaire in the event of surrender or termination of interest, or redivision of the subzone.[59] The two groups of concessionaires are then required to enter into an operating agreement to carry out joint exploration and exploitation of the subzone, the agreement specifying *inter alia* the manner in which resources and expenses will be shared equally between them, choice of Operator, treatment of sole risk operations, catering for the interests of fishermen, and arbitration procedure.[60] The operating agreement must be approved by the Parties[61] and should enter into force six months following the appointment of the concessionaires.[62] Neither group of concessionaire may interfere with the discharge of obligations by the other towards its government, provided the terms of the Agreement are not violated.[63]

The concessionaires will designate one of their number as Operator within three months of the commencement of term, but failing agreement the Parties may do so within a further two months, failing which Operator is chosen by casting lots.[64] The Operator carries sole responsibility for the conduct of operations pursuant to the Operating Agreement, including the selection of personnel and equipment, and for raising the capital to finance the project.[65]

The Agreement also specifies a minimum work requirement[66] and relinquishment provisions.[67] Each concessionaire acts in accordance with the domestic law of the concession, and operations are deemed to take place on, and petroleum recovered and having been produced from, the respective continental shelves of the parties for this purpose.[68] There are provisions for the avoidance of double taxation[69] and to harmonise customs and excise dues in respect of Joint Development Operations.[70]

To oversee the operation of the agreement and to perform a number of other consultative functions, a treaty commission, the Japan - Republic of Korea Joint Commission, is established.[71] The Commission is composed of two representatives from each State Party, assisted by a Secretariat. Decisions are to be unanimous. The Commission is charged with reviewing the operations of recommending amendments to the Agreement, observation of operators, resolving problems arising from the implementation of the Agreement and which may arise between Operators. The Parties will submit legislation and regulations bearing on the conduct of operations to the Commission.[72]

If a single geological structure extends across the boundary of the Joint Development Zone and is exploitable, wholly or in part, from inside or outside of the zone, the concessionaires concerned and other private parties with an interest in the field shall consult as to the effective exploitation of the field, submitting proposals to this effect to the Parties whereby production is to be apportioned on the basis of the percentage of the reserves in place on either side of the boundary. If no proposal is submitted within six months of the com-

mencement of negotiations, the Parties are entitled to intervene to assist the interest holders to reach agreement. These provisions shall also apply to petroleum fields crossing the boundaries of the subzones of the Joint Development Zone.[73]

The Agreement incorporates a procedure for binding arbitration between the parties where disputes cannot be resolved by diplomatic means;[74] the parties undertake to hold consultations on the implementation of the Agreement[75] and to take any internal measures necessary for implementation.[76] The Agreement has an initial term of fifty years from the date of ratification[77] unless terminated by the consent of the parties because the resources are exhausted or no longer economically exploitable.[78] Three years' notice is required for termination after the expiry of the fifty-year term.[79]

Japan did not ratify the Joint Development Convention until 1979, feeling that too much has been conceded to Korea. Indeed, Japan was prepared to ratify only when the matter of Operator for the seventh subzone was settled.

Iceland/Norway

Iceland and Norway concluded a detailed agreement which laid the basis for a detailed regime for hydrocarbon activities in a part of the Norwegian Sea between Iceland and Jan Mayen Island.[80]

The two Parties had previously concluded an Agreement on fisheries jurisdiction in the same area,[81] which provided, *inter alia*, for the appointment of a Conciliation Commission which would make recommendations with respect to the continental shelf boundary between Iceland and Jan Mayen. The present Agreement was based on the Report of the Commission.[82]

The Agreement adopted the exclusive economic zone boundary previously agreed between the parties and the continental shelf boundary also,[83] but instituted a special regime which would apply within a designated area of the shelf lying close to Jan Mayen.[84]

Exploration within the designated area by seismic or magnetic survey[85] is to be conducted jointly by the Parties but at the expense of Norway, unless the Parties otherwise agree. The Norwegian Petroleum Directorate will supervise these operations. Any net profit accruing from such exploration will be shared equally between the parties.[86]

Malaysia/Thailand

Malaysia and Thailand concluded two offshore jurisdiction agreements in 1979. Both pertained to the Gulf of Thailand. In February, a Memorandum of Understanding on the establishment of a joint authority for the exploitation of the resources of the seabed was signed.[87] In October, the two states concluded a partial continental shelf boundary agreement.[88]

The Joint Development Area established by the two states is to be supervised by a Joint Authority, comprising representatives from both parties. The Authority is to be responsible for the conduct of petroleum and mineral operations within the area. The extent of the powers of the Authority have yet to be determined, but it is clear that the body will operate under powers delegated by the governments, and that national authorities will play no direct role, except perhaps in the granting of licenses. From information currently available to the writer from the governments concerned, it appears that this matter has yet to be fully resolved. In addition, the question of the extent to

which domestic law of the parties applies generally to operations in the Area has yet to be determined.

Joint Development - Choice of Legal Structure

The brief outline of the approaches to joint development taken in the five cases reviewed above shows the emergence of some common themes, if not common responses.

An Authority

The establishment of a body charged with supervision is a common adjunct to any treaty. The powers to be given to that body are another matter. The central problem is summed up by Datuk Harun Ariffin, Office of the Prime Minister of Malaysia, in a paper presented at a workshop on joint development of offshore hydrocarbons in South East Asia organized by the present writer in 1985, "It is also acknowledged that licensing powers are aspects of sovereignty which in the view of some [governments] are too important to be allowed out of State control."[89] In other words, how "joint" is the Joint Development to be? Will decisions be made solely according to national interests, or in the interests of joint development itself?

It must be acknowledged that unitization permits a greater degree of political altruism than does the joint development of offshore areas. The context, and choices, are narrower.

Choice of Law: Petroleum Law

The only alternative to the application of national law is a unified code promulgated *sui generis* for the joint development. On the whole, the national approach is preferred, although some agreements between concessionaires may be provided for (as in the Japan-South Korea Agreement, where Joint Operating Agreements will be standardized).

Choice of Law: Other Law

The question of the applicability of domestic law (criminal, safety, tort, contract, environmental) is apt to be overlooked and yet is surely central to the creation of a stable legal regime. Where operations are carried out from drill ships or mobile rigs bearing the character of "ships," the law of the flag state introduces a third regulatory party. What is the solution? The Chiang Mai *Memorandum of Understanding* proposed a functional solution for criminal jurisdiction, but was silent on civil law matters.

Perhaps if it is remembered that works on oil rigs tend to be from one state, usually that of the owner or operator, a functional solution appears, namely, allow the law of the operator to govern. It can hardly be argued that this is a matter where sovereignty is at stake. Britain and Norway have agreed to harmonize the domestic legal regime applicable to the Frigg Field installations. Approximation or harmonization of laws applicable on installations in a Joint Development Zone is surely desirable and practical and a matter which might be referred to the Joint Authority.

Operator

Choice of operator in the domestic context has marked political ramifications; in the Joint Development context, these difficulties may multiply. However, one solution may lie in the working out of criteria for operators and an attempt to match the skills of the best available

licensees for this responsible position. In the domestic setting, in some jurisdictions the operatorship is open to a degree of competition, whereby a qualified party loses the position to an equally qualified party who seems able to function more effectively or efficiently. Again, decision making in such a matter might be entrusted to a Joint Authority, provided that authority was granted sufficient powers and independence. In the Neutral Zone and the Red Sea Zone, operations are conducted by two and one companies respectively, thus avoiding this difficulty, which is bound to arise in the Japan/South Korea and Malaysia/Thailand Zones.

A Future for Joint Development?

The *ad hoc* nature of the arrangements discussed above suggests that joint development is a concept which, while admirable in theory, has severe limitations in practice. Against this it may be argued that as we move into an area where boundary delimitation problems become increasingly more and more fraught, and regional cooperation is further advocated, joint development may seem increasingly attractive. There have been reports that Viet Nam and China are discussing such a scheme, and it is known that Australia and Indonesia are likely to implement a joint development arrangement in the Timor Gap -- an area of known hydrocarbon potential.[90]

Indeed, it is difficult to see how some of the more complex boundary disputes in areas such as the South China Sea can be resolved on the basis of unilateral rights, at least in the near future. One advantage claimed for joint development is that it permits activities to commence while providing for a diplomatic silence on the question of jurisdiction. This paper has pointed to occasions where the oil industry has played an important role in stimulating states into action; joint development area creation may be another.

Joint Development and Living Resources

Not very much can be said on this subject. Regional cooperation in the interests of conservation of living resources has been underway for some years, but joint development proposes a mutual surrender of unilateral sovereign rights, a matter going beyond cooperation.

It may well be that unilateralism has less of a future with respect to living resources than with minerals. The regime of the EEZ allocates areas to states, but not the living resources. And even where international law allocates areas between neighbors, as in the *Gulf of Maine* case, the state seeming to derive the greatest advantage, Canada, may find itself at the receiving end of retaliatory measures from the other, under pressure from its fishermen angered by loss of traditional grounds, for whatever legal reason. Thus, the illusory nature of single maritime boundaries as being the means whereby offshore resource disputes are "settled" is made clear. The boundary line clears up the problems as they appear to the foreign ministry, but only restates the issue for departments of fisheries and energy.

Thus, if unilateralism is indeed a chimera, would regional interests not be best served by the closest form of regional cooperation -- a form of joint development and management?

This argument remains a theoretical extrapolation from one case -- hardly enough for a general pronouncement. As states develop their whole "ocean policies" (in contrast to the sectoral approach found at present) in light of their opportunities under the new law of the sea, it may well be that the equation of pooled jurisdiction and pooled

management resources in favour of joint benefits will appear to be an increasingly attractive option.

NOTES

1. Professor Lagoni surveyed both aspects of joint development in his paper "Oil and Gas Deposits Across National Frontiers," *American Journal of International Law* 73:215. The literature on joint development of offshore areas includes Valencia, ed., "Geology and Hydrocarbon Potential of the South China Sea and Possibilities of Joint Development," *Energy* 10 no. 3/4. The literature on joint development of individual oil and gas fields includes Onorato, "Apportionment of an International Common Petroleum Deposit", *International and Comparative Law Quarterly* 17:85, and the same author's paper examining the Frigg Field development in the North Sea (discussed further in this paper) "Apportionment of an International Common Petroleum Deposit", *International and Comparative Law Quarterly* 26:324 (1977); Outhit, "Unitisation As Between Companies of Fields Between States (International)", published in the *Proceedings of the Petroleum Law Seminar* organized by the International Bar Association, London, and the same author's "The Frigg Field Unitisation", published in the *Proceedings of the 1979 Energy Law Seminar* organized by the International Bar Association, London; also Miller, "Unitization of the Statfjord Oil Field", also published in the 1979 Proceed ings (these papers are especially interesting, as they were writ ten by lawyers closely involved with the unitizations they dis cuss).
2. See, for example, Lauterpacht, "Sovereignty over Submarine Areas", *British Yearbook of International Law* XXVII(1950):367; Waldock, "The Legal Basis of Claims to the Continental Shelf", Grotius Society, Transactions for the Year 1950 (1951)36:115; Kunz, "Continental Shelf and International Law: Confusion and Abuse", *American Journal of International Law* 50(1956):828.
3. *Convention on the Continental Shelf*, (hereinafter *Law of the Sea Convention*) 1958, Article 2(1); *United Nations Convention on the Law of the Sea*, hereinafter *Law of the Sea Convention*) 1982, Article 77.
4. Cycling: - "A primary method by which condensate is recovered from gas produced from a condensate gas reservoir and the residue gas is compressed and returned to the reservoir from which it was originally produced. The return of the residue gas tends to maintain the pressure and thereby prevent retrograde condensation and resultant waste of hydrocarbons in the reservoir." (Williams and Myers, *op. cit.*, p. 163.
5. Pressure Maintenance: - "The injection of gas, water or other fluids into oil or gas reservoirs to maintain pressure or retard pressure declines in the reservoir for the purpose of increasing the recovery of oil or other hydrocarbons therefrom." (Williams and Myers, *op. cit.*, p. 567)
6. Secondary Recovery: - ". . . this term includes all methods of (petroleum) extraction in which energy sources extrinsic to the reservoir are utilized in the extraction. . . .a method of

recovery . . . in which part of the energy employed to move the hydrocarbons through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." (Williams and Myers)

7. Proclamation No. 2667, "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", 28 September 1945, *Federal Register* 10:12303; 3 C.F.R. 1943-1948 Comp., p. 67; *Bulletin*, Department of State XIII, no. 327 (30 September 1945):485; Whiteman, *Digest of International Law* (Washington, Department of State, 1965) 4:756-7.
8. In the Matter of an Arbitration between the Petroleum Development (Trucial Coast) Limited and His Excellency Sheikh Shackbut Bin Sultan Bin Za'id, Ruler of *Abu Dhabi and its Dependencies* (the *Abu Dhabi Arbitration*), decision of Lord Asquith of Bishopstone, 28 August 1951, [1951] International Law Reports 144:152, also reported in 1 I.C.L.Q. (1952) 247:253.
9. *Abu Dhabi Arbitration*, *supra*, note 8, per Lord Asquith, Umpire.
10. Mouton, "The Continental Shelf," *1954 Recueil des Cours. Academie de Droit International* (1955, Leyden, Sijthoff)I no. 348: 420 *et seq.*
11. *Ibid.*, p. 421.
12. *Ibid.*
13. *North Sea Continental Shelf Cases.*
14. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway Relating to the Delimitation of the Continental Shelf between the Two Countries*, London, 29 June 1965, 1965 U.K.T.S. 71.
15. The unitization of these fields is effected by a complex set of legal structures which include treaties, petroleum production licenses, and private contracts between members of national consortia of licensees, and between the two consortia themselves.
16. Reference to the potential role to be played by the "licensees, if any," for example, is confined to the Norway - U.K. Agreement and to the treaty concluded between Italy and Yugoslavia. The Argentina-Uruguay Agreement (*Treaty of the La Plata River and its Maritime Limits*, Montevideo, 19 November 1973, in force 12 February 1974) specifically provides that allocation of the resources of a cross boundary structure shall be in proportion to the percentages *in situ* on the respective areas of seabed.
17. Argentina and Uruguay (1973), Sri Lanka and India (1976), India and Maldives (1976), and Australia and Papua New Guinea (1980).
18. *Agreement concerning delimitation of the Continental Shelf between Iran and Bahrain*, Bahrain, 17 June 1971, in force 14 May 1972 (ST/LEG/SER.B/16 p.428).
19. *Agreement Concerning the Sovereignty over the Islands of Alarabiyah and Farsi and the Delimitation of the Boundary Line Separating the Submarine Areas Between the Kingdom of Saudi Arabia and Iran*, Teheran, 24 October 1968, in force 29 January 1969 (ST/LEG/SER.B/18, p. 403).
20. *Ibid.*, Article 4.
21. *International Petroleum Encyclopedia* Tulsa, PenWell Publishing Co., 1984), *passim.*
22. The International Court of Justice in the *North Sea Continental Shelf Cases* refused to regard the so-called principle of the "unity of the deposit" as a "special circumstance" justifying a departure from the equidistance method as set out in Article 6 of

the *Convention on the Continental Shelf*, on the grounds that treaty provisions to date had indicated general state ability to provide for the contingency of a divided offshore petroleum or mineral field.

23. The *Frigg Field Main Agreement* (unpublished).
24. The *Frigg Field Operating Agreement*, (unpublished).
25. The *Frigg Field Expert Agreement* (unpublished).
26. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas Therefrom to the United Kingdom*, London, 1976.
27. Other offshore petroleum fields in the North Sea have been unitized, but these have been wholly within the jurisdiction of the United Kingdom. No such unitization appear to have taken place within the Norwegian sector.
28. See paper presented by Mobil lawyer (responsible for Statfjord and Murchison unitization negotiations) Peter Miller presented to the 1979 Energy Law Seminar of the Committee on Energy and Natural Resources Law, Section on Business Law, International Bar Association, September, 1979, proceedings published by the I.B.A., London, 1980.
29. The International Court of Justice, in the course of its decision in the *North Sea Continental Shelf Cases* (1969 I.C.J. Reports, 3), rejected the principle of the "unity of the deposit" and remarked that single geological structure provisions in boundary treaties concluded before the judgement handed down showed that states were aware of the possibility of divided hydrocarbon structures result ing from the application of the equidistance/median line principle and that they were able to deal with the problems presented by them.
30. That is, all areas landward either of the limits of exploit ability, or the 200 meter isobath, or the 200 nautical mile limit, or the edge of the continental margin, as appropriate.
31. See the *Agreement Concerning Delimitation of the Continental Shelf Between Saudi Arabia and Bahrain*, Riyadh, signed and entered into force 22 February 1958, (ST/LEG/SER.B/16, p.409), and the Agreement between Abu Dhabi and Qatar (*supra*, Chapter Three, note 32).
32. *Supra*, note 19.
33. Daniel J. Dzurek, "Boundary and Resource Disputes in the South China Sea", 5 *Ocean Yearbook* (Chicago:University of Chicago Press, 1985.
34. *Agreement Between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries*, Seoul, 2 February 1974 (in force 1980). A continental shelf boundary agreement between the two states was concluded on the same date.
35. The agreement to set up a Joint Development Zone in the Gulf of Thailand is contained in a *Memorandum of Understanding* concluded between Malaysia and Thailand, Chiang Mai, 21 February 1979.
36. *Agreement Between the Government of Iceland and the Government of the Kingdom of Norway*, 22 October 1981, in force 2 June 1982.
37. *Agreement between Sudan and Saudi Arabia Relating to the Joint Exploitation of the Natural Resources of the Sea-bed and Sub-soil*

of the Red Sea in the Common Zone, Khartoum, 16 May 1974, in force 26 August 1974 (ST/LEG/SER.B/18, p.452).

38. *Convention Between the Government of the French republic and the Government of the Spanish State on the Delimitation of the Continental Shelves of the Two States in the Bay of Biscay*, Paris, 29 January 1974, in force 5 April 1975 (also given as being in force December, 1975).
39. *Agreement between Japan and the Republic of Korea Concerning the establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries*, Seoul, 5 February 1974, reprinted in *New Directions* IV:113.
40. *Ibid.*, Article II.
41. *Agreed Minutes to the Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Between the Two Countries*, Seoul, 5 February 1974, reprinted in *New Directions* IV:115.
42. *Id.*, para. 2.
43. *Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries*, Seoul, 5 February 1974, (hereinafter the "Joint Development Agreement"), reprinted in *New Directions* IV:117.
44. *Id.*, Art. II.
45. *Supra*, note
46. See Chi Young Pak, "The Continental Shelf Between Korea, Japan and China", *Marine Policy Reports*, College of Marine Studies, University of Delaware 4, no. 5:2. Much of the background information on the negotiations leading up to the conclusions of the Joint Development Agreement has been drawn from Dr. Pak's paper.
47. Law No. 2184, 1 January 1970, implemented by Presidential Decree No. 5020, 30 May 1970.
48. According to Professor Pak, *supra*, note X, the reserves of the Block has been estimated at 5-10 billion tons. It is suggested that this figure has probably been exaggerated to emphasize the political importance of that area; in any event, the reserves can only be estimated with a modicum of accuracy when field development is underway. The volume recoverable would probably be 40 percent at most of the reserves in place.
49. Joint Development Agreement, *supra*, note X, Art. III(1). The Appendix to the Agreement numbers and gives geographical coordinates for the subzones. The Appendix may be subsequently amended by the Parties without effect to the remainder of the Agreement (Art. III(2)).
50. Pak, *supra*, note X, 3.
51. Joint Development Agreement, Art. IX.
52. *Id.*, Art X(1).
53. *Id.*, Arts. X(2),(4)(3).
54. *Id.*, Art. X(3).
55. *Id.*, X(5).
56. *Id.*, Art. X(6).
57. *Id.*, Art. X(4)(2).
58. *Id.*, X(4)(2).
59. *Id.*, Art. IV. Where more than one concessionaire is appointed by a Party, all shall have an undivided interest but shall be represented by one of their number.

60. *Id.*, Art. V(1).
61. *Id.*, Art. V(2).
62. *Id.*, Art. V(3).
63. *Id.*, Art. VIII.
64. *Id.*, Art. VI(1).
65. *Id.*, Art. VI(2).
66. *Id.*, Art. XI.
67. *Id.*, Art. XIII.
68. *Id.*, Arts. XVI, XIX.
69. *Id.*, Art. XVII.
70. *Id.*, Art. XVIII.
71. *Id.*, Art. XXIV.
72. *Id.*, Art. XXV.
73. *Id.*, Art. XXIII.
74. *Id.*, Art. XXVI.
75. *Id.*, Art. XXIX.
76. *Id.*, Art. XXX.
77. *Id.*, Art. XXXI(2). The initial term will therefore terminate on date.
78. *Id.*, Art. XXXI(4).
79. *Id.*, Art. XXXI(2). The initial term will therefore terminate on date.
80. *Agreement on the Continental Shelf between Iceland and Jan Mayen*, Oslo, 22 October 1981, entered into force 2 June 1982, in XXI I.L.M. 1222.
81. 28 May 1980.
82. *Report of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen*, June, 1981, in XX I.L.M. 797 (1981).
83. Jan Mayen Continental Shelf Agreement, Art. 1.
84. *Id.*, Art. 2.
85. The usual form of preliminary exploration conducted prior to any consideration of drilling; see *supra*, Part A.
86. *Id.*, Art. 2.
87. *Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources of the Seabed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand*, Chiang Mai, 21 February 1979, ratified 24 October 1979.
88. *Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand*, Kuala Lumpur, 24 October 1979, ratified 15 July 1982.
89. Ariffin, "Licensing for Joint Development in the Malaysia - Thailand Joint Development Area," paper presented at the Workshop on Joint Development of Offshore Hydrocarbons in South East Asia, Bangkok, Thailand, 28 February 28 - 3 March 1985, published in the Proceedings of the Workshop, ed. Ian Townsend Gault, by Dalhousie Ocean Studies Program, Halifax, Canada, in the summer of 1986.
90. "Indonesians Hope to Settle Disputes,"*New York Times*, 16 Dec 1985

Gordon Munro: Questions?

Alan Hutchison: I have a comment and a question directed to the two panel members who discussed tuna. My comment: I believe you are preaching to the converted in this audience. We fully understand the nature of the tuna situation. Those of us who have tried to change it have run into a solid brick wall. While there are many groups that recognize the inconsistencies, for reasons I don't fully understand the political power of the small tuna fishing industry in San Diego seems to be strong enough to persevere and keep tuna as a migratory species from the U.S. point of view.

My question is directed to both panel members because neither one of you mentioned the question of marine mammals in relation to the tuna fisheries. As I'm sure you're probably aware, the U.S. Marine Mammal Protection Act applies to the U.S. tuna boats and they normally carry observers from the National Marine Fisheries Service to keep the porpoise kill at an acceptable level. There is some evidence produced by a number of U.S. conservation and environmental groups that this kill level of porpoises is no longer acceptable, and I have received a lot of information that these organizations plan a concerted effort against all tuna fishing on the grounds that it inhumanely kills a very intelligent marine mammal. I would appreciate comments on that issue.

Gordon Munro: Alberto, would you like to respond first?

Alberto Szekely: Yes. Among the coastal states of the eastern tropical Pacific who fish for tuna in that region, Mexico, I know, has an excellent record in this matter. It has given international evidence of that record both in its stringent legislation, which in some aspects predates U.S. legislation, to reduce to the lowest possible level the killing of porpoises incidental to the catch of tuna, and in its own statistics of that killing level of porpoises which is very low. I don't know specifically the record on marine mammals of other coastal tuna fishing nations in the eastern south Pacific. It would be interesting, for instance, to know about Ecuador. But I can report to you that this question has always been present in all negotiations on tuna in the eastern tropical Pacific. In all of the documents that have been drafted in preparation for the regional convention that have included conservation measures for tuna, there is always an important and stringent element to reduce, if possible to zero, the incidence of killing of marine mammals.

There is, of course, the danger of those transitory mini agreements that in the absence of a true regional agreement emerge once in a while for mere access and which do not contain any conservation measures for tuna, much less for protection of marine mammals. But in the authentic regional negotiations, these have always been very important issues that have been tackled with a great deal of good will and cooperation.

Judith Swan: First, I think that the dolphin lobby in the U.S. is stronger than the tuna lobby; it seems the reason the U.S. tuna industry left U.S. waters was its stringent regulations with respect to the by-catch.

Second, there are indications that the domestic laws of the Pacific Island parties do take into account the safety and well being of marine mammals. The process in the South Pacific and the Western Pacific would be to collect objective scientific evidence of (a) the species that are there (b) the numbers in which they are there, and (c) the incidence of by-catch, if any. Then the situation can be assessed and measures can be taken if the scientific criteria for conservation management are not met.

William Westermeyer: This question is for Ian Gault. Would you comment for me on the potential applicability of unitization and joint development in disputed boundaries between Canada and the United States in the Beaufort Sea and also between the U.S. and the USSR in the Bering Sea?

Ian Gault: Bud Krueger was going to talk about the Bering Sea, had he been here. All I can say is that, each time I've brought up this subject, after Bud gave a paper on this at a conference in Thailand last year, with people from the State Department and the Department of the Interior, Minerals Management Service, this idea was a non-starter. That's simply what government people in Washington told me. On the other hand, I think Bud's argument was that a joint development zone between the USSR and the U.S. would seem to be one way in which the more obvious political problems could be circumvented. I think he was quite right to point that out.

Once you get beyond the conceptual problems of whether or not there will be a joint development zone, you run into all the other problems with a high political profile which countries have to tackle when they commence licensing or start making decisions and formulating policies. If that is not going to be done through governments but through a consultative mechanism or a joint mechanism, that joint mechanism has to have its mandate specified. As the Japan-Korea experience showed in its earlier stages, when one of the parties isn't quite happy with the concept of joint development, it runs into some difficulties. Once the Japanese became happier with the idea, it seems that the mechanism worked further.

From the little experience that we have of joint development zones, it seems that much depends on whether you're dealing with an area of great potential or not. I mean, how much of the idea of the joint development zone is window dressing, simulating something useful happening in an area where not much is expected? That is one interpretation put on the joint development zone established by France and Spain; nothing much was expected of the project except to look like a good piece of foreign relations between France and Spain preparatory to Spain's joining the European Economic Community.

With respect to the United States and Canada, I think that some of us, certainly in Canada, would argue that if the boundary dispute in the Gulf of Maine was the longest running open sore in Canada-U.S. relations, then the boundary line hasn't closed the sore. It's replaced one difficulty with another. I'd take the view, not popular in a great many circles, that once the Chamber of the International Court handed down its decisions, all the various professors from Oxford and Cambridge and the Sorbonne and all the universities and the legal departments, Len Legault and the people from State, all went home thinking a good job had been done, as it had, but the people in the Gulf of Maine were left to get on with a rather difficult job. It simply replaced one problem with another.

If Doug Johnston were here he would launch into his speech on the functional theory of boundary-making and how the idea of a single maritime boundary promises so much and doesn't deliver on all sorts of functional grounds. And I think there's a lot to that. Oil fields don't behave in such easy ways that you can simply draw lines around them. Sometimes you don't know until well into the productive life of the field whether it is associated with a satellite field, whether they are part of the same structure, whether it is part a structure at a different depth; these matters simply can't all be worked out ahead of time. It seems to me that the functional or operational difficulties and the conceptual promises raised by joint development are perhaps balanced by the operational gains. That should certainly be considered, especially if we're looking at, say, hydrocarbons in the disputed part of the Beaufort Sea, where the expenses involved in production are considerable and the rewards of drilling so far are not. Perhaps that situation presents exactly the sort of opportunity for pooling administrative and industrial resources and not insisting on a boundary line. I would have thought that makes a lot of sense. A joint development zone in, say, the Beaufort Sea, would give Canada and the United States the opportunity to further develop their response to environmental problems resulting from oil development, again pooling resources so that the wherewithal, the equipment necessary to tackle environmental disasters can be stockpiled. But I don't think this is going to happen in the Canadian Beaufort Sea because it's too expensive. So, again, for operational reasons joint development appears to be an extremely attractive proposition in areas such as the Beaufort.

Gordon Munro: Was there a question over here?

Burdick Brittin: First, a question to Dr. Gault. On the Barents Sea problem between Norway and the Soviet Union, do you see any indications of how the boundary will be settled, not for fisheries but for the continental shelf and beyond?

Then I have an observation for Dr. Szekely. It's my understanding, and I could be incorrect here, that the average time of fishing for tuna by flag vessels of both Mexico and the United States has been diminished considerably, that there are tuna vessels in both countries that are practically non-operational. Looking into the future and following the theme that you're pursuing, sir, do you see changes in the fleets and in their operations? What will be the impact domestically in both of our countries?

Gordon Munro: Ian, would you like to respond first?

Ian Gault: I'm sure the Norwegians here could speak more authoritatively than I on the Barents Sea, but it seems to me that Norwegian concerns with respect to the potential for oil development off the north coast of Norway center on the likely adverse economic impact on fisheries. Norwegian fishermen have been concerned about this since the 1960s with very good reason, because the adverse economic impact on North Sea fisheries of oil development has been quite considerable. Perhaps joint development of one form or another -- I don't mean a straight replay of what other people have done but thinking in cooperative terms -- might again be one way to work these fishing concerns in with oil development in an area that is likely to be extremely expensive and, as far as we can see into the next few years, is hardly a

priority. And if it's neither a priority nor a particularly rich area of hydrocarbons but is an area of important fisheries concerns and therefore of environmental and other concerns, then joint development once again seems to provide an attractive means whereby political problems can potentially be defused through a permanent cooperative mechanism.

Gordon Munro: Alberto, would you care to respond to the second question?

Alberto Szekely: Yes. Since the conflicts began appearing in the east ern tropical Pacific because of the lack of a regional agreement on the basis of the new law of the sea, there has been considerable change, at least in the makeup of the Mexican fleet, which is now the second largest fleet in the region after the United States fleet. Because of the decision of the Mexican government to embark on a full marine policy to take full advantage of the benefits that we can derive from what was agreed at the Law of the Sea Conference, especially although not only in the tuna fleet, there were immediate effects. Some of these effects were derived also from the international situation of the fishery and the lack of original agreement, and the Mexican fleet multiplied substantially.

More than talking about the domestic effects of this change in the makeup of the fleet and of its operations, I should rather like to talk about the international effects that will be important in the light of the principle of the saturation of the fishery. Of course, in the measure that national fleets from coastal states increase, there will be less opportunity for others who have not fished in the region and who would like to. When we were talking about the principle of the saturation of the fishery back in 1978, a principle that was developed mostly by the Mexicans, we were talking about an international fleet that was composed in an entirely different manner from the way it is composed now. There is and there will be greater coastal state fishing capacity, and that is what is going to have an effect on the possibilities of other nations to come in the region. That's all.

Gordon Munro: Ambassador Djalal.

Hasjim Djalal: I would like to ask questions of Ms. Swan and Mr. Gault. In the South Pacific and North Sea, is the boundary of the economic zone concomitant with the boundary of the continental shelf and the seabed area, and, if not, how do they arrange the installation? Is it under the jurisdiction of the economic zone or under the jurisdiction of the continental shelf?

Judith Swan: I'm let off the hook somewhat by the geography of the South Pacific. I can't say that there are no continental shelves in the South Pacific. Certainly Australia and New Zealand have shelves, but most of the island states rise abruptly from the ocean bottom. There is therefore no appreciable continental shelf in most of the countries and the boundary delimitation is therefore drawn without reference to it. I might add that, although all of the Pacific island states have declared 200-mile zones, most have yet to officially set the coordinates and there are many outstanding boundary claim conflicts. Certainly the boundaries are drawn without regard to the continental shelf regime.

Ian Gault: I think it's true to say -- though a bit of a generalization -- that most South Pacific countries haven't got any oil and gas legislation. In fact, surprisingly few countries with offshore oil and gas legislation have a petroleum licensing regime.

In the North Sea, you must remember that the distances are comparatively small and the Frigg Gas Field is a good example. It's 120 miles from the coast of Britain and the coast of Norway. The boundaries of either exclusive economic zones or fishing zones, depending on which country one is talking about, do seem to correspond with continental shelf boundaries. I know there has been agitation in some European countries to rethink the coincidence of the two boundaries, but I see no signs of those suggestions being taken seriously. Installations in the North Sea will certainly be regarded as continental-shelf-based installations. This is clear from comments made in British and Norwegian reports on reform of legislation, in particular about getting rid of installations that have been abandoned. They concentrate then on the continental shelf provisions of the Law of the Sea Treaty and the Convention on the Continental Shelf, what they say about getting rid of these things. It's quite clear that the installations are within the authority that comes from the doctrine of the continental shelf.

Gordon Munro: This brings our panel to a close. I'm sure that you'd all like to join me in thanking our four speakers for giving us excellent presentations.

LUNCHEON SPEECH

INTRODUCTION

John P. Craven
The Law of the Sea Institute
University of Hawaii

I've been thinking long and hard as to how to introduce our luncheon speaker, and I suddenly realize that he is the only man who knows what is meant by the term "normal mode" in straits passage. I asked him yesterday, "What is the normal mode for a submarine in transit?"

He said, "Well, some years I was in the Marianas Trench at 20,000 feet below the ocean surface. I asked myself, what is the normal thing to do? So I broke out a bottle of Beaujolais and a chicken salad and had a fifteen-minute conversation with an associate, who was otherwise trembling. That's the normal mode for a submarine in the ocean."

"And then," he said, "just a few days later, I found myself flying at 20,000 feet. The stewardess came by, and what did she bring but a chicken salad and a bottle of Beaujolais. She and I had a conversation, and that was the normal mode at 20,000 feet."

So you can see that this gentleman really knows what submarining is all about. If I elaborated on his distinguished career at Woods Hole, you would suspect who he is because there's a submarine called *Alvin* named in honor of his exploits. It is now my pleasure to introduce the distinguished Al Vine.

FRONTIERS OF OCEANOGRAPHY

Allyn Vine
Woods Hole Oceanographic Institution

Ladies and gentlemen, it is certainly a pleasure to attend your meeting on the law of the sea, to meet old friends, and to make new ones. It is great that your Institute has been in operation for so long and continues to grow in size and vitality. In the time available I would like to mention some of the attitudes and directions that R&D at sea has taken so that you as lawyers can see what aspects may be of special interest.

A talk on this subject a thousand years ago could easily have been shorter and more dogmatic. For example, major features of the world ocean might have been described as:

> If you go north it becomes colder and finally freezes, if you go south it gets warmer and finally boils. If you go far away from the land the ocean has no bottom. Near the surface, life, light and motion exist, but at great depths there is no life, no motion, and nothing changes.

In this old-fashioned concept of the ocean, the earth was flat and sailors worried that, if one sailed too far, one would sail over the edge of the world. I suppose that if they had operated submarines as well as surface ships they would have debated as to which was worse: going over the edge of the world in a surface ship or going over the edge of the world in a submerged submarine.

About fifteen years ago, the Marine Technology Society held a meeting in Philadelphia about research and development on the bottom of the ocean. The program committee had heard that Claire Booth Luce was interested in Aqualunging and they were successful in arranging for her to give the after-dinner speech. Mrs. Luce started her excellent talk with comments on how hard the selling job would be to get industry and the government to support work on the ocean bottom. She stressed that since time immemorial mankind had lifted it eyes towards the heavens for hope but had looked downwards with dread. She mentioned that our legends and histories tended to consider oceans more in an ominous sense than in a positive, friendly sense. Mrs. Luce was, of course, correct.

One of the great accomplishments of the marine community in the past twenty years has been to get itself and society to take a much more positive attitude towards marine and deep-sea activities. Technology has helped bring the ocean down to size for people interested in science and engineering. At the same time, many wonderful lectures, TV programs, and books have explained the ocean with words and pictures to a wide audience. Economists and lawyers are grappling with these changing conditions. Meetings such as this help weave the interdisciplinary fabric of our progress.

Scientifically, we have found that the liquid ocean has many of the same characteristics as the gaseous atmosphere. Such major concentrated ocean currents as the Gulf Stream and the Kuroshiwo are reasonably comparable to the high-level jet streams in the air. Geologic theories of plate tectonics and drifting continents again show that Mother Nature is always changing and on the move. Earthquakes and

volcanoes, tornadoes and storms represent extreme and rapid readjustments of Mother Nature's attempts at maintaining her *status quo*.

Long ago Aristotle said that of all man's senses the eye was the best able to tell the difference between things. You lawyers are well acquainted with the importance of a *bona fide* eyewitness. If the water is reasonably clear, this visual concept frequently holds under water also. The intriguing underwater photographs of the ocean bottom taken in the 1940s and 1950s led to the interest and justification for deep research submersibles and deep water cable-connected closed circuit television systems now available. Gradually the bottom of the ocean is being considered to be part of the real world.

Some more items are:

Floating Cables

One of the difficulties in working in very deep water has been that steel cables longer than a few miles had difficulty in supporting much more than their own weight. However, in this modern age we also have our choice of lightweight polypropylene lines that require weights to make them sink. This means that some deep-sea work can be done with lightweight cables, winches, and small ships or yachts.

Transportation

One of the world's largest commercial businesses is hauling non-renewable coal and oil to prodice heat and power. In warm places like New Orleans and Miami, a fair percentage of that power goes into air conditioning. A century ago sailboats carried renewable, biodegradable ice to New Orleans from New England. Perhaps the day may come again when it is commercially practical to air-condition hot seacoast cities with ice from New England, Alaska, Greenland or Antarctica.

The deep water off nearly all coasts is very cold. In Hawaii they are piping the cold deep water ashore to utilize the cold water for a variety of experimental purposes.

Chemistry

Chemists are having a field day. Biologists and chemists are expanding the new field of biochemistry. Geologists and chemists are likewise expanding the new field of geochemistry with the help of some magnificent new industrial analyzers. Modern technology permits very accurate measurements to be made rather easily. They can measure parts per billion where only a few years ago it was parts per million. As always, when scientists and engineers can observe nature with greater ease and precision, they solve some old questions and open up new questions.

Ocean Engineering

Ocean engineers are busy adapting general engineering to problems involving the ocean. Underwater sound is one of the most important techniques because of its wide use by the navies of the world in trying to make their submarines more effective and to make submarines of other countries less effective. The use of underwater sound in scientific and commercial work for navigation, chartmaking, and object avoidance is increasing rapidly. On shore, other versions of underwater sound equipment are being used by engineers to detect flaws in metals. Somewhat similar equipment is used by doctors to look inside of patients with sound rays before or instead of cutting into them with a knife.

Ocean engineering may be of particular interest to lawyers because ocean engineers are apt to be dealing with problems that are close to economics and politics.

Global Surveys

There has been much discussion in recent years about such matters as sea level, ozone, global warming, acid rain, lack of rainfall, and climatic changes. There seems to be little question about some of the changes, but to what extent they are natural changes that have always occurred or whether some of them are manmade and can be minimized is debatable. In any case, we had better find out and improve the situation if we can. If not, learn how to best live with a changing environmental situation.

Oceanographers and meteorologists have been thinking hard about another major global survey and analysis program so as to better understand how our global earth-air-water system works and how it might be changing. Each generation of oceanographers has this same dream, and the past few generations have each done a fine job. This generation is equipped with background information and some marvelous new tools such as satellites, improved computers, and sensitive new instruments. The planning for such an international study is in its early stages and there are good omens for its eventual conduct and value.

In summary, scientists are learning more about the ocean, and engineers are learning how to either better utilize or better ignore the ocean. It is good to know that you lawyers are trying to provide the best legal background for the maritime elements of our society.

John Craven: A question from the floor: Does the ocean have a potential as a disposal area for high level radioactive wastes?

Allyn Vine: Long-lasting containers of high level radioactive waste placed well into the sediment in selected areas of the deep sea is considered by some groups to be the most promising and perhaps best means of long-term retention. These areas would be selected on the basis of type of sediment and remoteness from volcanic or earthquake activity or from fisheries or potential seabed mining regions. It may be that heavy streamlined containers would sink rapidly enough to bury themselves into the bottom.

A small but very good international team has been investigating this for about fifteen years. Unfortunately, the United States' interest in seabed waste disposal is waning. If R&D shows that seabed disposal is practical, it has the great advantage of being available to all nations.

PART IV:

COASTAL STATE PRACTICE IN THE EXCLUSIVE ECONOMIC ZONE: IS IT CONSISTENT WITH THE LOS CONVENTION? SELECTED EXAMPLES OF CONFORMITY AND NON-CONFORMITY

INTRODUCTION

Tullio Treves
Permanent Mission of Italy
To the United Nations

Among the new concepts set forth in the United Nations Convention on the Law of the Sea of 10 December 1982, the one that finds the widest correspondence in international practice is the exclusive economic zone (EEZ). Indeed, the practice of a growing group of states has influenced the shaping of the concept of the EEZ throughout the years of the elaboration of the Convention. The Convention -- as well as, before its opening for signature, the various Negotiating Texts elaborated by the Third UN Law of the Sea Conference -- has influenced the practice of states. As of August 1985, according to the study of National Maritime Claims published by the Office of the Geographer at the State Department, there existed more than one hundred claims for jurisdiction over areas of 200 miles and sixty-five of them were claims of economic zones.

It is now widely acknowledged that the provisions of the Convention concerning the exclusive economic zone correspond by and large to customary law. This appears clearly, for example, in the proclamation of an EEZ by the United States, a country that has not signed the Convention. It has clearly been affirmed by the International Court of Justice. In its judgment on the delimitation of the continental shelf between Libya and Tunisia the Court stated in 1982 that the exclusive economic zone "may be regarded as part of modern international law" (I.C.J., Reports, 1982, p. 74, para. 100). In the judgment of the Court's Chamber on the delimitation of the maritime boundary in the Gulf of Maine area between Canada and the U.S., one reads, furthermore, that the provisions of the Convention on the EEZ "even if in some respect they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question" (I.C.J., Reports, 1984, p. 294, para 94).

In the framework of this general perception of the correspondence in general terms of the EEZ as it is depicted in the Convention and customary law, it seems to be an urgent and most interesting task for the observers of international practice to determine how far this perception corresponds to the true situation of international law. In particular, it seems important to determine whether the details of the Convention's rules on the EEZ correspond to international practice and may be seen as incorporated in customary international law. While it is certain that written law can never reproduce in full customary law, because of the constant and continuing adaptation of the latter to small and big movements of the states' *opinio juris* and practice, it is also true that there are some details and shades of meaning that are not akin to customary law and that only written law can express. Consequently, the search for correspondence between the Convention's provisions and customary law cannot be pushed beyond a reasonable limit.

In general this search starts from the assumption that the Convention contains a detailed and somewhat maximum list of the powers for the coastal states to exercise in the EEZ. Consequently, the object pursued is that of determining whether all the items contained in the list, and all the details pertaining thereto, find support in international practice. In other words, what is most asked is whether international practice (and

international customary law) already reaches as far as the Convention's provisions.

Legitimate and interesting as this approach certainly is, one must consider that the Convention's provisions on the exclusive EEZ can also be seen as the result of a compromise between the interests furthering the traditional uses of the sea (navigation and communication, military activities, etc.) and the interest of the coastal state to extend its power in the adjacent areas of the sea. From this point of view, the Convention's provisions can be seen as a limit whose purpose is to brake the trend of the coastal states to extend their jurisdiction both in terms of miles and of the pervasiveness of the powers they seek.

Seen from this point of view, the task of those seeking to ascertain the degree of correspondence between the Convention and customary law must focus on another aspect. It must determine whether it is this trend or the Convention (or, perhaps, some other rule) that corresponds to today's customary law. The implications of this quest are of the utmost importance also as regards the situation that will prevail at the time the Convention will be in force for some, but not all (or all the important) maritime states.

In entitling the discussion we are about to engage in: "Coastal State Practice in the EEZ: Is it consistent with the LOS Convention? Selected examples of conformity and non-conformity," the Law of the Sea Institute, as well as I, as convenor of this panel, had in mind both aspects of the problem, but thought that the second is the newest and most interesting.

To deal with it, I have the honor to introduce to you the members of a most distinguished panel. They are such specialists in all the aspects of the subject we are about to consider that each of them could easily have undertaken the task of any one of the others.

Indeed, Barbara Kwiatkowska, who is Associate Director of the Netherlands Institute on the Law of the Sea at the University of Utrecht, is in the process of completing a full-fledged monograph on the EEZ. In fact, she had volunteered to present a paper on any of the subjects to be discussed this afternoon.

Tullio Scovazzi, who teaches international law at the University of Parma, Italy, has written extensively on fisheries and on many other relevant subjects. His first published paper on the EEZ is from 1975 when both the subject and the author were very young. And Tullio has been studying the EEZ ever since!

I need say very little about John Knauss and Ed Gold. They know close to everything in the international law of the sea and are, indeed, so familiar to every one in LSI that they need no introduction, other than the warmest thanks for having accepted to participate in this panel.

CONSERVATION AND OPTIMUM UTILIZATION OF LIVING RESOURCES

Barbara Kwiatkowska
Faculty of Law
Netherlands Institute for the Law of the Sea
University of Utrecht
Netherlands

Preliminary Observations

Scope of Examination

The questions which we will try to answer are:

* Is coastal state practice in the EEZ consistent with the LOS Convention?
* What lies ahead?
* Professor Treves has also suggested that any observations on customary law are welcome.

Thus we will examine on the basis of selected examples of conformity and non-conformity not only whether state practice is consistent with the LOS Convention but also whether and to what extent we already can speak about general international law concerning fisheries in the EEZ, and what the prospects are for further developments in this field. We will focus only on the specific principles and rules applicable to conservation and utilization of the living resources, for it is at present incontestable that the institution of the 200-mile zone, be it exclusive economic or fishery zone, and the sovereign rights of the coastal state with regard to exploration, exploitation, conservation, and management of living resources found therein already have become a part of customary international law.[1]

The Method of Examination

There are two possible approaches to the method of assessing coastal state practice against the yardstick of the LOS Convention. One is to analyze the conformity and non-conformity of fishery practice of selected states or groups of states. Such a method has been used by many scholars in their comments on both the legislative and the treaty practices of states. Examples of this approach include the excellent analyses of United States practice by William Burke, Jonathan Charney, and Thomas Clingan; of the European Economic Community fisheries policy by Robin Churchill and Albert Koers; of the practice of Indonesia by Hasjim Djalal; of India by Ram Prakash Anand, Rahmatullah Khan, and Mohamed Nawaz; and of Canada by Barry Buzan, Parzival Copes and David VanderZwaag.[2]

The other method is to examine the conformity and non-conformity of state practice with respect to particular elements of a new fisheries regime in the EEZ as established by the LOS Convention. The most remarkable among the studies based on this approach are general contributions by Carl Fleischer, surveys prepared within the Food and Agriculture Organization by Jean Carroz and Michel Savini with regard to bilateral fishery agreements, and by Gerald Moore on fisheries legislation of states.[3]

I chose the second of the two methods as more appropriate to the topic of this panel and the subject of the present conference. Two other considerations also influence this choice. One is that we are

already facing the second decade[4] of the new era in conservation, management, and utilization of fisheries in the extended zones of coastal state jurisdiction which radically changed the pattern of world fisheries, especially the distribution of access to the living resources of the sea and to the benefits derived from their exploitation.[5] The other is that this conference gives us a rare opportunity for multidisciplinary discussion on all aspects -- whether legal, economic, ecological, or social -- involved in the complex process of fisheries conservation and utilization. As a lawyer, I am fully convinced that a legal analysis of fisheries which fails to appreciate all those aspects cannot be sound.

The Existing Assessments of Conformity and Non-Conformity

Sources of Confusion

A closer look at the existing assessments of conformity and non-conformity of state practice with the particular elements of the new EEZ fisheries regime established by the LOS Convention and its implications for the development of customary law reveals a certain degree of confusion.

Such confusion cannot be claimed as resulting from the continuing disagreements at UNCLOS III. On the contrary, unlike those provisions of the Convention which gained consensus in a later stage of negotiations (*e.g.*, with regard to environmental protection or freedom of navigation in the EEZ[6]) the key fisheries provisions of the LOS Convention were not subject to any substantive changes since their first formulation in the 1975 Informal Single Negotiating Text.

The varying, often conflicting assessments seem, instead, to be due to a combination of factors involving both the assessed objects and the assessing subjects. Those on the part of the assessed objects include:

* the effects of particularity of the decision-making techniques at UNCLOS III, especially the consensus technique on the LOS Convention's provisions;[7]
* the novelty of the EEZ fisheries regime which requires a basic transformation of fisheries conservation and management processes; and
* the difficulties encountered by states in implementation of this regime in practice.[8]

The effect of the consensus technique is twofold. On the one hand, the fact that UNCLOS III succeeded in reaching consensus on all the elements of the EEZ before the final voting took place suggests that states intended to create legally binding principles and rules. On the other hand, the use of consensus called for greater sensitivity to nuances of formulation, so that different, often conflicting positions, corresponding to different subjective realities, could effectively be bridged. As this process sometimes obscured clarity of meaning, oversimplified concepts, and even created inconsistencies of language, interpretation of the LOS Convention became a part of the process of negotiations that led to the delicately balanced compromises achieved in its provisions.[9] In view of the ambiguity of those provisions, some states tend in practice to follow the original positions they took on a given issue during the UNCLOS III negotiations.[10]

At the same time, customary law on the EEZ is a result not of declaration (as in the case of the legal status of the high seas) or crystallization (as in the case of the breadth of territorial sea), but of the generating effect of the LOS Convention.[11] In particular, the conventional provisions *de lege ferenda* concerning fisheries in the EEZ impinge upon state practice, subsequently hardening into customary law, and this process encounters many technical, economic, and social difficulties.

Of the factors involving the assessing subjects, I submit that the most important among them is the use of the mechanical approach, which fails to differentiate between the basic legal principles and rules governing fisheries in the EEZ and criteria and methods to be used for attaining a result consonant with what such principles and rules indicate. Needless to say, such failure is to a large extent due to those factors involving assessed objects, as specified above.

The Pitfall of the Mechanical Approach

The pitfall of the mechanical approach consists in attributing to criteria and methods which vary in each particular case the character of principles and rules capable of generating norms of customary international law. Incidentally, such an approach can also result in misleading conclusions as to the tendency of taking up in state practice and, ultimately, in customary law primarily rights and powers and not obligations and responsibilities.[12] Even though the main purpose of our examination is to verify the mechanical approach, we will first review briefly all elements of the EEZ fisheries regime established by the LOS Convention against which state practice can be assessed. Such an inventory will enable us to review all instances of conformity and non-conformity and to choose those which are relevant from the viewpoint of evolved or emerging principles and rules of general international law.

The Summary Review of Conformity and Non-Conformity

Basic Objectives of Fisheries Management and Conservation
Articles 61 and 62, paragraph 1 of the LOS Convention.

Content: The basic objectives of fisheries management and conservation as established in the LOS Convention are:

* ensuring by the coastal state, on the basis of the best scientific evidence available to it, and through proper conservation and management measures (CMMs), that the living resources are not endangered by over-exploitation. Also, cooperating to this end, as appropriate, with international organizations;
* maintaining or restoring by the coastal state, through proper CMMs, the living resources at the level of maximum sustainable yield (MSY), as qualified by relevant environmental and economic factors. Also, taking into account fishing patterns, the interdependence of stocks, and international minimum standards;
* establishing by the coastal state, as one of the CMMs, of the total allowable catch (TAC);[13]
* contributing and exchanging by all states concerned, through international organizations, where appropriate, available information and data relevant to fisheries conservation ("all states concerned" meant to include foreign states fishing in the EEZ); and

* promoting by the coastal state of optimum utilization of the living resources without prejudice to the objectives specified above.

Conformity and Non-Conformity: State practice generally conforms with the basic objectives of fisheries management and conservation embodied in the LOS Convention.[14]

More specifically:

* Numerous states, especially developing countries, assert sovereign rights over not only exploration and exploitation but also conservation and management of living resources in their 200 mile zones without, however, indicating any management and conservation objectives (*e.g.* Bangladesh, Costa Rica, Democratic Kampuchea, Equatorial Guinea, Guatemala, Maldives, Mauritania, Nigeria, Sri Lanka, and Vietnam), or specify such objectives in general terms (*e.g.*, Colombia, Malaysia, Papua New Guinea, Peru, Philippines, Sao Tome and Principe, Solomon Islands, and Tuvalu).
* States whose legislation and treaty practice shows a good deal of similarity to the relevant provisions of the LOS Convention, including those on the determination of the TAC, are, *e.g.*, Australia, Bahamas, Canada, Cook Islands, Cuba, the European Economic Community, Federated States of Micronesia, Fiji, Gambia, Indonesia, Japan, Marshall Islands, Mexico, Nauru, New Zealand, Niue, Norway, Palau, Poland, Portugal, the Republic of Korea, Tonga, the U.S., the USSR, and Venezuela. Even though the detailed concepts adhered to by those states vary, *e.g.*, the U.S. and Bahamas adhere to the objective of optimum yield (OY) and states in the western Pacific region link the TAC with purely biological criteria -- most scholars and commentators agree that such practice is consistent with the LOS Convention's objectives.[15]
* A new and important concept not specifically embodied in the LOS Convention but emerging from state practice is planning in fisheries management and conservation.[16] States which introduced fisheries management plans (specifying the management objectives and CMMs) include, *e.g.*, Australia, Gambia, Malaysia, New Zealand, the U.S., and Vanuatu.

Customary Nature:

* Whereas many scholars admit that a coastal state may -- under customary law -- exercise sovereign rights over living resources within its 200 mile zone,[17] only some of them indicate that state practice confirms the sovereign character of the coastal state's exclusive rights to decide the rules applicable within that zone.[18] In particular, both national legislation and fishery agreements show that the management and conservation powers, including the establishment of TAC, are vested solely in the coastal state.
* A few authors have ascertained that state practice -- regardless of whether or not it incorporates the exact formulas of the LOS Convention (or its preceding negotiating texts) -- provides sufficient evidence that the sovereign rights of the coastal state with regard to living resources are, under general international law, qualified by its obligation to conserve and manage fisheries and to avoid over-exploitation.[19] According to adherents to this view, no specific rules, *e.g.*, with regard to the establishment of TAC, have yet emerged.
* Some opinions explicitly deny any possibility of inferring from state practice the obligation of rational management and conservation

or any rules concerning detailed matters such as TAC, endangering a target species, safeguarding associated or dependent species, and the identification of such species.[20]

Optimum Utilization
Articles 62, 69, 70, and 73 of the LOS Convention.

Foreign Access to the Surplus Catch
Article 62, paragraph 2

Content: The basic principles established by the LOS Convention for the purpose of promoting the objective of optimum utilization (Article 62, paragraph 1) include:

* determination by the coastal state of its capacity to harvest the living resources in its EEZ; and
* giving other states access to the surplus of TAC exceeding the coastal state's harvesting capacity. This is done through agreements or other arrangements and pursuant to terms and conditions established in the legislation of coastal state.

Conformity and Non-Conformity: Although almost all coastal states provide for foreign access to fisheries in their 200 mile zones, this practice is far from uniform.[21]

More specifically:

* A significant number of states, especially developing countries, do not refer in their legislation and fishery agreements to the TAC and surplus rule but provide for foreign fishing and establish the detailed terms and conditions for such access (relating to licenses and other measures). In the case of developing states, foreign catch is often considered as corresponding to the surplus.[22] According to some scholars, such practice may be interpreted to mean that there is no legal right of access and the coastal state has complete freedom of choice whether or not to allow foreign states to fish in its zone.[23]
* States which incorporated the surplus rule in their legislation and fishery agreements include, *e.g.*, Australia, Canada, Bahamas, Cape Verde, Cook Islands, Cuba, the EEC, Federated States of Micronesia, Fiji, Gambia, Indonesia, Japan, Marshall Islands, Mexico, Nauru, New Zealand, Niue, Norway, Palau, Papua New Guinea, Poland, Portugal, the Republic of Korea, Sao Tome and Principe, Tonga, United Arab Emirates, Venezuela, and the USSR.[24]

The practice of those states reflects a variety of approaches: general or more detailed procedures established to implement the surplus rule; the conditional or mandatory character of granting access to foreign states; differences in duration of access and differences as to the substance of a surplus rule. Some commentators indicate that, at certain points, practice does not completely comply with the LOS Convention, but they find the area of non-compliance to be of little practical significance.[25] Strong objections have only been raised against the attempt to promote a total phase-out of foreign fishing in the American zone,[26] but many scholars maintain that a phase-out program is compatible with the LOS Convention.[27] The legitimacy of displacement of foreign fleets by those of the coastal state, proclaimed by many other states as a goal of their fisheries management,[28] has never been objected to nor has the consistency of access based on

reciprocity (as, *e.g.*, applied by the European Economic Community)[29] with the LOS Convention ever been challenged.

Apportionment of the Surplus Catch
Article 62, paragraphs 2 and 3 and Articles 69 and 70.

Content: In giving other states access to the surplus, a coastal state has to take into account all relevant factors. A few examples thereof are listed in Article 62, paragraph 3:

* the significance of the living resources to the economy and other national interests of the coastal state;
* participation of the landlocked and other geographically disadvantaged states (LL/GDS) as established in Articles 69 and 70;
* the requirements of developing states in the subregion or region; and
* the need to minimize economic dislocation in states which have habitually fished in the zone or made substantial efforts in research and identification of stocks.

In addition, Article 62, paragraph 2 provides that in giving other states access to the surplus, the coastal state is to have particular regard to the provisions of Articles 69 and 70, especially to the developing states mentioned therein. Paragraph 1 of Articles 69 and 70 provides for participation of LL/GDS in conformity with the provisions of Articles 61 and 62.

Conformity and Non-Conformity:

* A number of states which incorporated in their legislation and fishery agreements the LOS Convention's provisions relating to the TAC and surplus rule also specify criteria for determining the apportionment of the surplus which correspond to those listed in the LOS Convention.[30] Similar criteria are applied by states for the purpose of issuing foreign fishing licenses and allocating catch quotas. The lists of such criteria are expressly non-exhaustive.
* The participation of the LL/GDS is referred to explicitly only in the legislation of Haiti, Morocco and Togo. Moreover, the interests of coastal GDS are accommodated under the 1983 Common Fisheries Policy of the EEC and the 1984 Convention on Regional Development of Fisheries in the Gulf of Guinea. Certain other initiatives towards regional cooperation, especially in Africa, may also result in the accommodation of the position of those states.[31]

Iran, Sudan and Romania made special declarations upon signature of the LOS Convention to the effect that states being GDS themselves are not supposed to accommodate interests of other GDS in their zones. Spain explicitly declared that the access of developed LL/GDS depends upon prior granting of access to states traditionally fishing in the area.

* The examples of criteria applied in state practice in addition to those explicitly listed in the LOS Convention are: cooperation in enforcement of the coastal state's fisheries regulations (*e.g.*, Bahamas, Fiji, Marshall Islands, New Zealand, and the U.S.); cooperation with regard to trade in fish and fisheries products (*e.g.*, Australia, Canada, the U.S.); and cooperation in development of the coastal state's fisheries (*e.g.*, the U.S., Malaysia).[32]

* Some scholars raise questions as to the conformity of American legislation with the LOS Convention on the ground that the former has deleted (by virtue of 1980 amendments) the criterion of minimizing economic dislocation in traditional fisheries and omits participation of LL/GDS and developing states in the region.[33] Other believe that the coastal state is authorized by the LOS Convention to take into account any relevant factors, with its own interests having preference. It is also emphasized that the U.S. has already fulfilled its obligations towards traditional fisheries and that the position of GDS and/or developing states might be accommodated by giving more weight in allocation decisions to the needs of Caribbean states and Mexico.[34]

Terms and Conditions for Foreign Fishing
Article 62, paragraphs 4 and 5 and Article 73

Content: States which are granted access to fish in the 200 mile zone must comply with a coastal state's regulations establishing conservation measures and other terms and conditions consistent with the LOS Convention. Paragraph 4 of Article 62 contains an extensive but non-exhaustive list of such terms and conditions, including enforcement procedures, and paragraph 5 requires a coastal state to give due notice of its regulations.

The enforcement procedures are subject to Article 73, which explicitly forbids imprisonment, unless provided otherwise by agreements of states concerned (paragraph 3).

Conformity and Non-Conformity: Almost all coastal states established, by virtue of their legislation and fishery agreements, detailed terms and conditions for foreign fishing in their 200 mile zones.[35] Such terms and conditions are considered of fundamental practical importance as the implementation of access depends on the reasonableness of license fees and other measures.

* A significant trend noticeable in state practice is towards regional harmonization of conditions for foreign fishing as evidenced by the 1982 Nauru Agreement; the arrangements made by member states of the South Pacific Forum, including the establishment of a regional register of fishing vessels (operating since 1983 in Honiara, Solomon Islands); and the efforts undertaken by member countries of the Organization of Eastern Caribbean States and by Western African states (Cape Verde, Gambia, Guinea Bissau, Mauritania and Senegal).[36]
* A major case of non-conformity of state practice with the LOS Convention exists in the laws of thirty-two states that provide for imprisonment as a possible penalty for illegal unlicensed fishing.[37] This category does not include the U.S., which in practice secured agreement of the states concerned.[38]
* A controversial question is whether and to what extent the controls claimed by a large number of states (*e.g.*, Australia, Canada, Costa Rica, Gambia, Maldives, New Zealand, Solomon Islands, Spain and the U.K.) over transit of unlicensed foreign fishing vessels through their EEZs are consistent with the LOS Convention.[39] Most of the requirements of this kind are considered to be incompatible with the LOS Convention. Such controls are deemed necessary to protect the legitimate interests of the coastal state, but at the same time may impede the freedom of navigation in the EEZs. Most commentators believe that to conform with the LOS Convention such measures can be taken depending on the circum-

stances of foreign transit/access in a particular 200 mile zone, and only in exceptional situations.[40] In spite of various attempts to define such situations and criteria related thereto, *e.g.*, the direct readiness of vessel for immediate fishing, there are no clear formulas on which to base such controls.

Customary Nature of Principles and Rules Pertaining to Optimum Utilization:

* As in the case of fisheries management and conservation, some scholars emphasize that both national legislation and fishery agreements demonstrate the exclusivity of the coastal state's prescriptive and enforcement powers with regard to optimum utilization of the living resources as deriving from sovereign rights exercised by that state in the EEZ.[41]
* Several commentators express their conviction as to the customary nature of the principle of optimum utilization, as evidenced by a large number of national laws and fishery agreements providing for foreign fishing in conformity with the provisions of the LOS Convention.[42]
* Others are of the opinion that the LOS Convention's provisions on the determination by the coastal state of its harvesting capacity and providing foreign states with access to a surplus have not found their way into customary law through practice of states.[43]
* A moderate view between those two positions is that the general acceptance of the 200 mile zone has been subject to a condition that the coastal state may not exclude or curtail foreign fishing without sufficient reasons, but it would be difficult to find support in state practice for any specific customary rules concerning optimum utilization, harvesting capacity and surplus.[44] It is also emphasized that the lack of uniformity of state practice makes less likely the development of a uniform rule of customary law on foreign access.[45]

Straddling Stocks
Article 63, 116 and 123 of the LOS Convention

Content: In addition to principles and rules embodied in other articles of Part V:

* Where the same stock occurs within two or more EEZs, coastal states must seek to agree upon the conservation and development measures and their coordination (Article 63, paragraph 1). States bordering the enclosed and semi-enclosed seas must endeavor to coordinate the management, conservation, exploration and exploitation of the living resources of such seas (Article 123(a)).
* Where the same stock occurs within the EEZ and in the adjacent high seas, the coastal state and the fishing states must seek an agreement on conservation measures with regard to the area of the high seas (Article 63, paragraph 2). Article 116 subjects the freedom of fishing on the high seas to Article 63, paragraph 2.

Conformity and Non-Conformity/Customary Nature:

* Neighboring coastal states in various regions increasingly acknowledge their joint responsibility for seeking an agreement on conservation and management of stocks migrating between their EEZs in conformity with the LOS Convention. This is evidenced by practice of,

e.g., the United States and Canada; the European Economic Community with regard to stocks shared with other states; the Baltic states; the Gulf of Guinea states; and activities of the regional fishery commissions of the FAO.[46] No conclusions as to the customary nature of the principle of international cooperation in this respect have been drawn.
* Although the LOS Convention provides only for conservation of the EEZ/high seas stocks and only in the adjacent high seas, state practice acknowledges the interrelationships that exist between both conservation and optimum utilization of such stocks within and beyond 200 miles.[47]

Furthermore, state practice in the regions where such stocks are at present exploited (North and Southwest Atlantic and South Pacific) reflects basically shared responsibility of the coastal states and the relevant organizations for coordination of fisheries measures within and beyond 200 miles; at the same time there is a noticeable tendency to ensure the consistency of measures applicable to the high seas with those adopted by the coastal state in the EEZ.[48]

Some scholars have raised objections as to the conformity with the LOS Convention of the practice by Canada which introduced in its bilateral agreements the concept of "special interest" in the living resources situated beyond its 200 mile zone.[49] As this concept has also partly been reflected in the 1978 NAFO Convention, this practice is considered as evidence of the emergence of subregional rule in the Northwest Atlantic non-conforming with the LOS Convention.[50]

Other authors emphasize that the Canadian concept of "special interest" failed during NAFO negotiations and that the NAFO Convention only gives Canada "some claim of preferential treatment in the allocation of the catches of the Grand Banks and Flemish Cap stocks".[51]

Highly Migratory Species (HMS)
Articles 64 and 116 and Annex I of the LOS Convention

Content: The coastal state and other states harvesting HMS in a given region must cooperate with a view to ensure conservation and to promote optimum utilization of HMS both inside and outside the EEZs. If no appropriate organization exists in a given region, states must cooperate to establish it (Article 64, paragraph 1). State obligations of international cooperation specified above apply in addition to other provisions of Part V (Article 64, paragraph 2). Article 116 subjects the freedom of fishing on the high seas to Article 64.

Conformity and Non-Conformity/Customary Nature:

* State practice shows an increasing acceptance of the obligation of international cooperation established in Article 64.[52] At the same time, U.S. practice has resulted in a major controversy with regard to the question of conformity of a coastal state's jurisdiction over HMS with the LOS Convention.
* The U.S. (also Bahamas) affirmatively excludes one group of these HMS *i.e.*, tuna, from its fishery authority within the EEZ and claims that customary law precludes the coastal state from exercising this kind of jurisdiction.[53] This resulted in a conflict with Canada and the South Pacific states (where approximately 70 percent of the world's tuna is caught) which explicitly include -- by virtue of their legislation (*e.g.*, Australia, Cook Islands, Fiji, New Zealand and Western Samoa) and fishery agreements (the 1979 South Pacific Forum Fisheries Agency

(SPFFA) Convention) -- the HMS in their jurisdiction within 200 mile zones.[54]

The conflicting positions of states have partly been reconciled under the 1981 U.S.-Canadian Agreement on Pacific Coast Albacore Tuna Vessels and Port Privileges and the 1983 Eastern Pacific Ocean Tuna Fishing Agreement signed by the U.S., Costa Rica, Guatemala, Honduras and Panama.[55] In the western Pacific the lack of agreement between the U.S. and the SPFFA resulted in 1985 in the conclusion of the first bilateral treaty with the USSR (by Kiribati, possibly to be followed by Vanuatu).[56]

* Some commentators maintain that the exclusion by the U.S. of tuna from its authority within the 200 mile zone conforms with the LOS Convention because, *inter alia*, Article 64 reflects a basic, mandatory objective of establishing the uniform international management of tuna.[57]

However, the predominant view is that the HMS fall under the sovereign rights of the coastal state in the EEZ as qualified by the obligation of international cooperation established in Article 64, and therefore, the U.S. position does not conform to the LOS Convention.[58] Some scholars are of the opinion that coastal states' authority over tuna in a 200 mile zone is recognized under customary law, but state practice provides no basis for the customary nature of the principle of international cooperation with regard to the conservation and utilization of HMS in the EEZ.[59] Others believe that the U.S. position generally weakens the contention that on these points the LOS Convention reflects customary law.[60]

Marine Mammals (MM)
Articles 65 and 116 of the LOS Convention

Content: The coastal state or international organization, as appropriate, has the right to prohibit or regulate the exploitation of MM more strictly than provided for in Part V. States must cooperate with regard to conservation of MM, in the case of cetaceans through international organizations (Article 65). Article 116 subjects the freedom of fishing on the high seas to Article 65.

Conformity and Non-Conformity/Customary Nature: State practice with regard to MM conforms with the LOS Convention. Among important measures undertaken at an international level are: a five year moratorium on commercial whaling starting from 1986 adopted by the International Whaling Commission; initiatives to develop regional agreements for the Baltic and North Seas; and the 1984 FAO/UNEP Global Plan of Action for the Conservation, Management and Utilization of Marine Mammals.[61]

Anadromous Stocks (AS)
Articles 66 and 116 of the LOS Convention

Content: According to Article 66 of the LOS Convention:

* states of origin of AS have the primary interest in and responsibility for conservation and utilization of such stocks both within and beyond the EEZ (paragraphs 1 and 2);
* the state of origin may, after consultation with the fishing states, establish the TACs for anadromous stocks (paragraph 2);

* fisheries for AS can only be conducted within the EEZs, except where this would result in economic dislocation of states other than the state of origin (paragraph 3); and
* states of origin and other states concerned must cooperate as to prescriptive and enforcement measures of conservation and utilization of AS (paragraphs 3-5).

Article 116 subjects freedom of fishing on the high seas to Article 66.

Conformity and Non-Conformity/Customary Nature:

* In spite of certain differences between legislative and treaty practice by the states of origin (in particular Canada, Japan, the U.S., and the USSR) and the LOS Convention,[62] state practice in the regions where anadromous stocks occur (North Atlantic and North Pacific) show recognition of primary interest and responsibility of the state of origin, limitation of fishing to the areas within 200 mile zones, and the indispensability of international cooperation in conservation and management of such stocks.[63]
* Some commentators maintain that the LOS Convention's rules support the prior positions of the states of origin with regard to their primary interest in AS and progressive phase-out of the high seas fisheries for such stocks and, therefore, at least in those parts, codify the existing law.[64] Others, while convinced of the customary character of those rules, as well as of the principle of cooperation of all states concerned in conservation and management of such stocks, doubt whether general international law permits the enforcement authority of the state of origin beyond its EEZ, as claimed by the United States.[65]
* Very rarely is the view expressed that the LOS Convention creates a new rule of law by granting special rights to states of origin and likewise that the U.S. legislation (and presumably that of other states of origin) does not conform to the LOS Convention.[66]

Sedentary Species
Article 56, paragraph 3, Article 68 and Part VI of the LOS Convention

Content: The conservation and utilization provisions of Part V do not apply to the living resources of the seabed and subsoil of the EEZ that are sedentary species, as defined in Article 77 of Part VI on the Continental Shelf (Article 68).

The coastal state exercises its sovereign rights with respect to the seabed and subsoil of the EEZ in accordance with Part VI (Article 56, paragraph 3).

Conformity and Non-Conformity/Customary Nature: No uniformity in the EEZ legislation of states exists.

More specifically:

* Some states explicitly exclude the sedentary species from the scope of the fisheries regime (*e.g.*, Australia, New Zealand). Most states either specify that the EEZ does not affect sovereign rights over sedentary species (*e.g.*, Portugal); or that the exercise of the rights with regard to the seabed and subsoil of the EEZ is subject to the legislation concerning continental shelf (*e.g.*, France and the USSR);

or simply include those species in the living resources of the continental shelf (*e.g.*, Burma, Democratic Vietnam, Dominican Republic, India, Pakistan and Seychelles).

* States which include sedentary species into the fisheries regime applicable to their 200 mile zones are: the U.S., Bahamas and Gambia.[67] This approach is also followed by some states belonging to the first group, specified above as shown by inclusion of sedentary species in fisheries resources of the "protected zone" established under the 1978 Treaty on Sovereignty and Maritime Boundaries between Australia and Papua New Guinea.[68]

* Some scholars criticize Article 68 of the LOS Convention, emphasizing that national conservation and utilization of sedentary species requires such species to be subject to the fisheries regime of the EEZ.[69] Others believe that these questions are of no practical importance within the EEZ, since all rights to exploitation of resources within that zone are vested in the coastal state.[70] However, in the view of some scholars it is important to determine which regime, that of the EEZ or the continental shelf, applies. Application of the EEZ regime would mean the coastal state's obligation to give foreign states access to the surplus of sedentary species.[71]

Verifying the Mechanical Approach

The Determination of Norm-Creating Provisions of the LOS Convention

To adequately assess the conformity and non-conformity with the LOS Convention of state practice relating to the new fisheries regime in the EEZ and its implications for the development of customary international law, we must first determine which articles governing fisheries in the EEZ might be norm-creating provisions. Only when we establish that can we proceed further in determining whether, to what extent, and which of these provisions have generated the rules which have passed into the general *corpus* of international law binding upon states notwithstanding the Convention's entry into force. Otherwise, we are exposed to the pitfall of the mechanical approach which, as I said, may mislead us in our assessments of both the conformity of state practice with the LOS Convention and the customary character of emerging or emerged principles.

Although it is commonly acknowledged that not every provision of the LOS Convention is capable of impinging upon customary international law and that customary rule cannot, by its very nature, correspond in every detail to the written rule,[72] the review of assessments of the new fisheries regime in the EEZ proves that in specific cases it is difficult to determine the provisions which are generalizable as norms of law. This question was addressed briefly by Robin Churchill at the 1985 LSI conference in Cardiff. Considering the fisheries conservation and utilization duties of the coastal state within the EEZ, he observed that:

> it is doubtful whether all these duties have become part of customary international law because some of these duties allow such a latitude of discretion by the coastal state that they would not be of a "fundamentally norm-creating character", which according to the International Court of Justice is a necessary quality for a treaty provision if it is to pass into customary international law.[73]

As a basis for identification of such norm-creating provisions of the LOS Convention, I propose to call upon the essential distinction that has been drawn by the Chamber of the Court in the *Gulf of Maine* case between:

> what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules in question.[74]

The basic legal principles and rules governing the matter "lay down," as the Chamber stated, "guidelines to be followed with a view to an essential objective" and only they can generate rules which may pass into customary international law.[75]

The criteria or practical, often technical, methods or combination of methods used for attaining an essential objective can only be determined in relation to each particular case and its specific characteristics. They "remain," according to the Chamber, "simply criteria and methods even where they are also, in a different sense, called principles" and are incapable of being generalizable as the norms of law and, therefore, of impinging upon formation of principles and rules of customary law.[76]

The Obligations of Conservation, Rational Management and Optimum Utilization

Keeping this distinction in mind, I submit that, among provisions contained in Articles 61 and 62 of the LOS Convention, the only basic principles that impinge upon customary international law are the coastal state's obligations of conservation, rational management, and optimum utilization of the living resources which qualify sovereign rights of the coastal state over those resources within the 200 mile zone.

Articles 61 and 62 of the LOS Convention: An essential objective of those obligations is to ensure that the maintenance of the living resources in the EEZ is not seriously endangered (Article 61). At the same time, optimum utilization must be promoted without prejudice to the objective of conservation (Article 62, paragraph 1).[77]

The coastal state is obliged to attain these objectives through the proper conservation and management measures based on the best scientific evidence available to it and designed both to maintain and restore the living resources according to the requirements of conservation. To this end, a coastal state must cooperate, as appropriate, with international organizations and other states concerned (Article 61, paragraphs 2 and 3).

Other Provisions of the LOS Convention: In addition to those specific provisions of Articles 61 and 62, a coastal state's obligation to manage the resources and to take effective measures of conservation can be inferred from Article 56, paragraph 1 (a) providing for sovereign rights of this state not only for the purpose of "exploring and exploiting" but also "conserving and managing" such resources[78] as well as from certain environmental obligations formulated in Part XII of the LOS Convention. In particular, the Convention codifies the basic obligation of states to protect and preserve the marine environment, including marine life (Article 192)[79] and requires states to balance their sovereign right to exploit their natural resources pursuant to

their environmental policies with this basic duty (Article 193). Moreover, the Convention specifically provides for preservation of the unique ecosystems and protection of the habitats of endangered species (Article 194, paragraph 5), one of its major achievements from the viewpoint of conservation.[80]

An important argument consists also in the fact that, as its preamble specifies, the LOS Convention has been adopted in recognition of the desirability of promoting among others equitable and efficient utilization and conservation of the living resources. To achieve those purposes, states have a general duty to fulfill all their obligations in good faith and to exercise their rights in a manner which would not constitute an abuse of right (Article 300).

State Practice: If we assess state legislative and treaty practice concerning fisheries in the 200 mile zone against the yardstick of those provisions of the LOS Convention that provide for basic obligations of conservation, rational management, and optimum utilization of the living resources, we will find that, as summarized above, coastal states generally acknowledge those obligations.

In addition, important evidence of such recognition may also be inferred from state activities within various regional fishery bodies and other international organizations concerned with fisheries, both within and outside the United Nations system, which significantly enhance state cooperation in conservation, management, and optimum utilization of the living resources situated in the 200 mile zones.[81]

The considered objectives also constitute the important element of (by now nine) Action Plans for the Protection of the Marine Environment and Coastal Areas in the regions covered by the UNEP's Regional Seas Program.[82] In particular, all those action plans aim, among others, at such management of socio-economic development activities which safeguard environmental quality on the one hand, and the protection and utilization of marine living resources on a "sustainable basis" on the other. Accordingly, the sound management, conservation, and utilization of living resources is one of the main fields of activities carried out under those action plans and the relevant conventions,[83] with the protection of rare and endangered species, including marine mammals, governed by separate protocols to those conventions.[84]

Finally and most significantly, one of the basic principles of the Strategy for Fisheries Management and Development endorsed by the 1984 FAO World Fisheries Conference explicitly recognizes that:

> The sovereign rights of coastal states with respect to the exploration, exploitation, conservation and management of the living resources in their exclusive economic zones are the basis for the rational management and optimum use of these resources (III-11).[85]

At the same time:

> Management should be conceived and understood not as a constraint upon rational exploitation but as an essential tool for the sound, sustained development of fisheries. Hence, management of fisheries is an integral part of the development process (III-12).

It has also been emphasized that the text of Strategy, constituting a World Fisheries Charter, was not intended to reopen the issues

settled at UNCLOS III and that it was without prejudice to the provisions of the LOS Convention.[86]

Subsequently, the Strategy has been endorsed by resolution 39/225 adopted by the UN General Assembly by consensus in 1984.[87] Recognizing the relevant provisions of the LOS Convention and bearing in mind "the importance of the need to promote improvements in the production and distribution of all food and agricultural products, including those from fisheries, and to raise levels of nutrition and standards of living," the General Assembly invited states and international organizations to take into account the principles and guidelines contained in the Strategy when planning the management and development of fisheries.

On the basis of state legislative and treaty practice with respect to fisheries within the EEZ (reviewed in a summary above) and my present observations we can, in my opinion, submit that the coastal state's obligations of conservation, rational management, and optimum utilization of the living resources have already passed into the general *corpus* of international law.[88]

Principles Related to Straddling and Migratory Species

The basic obligations of the coastal state considered above are accompanied by specific principles formulated in the LOS Convention with regard to straddling and migratory species. The distinctive characteristic of those principles is that, although they are of a norm-creating character, their applicability -- unlike that of basic obligations of conservation and optimum utilization -- is limited to the regions and subregions where such species occur.

Practice of states sharing the same stocks or stocks of associated species in their EEZs (reviewed above) clearly evidences an emerging customary principle providing for state obligation to coordinate and ensure conservation and development of such stocks in conformity with the LOS Convention. Even though in the Convention this obligation related only to "seeking to agree upon" the necessary measures, in practice "the advantages of joint management and agreed sharing of transboundary stocks . . . are so evident that in long term neighboring countries are almost bound to reach a settlement."[89] The World Fisheries Strategy which identified possible elements of the harmonization of management regimes of such stocks in the EEZ (III-14 xi and xii) will certainly have an accelerating effect upon such cooperation.

The character of an emerging principle of customary law could also be attributed to the obligation of the coastal and fishing states to cooperate (and certainly to "seek" to cooperate, as the LOS Convention provides) with regard to the conservation of the coastal zone/high seas stocks. At the same time, even though a tendency (noted earlier) to ensure in practice the consistency of measures applicable to the high seas with those adopted by the coastal state is at variance with the LOS Convention, it does not contradict the substance of the obligation established therein. It may, therefore, be regarded as reflecting an admissible, in the light of the Convention, form taken by this obligation in the practice of states whose interests are specially affected.

The concept of "special interest" of the coastal state in the EEZ/high seas resources beyond 200 miles, as claimed by Canada is, to the contrary, inconsistent with the LOS Convention. Moreover, no subregional rule on such "special interest" in the northwest Atlantic could, in my opinion, be inferred from the accommodation of Canada's

interests by granting it preferential treatment under the NAFO Convention. Yet, due to the determined position of Canada and other states having interest in such stocks at UNCLOS III it would be difficult to exclude certain developments to this end in the future.

As far as the highly migratory species are concerned, there is the controversial problem (noted above) of the possible impact on the formation of a customary law of the exclusion by the United States of tuna from its fishery authority within the EEZ. The question to be answered is, in particular, whether dissent by the U.S., as one of the world's major tuna fishing states, prevented the sovereign rights of the coastal state over tuna from acquiring the status of a customary law rule or whether such a rule emerged but the U.S. has a title to claim that the rule does not apply to it. Limited time makes it impossible to deal with all aspects of this question. It involves controversies with respect to both interpretation of the relevant provisions of the LOS Convention and the impact of the practice of the dissenting state on the formation of a new rule of customary law.[90] Yet, and with full respect for the commentators who maintain to the contrary, the circumstances of the present case seem to give us the ground to ascertain the customary nature of a principle providing for sovereign rights of the coastal state over highly migratory species, including tuna. However, this principle does not apply to the persistent objector, *i.e.*, United States, which has maintained its dissent consistently and openly from a time when the alleged customary rule had not yet crystallized.[91] This does not preclude that, as many scholars agree, the controversy of the coastal state's sovereign rights *versus* international management of tuna can be settled through practical arrangements between the U.S. and the states concerned, especially when no state objects to the indispensability of international management.[92]

Unlike the case of HMS, the practice of the states of origin of anadromous stocks (summarized above) generally conforms with the LOS Convention. Subsequently, we can claim the emergence of customary rules concerning the primary interest in and responsibility of the state of origin for anadromous stocks; limitation -- with exceptions conforming with those permitted by the LOS Convention -- of fishing for such stocks to the areas within 200 mile zones; and international cooperation of the states of origin and the fishing states (both in the neighboring EEZs and the high seas) in conservation and utilization of such stocks.[93]

Enforcement of Fisheries Regulations

The customary nature of the sovereign rights of the coastal state over living resources covers not only legislative but also enforcement powers exercised by that state in its 200 mile zone (Article 56, paragraph 1(a) and 73).[94] In this case, even though state practice is largely compatible with the LOS Convention, a major non-conformity exists in the laws of some states that provide for a penalty of imprisonment as well as control over transit of unlicensed foreign fishing vessels through their EEZs (both noted earlier).

Criteria, Standards and Methods to Attain Conservation, Rational Management, and Optimum Utilization

Turning to the principles and rules contained in Articles 61 and 62 of the LOS Convention other than the basic obligation of conservation, rational management and optimum utilization of the living resources in the EEZ, I would like to submit a thesis which may not

easily gain widespread acceptance. I am convinced that, at the present stage of development of state practice concerning fisheries within the 200 mile zones, all those principles and rules, including the ones relating to the permissible level at which the living resources should be maintained or restored, the total allowable catches and the foreign access to the surplus catch constitute practical criteria, standards and methods to be used to attain conservation, rational management and optimum utilization of the living resources.[95] Such standards and methods, often of a technical character, have to be established by the coastal state according to specific characteristics of fisheries in its zone as well as its particular socio-economic situation and cannot -- by their very nature so determined -- generate rules capable of impinging upon customary law.[96]

Inadequacy of the LOS Convention: Even though the provisions of Articles 61 and 62 of the LOS Convention use the term "shall" (indicating the coastal state's obligations), their practical and/or technical character gives the state such a large broad of discretion that it is difficult to clearly qualify them in terms of obligations. This is further reflected in the dispute settlement provisions of Article 297, paragraph 3(a) of the LOS Convention which explicitly refers to the coastal state's "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."[97] As a result, there is also a significant inconsistency in the literature in addressing the relevant competences of the coastal state as duties or rights.[98]

As I already mentioned, the provisions of Articles 61 and 62 gained relatively early consensus during negotiations of UNCLOS III. Specifically, they have been reproduced in the negotiating text of the Convention from the 1975 Draft of the Evensen Group. This Draft was considered to offer the best compromise between the conflicting interests of the coastal and distant water fishing states, both developing and developed, and was accepted by states due to their "awareness that a persistent and essential disagreement would mean chaos in the future law of the sea and constitute the source of endless disputes."[99] How far this compromise was from the ideal was proven by the protracted negotiations that were further carried out on the interrelated problems of the rights of landlocked and other geographically disadvantaged states and the settlement of fisheries disputes.

Without underrating the decisive role played by the Evensen Group in the wide acceptance of the EEZ, it should be emphasized that the formulas of its 1975 Draft now incorporated in the LOS Convention can only be viewed as reflecting the best compromise available at the time when they were negotiated. What I mean is that ten years ago states simply lacked the necessary experience in managing, conserving, and utilizing living resources in the vast areas of 200 mile zones to propose rules more adequate than those now found in the Convention.[100]

Basic Transformation of Fisheries Conservation, Management and Utilization: In replacing traditional open access to coastal fisheries, the new fisheries regime for the EEZ transformed fisheries conservation, management, and utilization processes. After the fisheries provisions of the LOS Convention were agreed upon, the 1984 FAO World Fisheries Strategy, for the first time, and without prejudice to the LOS Convention, formulated principles and guidelines to be taken into account by the coastal states in the reassessment of approaches to the

rational management and optimum use of living resources in their EEZ (III-14). These guidelines were drawn to enable coastal states "to take greater advantage of those resources to increase the contribution they make to national economic, social and nutritional objectives" (I-6). However, priorities among alternative objectives of state fishery policies such as food production, generation of income and employment, or resource conservation were not set nor was a single model for fisheries development chosen. Therefore, as the Strategy expressly states:

> Individual governments have to determine their own policies and objectives in the light of their particular situations and requirements.(I-7)

Furthermore, since many countries lack the relevant knowledge of the biological, economic, and social aspects of fisheries, as well as the capacity to use the opportunities and to carry out the tasks inherent in the new regime (III-13), the Strategy regards a substantial improvement and systematic development in the technical, institutional and financial self-reliance of states, especially developing countries, as a key issue facing world's fisheries at present (II). It also addresses and formulates principles and guidelines with regard to other important questions raised by the new fisheries regime that relate to small-scale fisheries and aquaculture (IV), international trade in fish and fishery products (V), investment in fisheries management and development (VI) as well as economic and technical (VII) and international fisheries cooperation (VIII). Moreover, the Strategy is accompanied by a comprehensive and integrated package of five Programs of Action adopted by the World Conference in order to complement the Program of Assistance in the Development and Management of Fisheries in the EEZ which was launched by the FAO in 1979.[101]

Both the Strategy and Programs of Action have, after their endorsement by the UN General Assembly in 1984, been implemented by various regional bodies of FAO and other international organizations.[102] In addition, the UN Economic and Social Council, recognizing in its resolution 1985/75 that marine resources represent an important contribution to development, requested the Secretary-General to submit to it in 1987 a report that identifies needs and problems encountered by states, especially developing countries, in the management and development of the resources situated within the EEZ, as well as the activities and approaches required to respond most effectively to those needs and problems.[103]

A Revised Look at the LOS Convention and State Practice: If we look at the provisions of Articles 61 and 62 of the LOS Convention in the light of transformations occurring in fisheries conservation, management, and utilization, it becomes clear that all the "*obligationes imperfectae*" contained therein amount only to certain simplified guidelines with regard to the various criteria, standards, and methods that can be applied by coastal states according to their individual situations, requirements, and concerns. Therefore, the assessment of the conformity and non-conformity of state practice with the LOS Convention in relation to the detailed rules concerning permissible yield, allowable catches, access to the surplus catch, apportionment of the surplus, or terms and conditions of access (as summarized earlier) must be regarded with particular caution so as to avoid misleading conclusions.

Fisheries management and development in the extended zones of states jurisdiction is, as follows from the World Strategy, not only an extremely complex but also a very recent and dynamic process involving all kinds of biological, economic, and social considerations which cannot be judged by lawyers under a presumption that a few rules of the LOS Convention will settle the particular situations of more than a hundred coastal states.[104] Significantly, recent practice of certain states who at the beginning incorporated into their legislation and fishery agreements some detailed provisions of the LOS Convention or have agreed upon their fisheries policies at a later stage evidences a noticeable shift from the Convention's exact formulas. This does not preclude the conformity of such practice with the LOS Convention, for what matters is only whether the coastal state's measures are consistent with its basic obligations of conservation, rational management, and optimum utilization of the living resources and several additional obligations with respect to the straddling stocks and migratory species.

To give a few examples. The standard objective of fisheries conservation and management is, according to the LOS Convention, "the maximum sustainable yield, as qualified by relevant environmental and economic factors" (Article 61, paragraph 3). Even though this standard has been criticized as giving the coastal state considerable management flexibility,[105] this flexibility is in fact necessary to ensure adequate management and conservation, since the strictly biological concept of the MSY has little relevance for tropical waters that support multi-species fisheries.[106] As a result, whether state practice, such as that of the U.S., provides for the optimum yield which is based on the MSY as modified by economic, social or ecological factors and aims at the greatest overall benefit to the nation or, such as that of Western Pacific countries, links the standard objective to biological criteria or, such as that of the European Economic Community, aims at ensuring conservation and exploitation "on a lasting basis and in appropriate economic and social conditions," such practice is in conformity with the LOS Convention.[107]

Another example is that of total allowable catch. Whereas the LOS Convention obliges the coastal state to establish an allowable catch for the living resources (Article 61, paragraph 1), the TAC, albeit very valuable,[108] is only one of several possible conservation and management measures and cannot be viewed as generally mandatory. Apart from the fact that its establishment is unnecessary for stocks that are not heavily exploited, even in those cases where they are, the economic distortions and the high administrative costs accompanying the determination of TACs, for instance, have given rise to the exploration of alternative measures with regard to the 200 mile zone of the European Community.[109]

Finally, an example of a scheme established in the LOS Convention with a view to implementing a principle of optimum utilization which consists of the coastal state's obligations to determine its harvesting capacity and to grant other states access to the surplus catch it has declared to exist (Article 62, paragraphs 2-5). Here state practice (summarized above) shows a great variety of individual solutions which are difficult to categorize.

For instance, the European Economic Community grants other states a share of TAC even though no surplus of commercially exploited stocks basically exists in its 200 mile zone.[110] The Soviet Union, who in its 1976 legislation explicitly adhered to the surplus rule, has already

omitted it in its 1984 Decree which merely provides for determining that part of the TAC to which access may be given to other states. The practice of the United States, which is continuously based on the surplus rule, shifted, instead, after a few first years of the new regime, to the so-called "fish and chips policy," implying various kinds of reciprocity for obtaining access to the American zone and a gradual phase-out of foreign fishing. The policy of protectionism for the domestic fishing industry is also characteristic of Canada.

Furthermore, there are many states, especially developing countries, which provide for foreign access without any reference to the TACs and the surplus rule, but which usually grant this access in exchange for fisheries data and statistics as well as various forms of compensation that they subsequently use to develop their own conservation and management capacities. This practice is part of the general phenomenon of granting foreign access so as to foster development of the coastal state's domestic fisheries, and it is explicitly reflected in the principles and guidelines for rational management and optimum use of fisheries in the EEZ formulated in the FAO's World Strategy, according to which:

> Whenever access is granted to foreign fishing vessels, its possible impact on national fishing operations should be assessed. The relevant agreements should include provisions to facilitate cooperation aimed at protecting national operations, promoting the transfer of appropriate technologies and developing national capabilities (III-14 (xiv)).[111]

On the other hand, an increase in the coastal state's capabilities does not necessarily have to result in the phasing out of foreign fishing.

Notwithstanding those different policy patterns, they can all be regarded as consistent with the LOS Convention because they conform to the main rationale of optimum utilization of living resources aiming at maximum production of animal protein from the sea and avoiding the waste of living resources. It is a question of practical methods and standards corresponding to the economic situation and fishery management goals of each coastal state and in what way and under what conditions each state meets these objectives. As a result, the sovereign rights of the coastal states over living resources in the EEZ that imply sovereign rights "to determine their policies for the development and use of their fishery resources,"[112] should be assessed not *versus* their obligation of granting foreign access but *versus* obligations of conservation and optimum utilization of the living resources.

Therefore, in view of the individual character of fisheries management and the primary importance of the coastal state's obtaining greater advantages from those resources (as discussed above), we cannot assert more than the *obligatio imperfecta* of the coastal state to grant foreign access to its zone. This *obligatio imperfecta* cannot generate rules capable of impinging upon customary law and, consequently, does not involve any legal right of access on the part of third states. The coastal states may grant foreign access, and are in fact doing so in practice, under conditions that suit their own fisheries policy determined according to their economic and other interests and in conformity with the requirements of conservation, rational management, and optimum utilization. Additionally, in the case of straddling and migratory species, a coastal state is, to various extents, obliged to agree to

the respective measures with the other states concerned, and in the case of marine mammals it is not obliged to allow their optimum utilization.

Landlocked and Other Geographically Disadvantaged States

The foregoing conclusions also apply to the access by landlocked and other geographically disadvantaged states situated in the same subregion or region. However, in this case the situation is more complicated insofar as, unlike the considered provisions of Articles 61 and 62, the provisions of Articles 69 and 70 of the LOS Convention providing for the participation of the LL/GDS and the corresponding obligation of the coastal state to accommodate such participation may basically generate rules capable of passing into the general *corpus* of international law.

At the same time, this process may encounter significant obstacles, because such participation, similar to technical criteria and methods, can only be established after having considered circumstances relevant to each particular case, and the LOS Convention does not in fact offer any clear guidelines how the parties concerned should proceed.[113] In addition, even though certain states may in practice agree upon subregional arrangements granting the LL/GDS equal or preferential rights (as noted above), it will take a long time for the advantaged developing coastal states to reach the fisheries management capabilities sufficient to accommodate any preferential access to their zones by the LL/GDS in the same region or subregion. As far as the landlocked states are concerned, I share the opinion of those commentators who indicate that, in view of the cost and difficulties of such states in starting a marine fishing industry, it would be more effective and economic to oblige coastal states to give the landlocked countries part of their catch or a cash equivalent.[114]

Conclusions

Summing up our brief assessment, I cannot resist a conclusion on the remarkable progress achieved by the world community in the first decade of a new fisheries regime in the extended zones of coastal state jurisdiction. This progress is largely due to the significant impact of the LOS Convention upon coastal state practice, as evidenced by the general compatibility of the latter with the relevant provisions of this Convention. At the same time, even in a few instances of nonconformity relating to the enforcement competence of the coastal state, its special interest in the EEZ/high seas stocks beyond 200 miles and the authority over tuna, the states concerned attempt to justify their conduct in terms of the LOS Convention.

As a result of these developments, we can already speak of the customary nature of the sovereign rights of coastal states over living resources in the 200 mile zones, as qualified by those states' basic obligations of conservation, rational management, and optimum utilization and the emergent or emerging obligations with regard to the straddling and migratory species. This qualification, at least to some extent, seems to dispel concern as to whether also the restraints on the coastal state's rights may be incorporated into customary international law.[115]

Moreover, coastal state practice shows a significant effort towards the establishment of sound and rational conservation and management of fisheries. This effort largely enhances the possibility of identifying various criteria, standards, and methods to be applied by

the coastal states according to their individual situations and requirements. And although such criteria and methods are not of a norm-creating character, they play an important role in attaining the results consonant with the essential objectives of conservation, rational management, and optimum utilization of the EEZ living resources. In a long-term perspective, these criteria and methods will also contribute to enhancing the possibility of accommodation of the rights and interests of the LL/GDS.

As a very final point, there is also one specific consideration in favor of both my foregoing conclusion and my conviction that the new regime of coastal state control in the EEZ will in the long term bring results better than the *laissez faire* system of open access.[116] While submitting this point, I feel like mentioning that I owe it to a long time commentator on fisheries matters and my friend, Albert Koers, who after twenty years of involvement in the law of the sea moved to another field. It is that the major benefit of the system we have now consists in the substantially advanced opportunities to apply sound conservation, management, and utilization principles to fisheries by dealing with and weighing comprehensively all aspects, be they legal, political, ecological, economic or social, involved therein.[117]

Acknowledgement

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NOTES

1. For a thorough examination of international jurisprudence and the views of proponents of international law doctrine, *see* B. Kwiatkowska, *New Soviet Legislation on the 200 Mile Economic Zone and Certain Problems of Evolution of Customary Law*, 33 Netherlands Int'l L. Rev. 37-50 (1986).
2. From amongst numerous works by those authors, *see e.g.*, R. P. Anand, *The Law of the Sea, India and the Indian Ocean*, 14 IDSA J.: Quarterly J., Institute for Defense Studies & Analysis (New Delhi) 128-150 (1981); W. T. Burke, *U.S. Fishery Management and the New Law of the Sea*, 76 Am. J. Int'l L. 24-55 (1982) and *The Law of the Sea Convention and Fishing Practices of Nonsignatories, with Special Reference to the United States*, in J. M. Van Dyke ed., *Consensus and Confrontation: The United States and the Law of the Sea Convention*, a Workshop of the Law of the Sea Institute held in Honolulu on January 9-13, 1984 314-337 (1985); B. Buzan, *Canada and the Law of the Sea*, 11 Ocean Dev't & Int'l L. 149-180 (1981); J. I. Charney, *The Offshore Jurisdiction of the States of the United States and the Provinces of Canada: A Comparison*, 12 Ocean Dev't & Int'l L. 301-335 (1983); R. R. Churchill, *The EEC's Contribution to State Practice in the Field of Fisheries*, in E.D. Brown and R. R. Churchill, eds., The Law of the Sea: Impact and Implementation, Proceedings of the 19th Annual Conference of the Law of the Sea Institute, pp.557-568; T. A. Clingan, *An Overview of Second Committee Negotiations in the Law of the Sea Conference*,

63 Oregon L. Rev. 53-63 (1984); P. Copes, *Implementing Canada's Marine Fisheries Policy*, 6 Marine Pol. 219-235 (1982); H. Djalal, *Implementation of Agreements with Foreigners*, in Report of the Expert Consultation on the Conditions of Access to the Fishery Resources of the EEZs, Rome, April 11-15, 1983, UN Doc. FAO Fisheries Report FIPP/R 293 129-141 (1983); B. Johnson, *Canadian Foreign Policy and Fisheries*, in B. Johnson and M. W. Zacher eds., Canadian Foreign Policy and the Law of the Sea 71-99 (1977); R. Khan, *Ocean Resources Development - India's Option*, 22 Indian J. Int'l L. 448-458 (1982); A. W. Koers, *Fisheries Management: The Case of the EEC and the Capabilities Required*, in E. Hey and A. W. Koers eds., The International Law of the Sea, Issues of Implementation in Indonesia, Proceedings of a Symposium at Jakarta, August 22-27, 1983 119-128 (1984) and *The Northeast Atlantic: What Trends and Implications?*, a paper presented at the World Fisheries Project Workshop held at Seattle on July 7-11, 1985; M. K. Nawaz, *The Legal Regime of Fisheries: A Case Study of India*, Derecho Pesquero (Mexico) 43-56 (1981/1); and D. VanderZwaag, *Canadian Fisheries Management: A Legal and Administrative Overview*, 13 Ocean Dev't Int'l L. 171-212 (1983).

3. *See* J. E. Carroz and M. J. Savini, *The New International Law of Fisheries Emerging from Bilateral Agreements*, 3 Marine Policy 79-98 (1979) and *The Practice of Coastal States Regarding Foreign Access to Fishery Resources* (An Analysis of Bilateral Agreements), in UN Doc. FAO Report FIPP/R 293, *supra* n. 2, at 43-72; C.A. Fleischer, *The Exclusive Economic Zone Under the Convention Regime and in State Practice*, in A. W. Koers and B. H. Oxman eds., *The 1982 Convention on the Law of the Sea*, Proceedings of the Law of the Sea Institute's 17th Annual Conference held at Oslo on July 13-16, 1983 241-285 (1984); G. K. Moore, *National Legislation for the Management of Fisheries under Extended Coastal States Jurisdiction*, 11 J. Maritime L. & Commerce 151-182 (1980) and *Coastal State Requirements for Foreign Fishing*, UN Doc. FAO Legislative Study no. 21, rev. 2 (1985); Regional Compendium of Fisheries Legislation, West Africa (CECAF Region), UN Doc. FAO Legislative Study no. 27 (1983); and Regional Compendium of Fisheries Legislation (Western Pacific Region), UN Doc. FAO Legislative Study no. 35 (1984).
4. Even though the LOS Convention was only adopted four years ago, the key period of implementing this new regime through state practice started in 1976. For general survey of claims to the 200 mile zones *see* U.S. Dept. of State, Limits in the Seas no. 36 5th revision (1985).
5. *See* G. Pontecorvo, *The Impact of the Law of the Sea Treaty on the Organization of World Fisheries*, in E. D. Brown and R. R. Churchill, eds., The Law of the Sea: Impact and Implementation, Proceedings of the 19th Annual Conference of the Law of the Sea Institute, 138-156 (1987).
6. *Cf.* H. B. Robertson, *Navigation in the Exclusive Economic Zone*, 24 Virginia J. Int'l L. 869-880 (1984).
7. *Cf., e.g.*, B. Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 Am. J. Int'l L. 324-348 (1981); A. W. Koers & B. Kwiatkowska, *The International Law of the Sea: The Process of Building a New Economic Order for the Oceans*, in P. van Dijk, F. van Hoof, A. Koers, and K. Mortelmans eds., Restructuring the International

Economic Order: The Role of Law and Lawyers 185211 (1987); and T. Treves, *Devices to Facilitate Consensus: The Experience of the Law of the Sea Conference*, 2 Italian Y. B. Int'l L. 36 *ff* (1976).

8. *See supra* pp.261-262.
9. For an example of how the process of negotiations can be helpful in interpretation of the fisheries provisions of the LOS Convention *see* Clingan, *supra* n. 2, at 60 (anadromous stocks); Carroz & Savini 1983, *supra* n. 3, at 47 (notion of the surplus catch); and Burke 1982, *supra* n. 2, at 38 (priority in foreign access).
10. *E.g.*, Canada on the EEZ/high seas stocks (*see supra* p.252) and the U.S. on sovereign rights over tuna (*see supra* p. 253).
11. *See* E. J. de Arechaga, *Customary International Law and the Conference on the Law of the Sea*, in J. Makarczyk ed., Essays in International Law in Honor of Judge Manfred Lachs 583-585 (1984).
12. The balancing of rights with obligations is a remarkable characteristic of the LOS Convention. *See* H. Caminos, *Les sources du droit de la mer*, in R. J. Dupuy & D. Vignes eds., Traite du Nouveau Droit de la Mer 78 (1985).
13. *Note* that although the term "TAC" is widely used in state practice, Articles 61 and 62 of the LOS Convention refer to "allowable catch" and "entire allowable catch" respectively. *See* also *infra* n. 62.
14. For detailed survey *see* references *supra* ns. 2 and 3 and *also*, *e.g.*, E. R. Agoes, *Comparative Legislative Implementations of the EEZ in Southeast Asia*, a paper presented at the SEAPOL Technical Workshop held at Phuket, Thailand on February 22-24, 1986; W. R. Edeson, *Types of Agreements for Exploitation of EEZ Fisheries*, in E.D. Brown ed. *supra* n.5, at 157-177. E. Hey, *The Exclusive Economic Zone and Cooperation between States through Bilateral Fisheries Agreements*, 1 Int'l Insights, A Dalhousie J. Int'l Affairs 70-83 (1985); L. Juda, *The EEZ: Compatibility of National Claims and the United Nations Convention on the Law of the Sea*, 16 Ocean Dev't & Int'l L. 20-27 (1986); R. B. Krueger and M. H. Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 Virginia J. Int'l L. 321-374 (1979); T. Scovazzi, *Le regime de la peche dans la Communaute Economique Europeenne*, 20 Diritto Comunitario e Degli Scambi Internazionali 541-553 (1981); M. Silva and W. Westermeyer, *The Law of the Sea and the U.S. Exclusive Economic Zone: Perspectives on Marine Transportation and Fisheries*, 15 Ocean Dev't & Int'l L. 321-353 (1985).
15. For details on such various concepts *see e.g.*, Burke 1982, *supra* n. 2, at 36-37 (the U.S.); Copes, *supra* n. 2, at 223-224 (Canada); Koers 1985, *supra* n. 2 at 7-12 and 20 (the EEC); and UN Doc. FAO no. 35, *supra* n. 3, at 9 (Western Pacific). According to Juda, *supra* n. 14, at 23, definition of the OY in the U.S. legislation is not synonymous with the wording and objectives of the LOS Convention.
16. *See also* observations on the decentralization of management powers, in UN DOC. FAO NO. 35, *supra* n. 3, at 8.
17. *See supra* n. 1.
18. *See, e.g.*, Carroz & Savini 1979, *supra* n. 3, at 85; J. I. Charney, *The Exclusive Economic Zone and Public International Law*, 15 Ocean Dev't & Int'l L. 249 (1985); Fleischer, *supra* n. 3, at 262. Moreover, *e.g.*, Drewry speaks about evolving customary law in this

respect. See J. S. W. Drewry, *Law of the Sea Implications for Fisheries*, in Ocean Policy Study Series vol. I 85 (1984/3).

19. *See, e.g.* Fleischer, *supra* n. 3, at 255-266 and comment by B. H. Oxman, in Van Dyke ed. 1985, *supra* n. 2, at 394-395. *Cf. also* Drewry, *supra* n. 18 and Juda, *supra* n. 14, at 22-23. The opinion of Burke 1985, *supra* n. 2 seems to be unclear. On the one hand he maintains that no provisions other than those providing for the coastal state's sovereign rights have found their way into customary law (*id.*, at 332-333). On the other hand he points out that the coastal state's discretionary power to establish TAC is subject to the condition of not entailing over-exploitation to the point of endangering the maintenance of the resources (*id.*, at 317). Charney, *supra* n. 18 interprets Burke's view as opposable to that of Fleischer.
20. *See, e.g.*, Charney, *supra* n. 18, Churchill *supra* n. 2, at 7. *See also* comment on the view of Burke, *supra* n. 19.
21. *See* references *supra* n. 14.
22. *E.g.*, in the EEZ of the Philippines, *see* V. L. Aprieto, *Fishery Management and Extended Maritime Jurisdiction: The Philippine Tuna Fishery Situation*, East-West Center Env'l & Policy Inst. Research Report 45 (1981/4). Also the amount of fish harvested by the EEC in African states' zones corresponds most likely to the surplus catch. *See* Churchill, *supra* n. 2, at 14.
23. *See* Fleischer, *supra* n. 3, at 267.
24. A number of these countries extended those rules to their territorial seas. Moreover, the considered rules are also applied by traditional territorialists such as Brazil, Chile, Ecuador and Peru, as evidenced by, *e.g.*, the 1984 Vina del Mar Declaration of the Ministers of Foreign Affairs of the state members of the Permanent Commission for the South Pacific.
25. *See, e.g.*, Burke 1982, *supra* n. 15 and 1985, *supra* n. 2, at 334, Drewry, *supra* n. 18, at 89, Silva & Westermeyer, *supra* n. 14, at 337-341 (the U.S.); Churchill, *supra* n. 2, Koers 1984, *supra* n. 2, at 120-125 and 1985, *supra* n. 15 (the EEC); Kwiatkowska, *supra* n. 1, at 28 (the USSR).
26. *See, e.g.*, Juda, *supra* n. 14, at 25 and text accompanying n. 48.
27. *See, e.g.*, Burke 1982, *supra* n. 2, at 28-29; Clingan, *supra* n. 2, at 57-58 and text accompanying n. 22; Drewry, *supra* n. 18, at 86 and 89; Silva & Westermeyer, *supra* n. 14, at 341-342.
28. *See, e.g.*, Agoes, *supra* n. 14, at 15 (Indonesia); G. R. Munro & G. Pontecorvo, *The Taking of Living Resources: Expectations and Reality*, in Koers & Oxman eds., 1984, *supra* n. 3, at 291 (Canada); W. Ostreng, *Norway's Law of the Sea Policy in the 1970s*, 11 Ocean Dev't & Int'l L. 76-77 (1982).
29. The principle of reciprocity is also referred to in legislation of the Bahamas, Gambia, Ivory Coast and Japan.
30. *See* references *supra* n. 14.
31. For details *see* Carroz & Savini 1983, *supra* n. 3, at 49 and E. E. Mtango & F. Weiss, *The Exclusive Economic Zone and Tanzania: Considerations of a Developing Country*, 14 Ocean Dev't & Int'l L. 38-39 (1984). It may also be noted that the UN Economic Commission for Africa recommended at its 1984 meeting at Addis Ababa which considered application of the LOS Convention, to increase cooperation between landlocked and coastal states within the existing regional bodies, so as to accommodate the problems of landlocked

countries in accordance with the LOS Convention. *See* UN Doc. FAO COFI/85/INF. 6 (February 1985), at 24.

32. The political and strategic considerations which have, *e.g.*, been applied by the U.S. with regard to the access of Poland and the USSR after imposition of martial law in Poland and Soviet invasion in Afghanistan, are covered by "other national interests" referred to in Article 62, paragraph 3 of the LOS Convention.
33. *See, e.g.*, C. S. Harrison, *Costs to the United States in Fisheries by not Joining the Law of the Sea Convention*, in Van Dyke ed. 1985, *supra* n. 2, at 349; J. L. Jacobson & D. G. Cameron, *Potential Conflicts between a Future Law of the Sea Treaty and the Fisheries Conservation and Management Act of 1976*, 52 Washington L. Rev. 463 (1977); G. A. B. Peirce, *Selective Adoption of the New Law of the Sea: The United States Proclaims Its Exclusive Economic Zone*, 23 Virginia J. Int'l L. 594 (1983).

    The objections with respect to LL/GDS participation have never been raised in relation to practice of other coastal advantaged states, *e.g.*, the USSR. Significantly, Eastern European scholars have, for instance, suggested an eventual accommodation of the position of Baltic GDS in the zone of the EEC and not the Soviet Union. *See, e.g.*, B. Kwiatkowska-Czechowska, *International Legal Status of the 200 Mile Economic Zone* (in Serbo-Croatian), 32 Medunarodni Problemi 129 (1980).
34. *See, e.g.*, Burke 1982, *supra* n. 2, at 38-39 and 1985, *supra* n. 2, at 328-329; Clingan, *supra* n. 2, at 58 and text accompanying n. 24; Drewry, *supra* n. 18, at 88; and Silva & Westermeyer, *supra* n. 14, at 341.
35. For detailed survey of licensing systems, management measures, reporting requirements, landing of catches and joint ventures *see* references *supra* n. 14. Coastal state requirements have been compared by Moore 1985, *supra* n. 3, Tables B-D, at 34-260; UN Doc. FAO no. 27, *supra* n. 3, Tables B-F, at 408-439; and UN Doc. FAO no. 35, *supra* n. 3, at 11-36.
36. As noted at p. 54 *supra*, harmonization of access regimes is also recommended by the 1984 World Fisheries Strategy with regard to straddling stocks.
37. *See* Moore 1985, *supra* n. 3, at 21 and Table E at 261-288 and UN Doc. FAO no. 27, *supra* n. 3, Tables G-I at 440-459.
38. *See* Burke 1982, *supra* n. 2, at 51-52 and 55; Carroz & Savini 1983, *supra* n. 3, at 57.
39. For detailed survey *see* Moore 1985, *supra* n. 3, at 24-25; D. Robb, *Access Conditions and Compliance Control*, in UN Doc. FAO Report FIPP/R 293, *supra* n. 2, at 150-160; UN Doc. FAO no. 35, *supra* n. 3, at 25.
40. For thourough examination *see* W. T. Burke, *Exclusive Fisheries Zones and Freedom of Navigation*, 20 San Diego L. Rev. 595-623 (1983); L. E. Naumov, *Freedom of Navigation and Fishing Ships in Economic and Fishing Zones* (in Russian), Sovetskii Ezhegodnik Mezhdunarodnogo Prava 131-143 (1983); J. R. Stevenson & B. H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions*, 71 Am. J. Int'l L. 264 (1977); Robertson, *supra* n. 6, at 890-895; and T. Treves, *La navigation*, in Dupuy & Vignes eds. 1985, *supra* n. 12, at 736-738.
41. *See supra* n. 18.
42. *See, e.g.*, R. P. Anand, *The Politics of a New Legal Order for Fisheries*, 11 Ocean Dev't & Int'l L. 285 (1982); comment by D.

Colson, in Van Dyke ed. 1985, *supra* n. 2, at 338; Drewry, *supra* n. 18, at 85-88. According to the latter author, also the concept of foreign access to the surplus catch and the rule providing for allocation of surpluses to states traditionally fishing in the area became customary law.

43. *See supra* n. 20; and Burke 1985, *supra* n. 2, at 332-336 and Juda, *supra* n. 14, at 23-26.
44. *See* Fleischer, *supra* n. 3, at 266 and 272-275.
45. *Id. See also* Churchill, *supra* n. 2; and a brief comment by B. H. Oxman, in Van Dyke ed. 1985, *supra* n. 2, at 396 on what "may and ought to" be part of customary law. Oxman refers to the view of Burke (quoted *supra* n. 43), but Burke's reasoning is that the details accompanying sovereign rights of coastal state "are not now part of customary law" (*id.* at 315), rather than "may not" become part of customary law.
46. For details *see* Burke 1982, *supra* n. 2, at 47-49; J. E. Carroz, *Institutional Aspects of Fishery Management Under the New Regime of the Oceans*, 21 San Diego L. Rev. 519-529 (1984); Churchill, *supra* n. 2; Edeson, *supra* n. 14, at 10-11; Hey, *supra* n. 14, at 76-78; and A. W. Koers, *The European Economic Community and International Fisheries Organizations*, Legal Issues of European Integration 113-131 (1984/1).
47. *See, e.g.*, Churchill, *supra* n. 2, and Koers, *supra* n. 46, at 119-122. For details on practical necessity of such coordination *see* W. T. Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction*, 63 Oregon L. Rev. 111-112 (1984).
48. This is evidenced by activities of, *e.g.* NAFO, NEAFC and the Fishery Committee for the Eastern Central Atlantic. *See also* the 1984 Vina del Mar Declaration (paragraph 21) referred to *supra* n. 24. The declarations to this effect have also been made by Cape Verde, Sao Tome and Principe and Uruguay upon signature of the LOS Convention. *Cf.* Carroz, *supra* n. 46, *esp.* at 519-521 and Koers, *supra* n. 47.
49. This corresponds to the position of Canada at UNCLOS III and its unsuccessful attempts (together with other states concerned) to modify Article 63, paragraph 2 of the LOS Convention. *See* J. L. Meseguer, *La regime juridique de l'exploitation de stocks communs de poissons au-dela des 200 milles*, 28 Annuaire Francais de Droit Int'l 891-897 (1982). On the EEC-Canada's practice *see* Carroz & Savini 1979, *supra* n. 3, at 88.
50. *See* Meseguer, *supra* n. 49, at 899. *Cf. also* P. Copes, *The Impact of UNCLOS III on Management of the World's Fisheries*, 5 Marine Policy 221 (1981).
51. Koers, *supra* n. 46, at 119.
52. This is evidenced by, *e.g.*, the 1979 SPFFA Convention; the 1982 Nauru Agreement; the 1983 Eastern Pacific Agreement; bilateral agreements of Cook Islands and New Zealand; and measures undertaken by the FAO's Indian Ocean and Indo-Pacific Fishery Commissions. For details *see, e.g.*, Carroz, *supra* n. 46, at 525-528; Moore 1985, *supra* n. 3, at 10; C. Narokobi, *The Tuna, the South Pacific and the United States*, in Van Dyke ed., 1985, *supra* n. 2, at 370-373; I. Ronquillo, *The Law of the Sea and Its Implications on the Development of Fishery Resources in Southeast Asia*, in D. J. Johnston *et al.* eds., International Symposium on the New Law of the Sea in Southeast Asia 60-63 (1983).

53. For details *see, e.g.*, Burke 1982, *supra* n. 2, at 41-45 and *Highly Migratory Species in the New Law of the Sea*, 14 Ocean Dev't & Int'l L. 303-306 (1984); F. D. Froman, *The 200 Mile EEZ: Death Knell for the American Tuna Industry*, 13 San Diego L. Rev. 707-741 (1976).
54. Costa Rica and Sao Tome and Pricipe made declarations to this effect upon signature of the LOS Convention. The traditional territorialists: Chile, Ecuador and Peru (joined by Colombia) take -- as negotiations on Eastern Pacific tuna fisheries evidence -- a particularly strong position in favor of exclusive rights of the coastal state over tuna. For detailed survey *see, e.g*, memo of the IATTC's Director of Investigations, J. Joseph on *Review of Progress through 1979 in Negotiations for a New Eastern Pacific Tuna Management Convention* of 4 June 1980; S. Nandan, *Implementing the Fisheries Provisions of the Convention*, in Van Dyke ed. 1985, *supra* n. 2, at 383-386; N. P. Rasmussen, *The Tuna War: Fishery Jurisdiction in International Law*, University of Illinois L. Rev. 764-768 (1981); UN Doc. FAO no. 35, *supra* n. 3, at 1-36.
55. The latter agreement has so far been ratified by Panama and the U.S. *See also* the 1984 Vina del Mar Declaration (paragraphs 19-20) referred to *supra* n. 24. For details *see* references *supra* n. 54 and Carroz, *supra* n. 46, at 525 and Edeson, *supra* n. 14.
56. *Cf.*, *e.g.*, Burke 1984, *supra* n. 53, at 308 and B. M. Tsamenyi, *The South Pacific States, the U.S. and Sovereignty over Highly Migratory Species*, 10 Marine Policy 36-41 (1986).
57. *See, e.g.*, Clingan, *supra* n. 2, at 62-63.
58. *See, e.g.*, Burke 1982, *supra* n. 53 and 1984, *supra* n. 53, at 309-310; R. R. Churchhill & A. V. Lowe, The Law of the Sea 208 (1985); Drewry, *supra* n. 18, at 90-92; Fleischer, *supra* n. 3, at 256; Harrison, *supra* n. 33, at 352; Juda, *supra* n. 14, at 26-27; Nandan, *supra* n. 54, at 385; and Tsamenyi, *supra* n. 56, 31-36.
59. *See, e.g.*, Burke 1984, *supra* n. 53, at 294 and 308 and 1985, *supra* n. 2, at 333 and 335-336; Tsamenyi, *supra* n. 58.
60. *See, e.g.*, T. Treves, *The UN Convention on the Law of the Sea as a Non-Universally Accepted Instrument: Notes on the Convention and Customary Law*, in Koers & Oxman eds. 1984, *supra* n. 3, at 687.
61. The whaling moratorium has been accepted by Japan and the USSR, but not Norway. *See* International Herald Tribune of 5 June 1986, at 8. For FAO/UNEP Global Plan of Action *see* UN Doc. UNEP/GC.12/15 (1984).
62. For detailed examination *see* Burke 1982, *supra* n. 2, at 45-47; Kwiatkowska, *supra* n. 1, at 29-31.

    Certain variations could be due to the vague language of the LOS Convention. *E.g.*, Article 66, paragraph 2 refers to the "TAC," whereas Articles 61-62 use the term "allowable catch". This could mean that the TAC established by the state of origin covers also catches in the EEZ of other states.
63. This is evidenced by, *e.g.*, the 1978 amendments to the Convention on the International North Pacific Commission, the 1982 Convention for the Conservation of Salmon in the North Atlantic and the 1985 U.S.-Canada Treaty on Pacific Salmon. For detailed survey *see, e.g.*, Carroz, *supra* n. 46, at 522-523; Koers 1984, *supra* n. 46, at 123-124; J. F. Sherwood, *Canada-U.S. Pacific Salmon Management*, 1 Int'l Insights, A Dalhousie J. Int'l Affairs 62-69 (1985).
64. *See, e.g.*, Clingan, *supra* n. 2, at 60-61.

65. *See, e.g.*, Drewry, *supra* n. 18, at 92-95.
66. *See, e.g.*, Harrison, *supra* n. 33, at 362-368.
67. *Cf.* Burke 1982, *supra* n. 2, at 47.
68. *Cf.* Hey, *supra* n. 14, at 77-78.
69. *See supra* n. 67 and S. Oda, International Law of the Resources of the Sea 69-71 and 74-75 (1979).
70. *See, e.g.*, Churchill & Lowe, *supra* n. 58, at 119.
71. *See, e.g.*, J. F. Pulvenis, *Le plateau continental*, in Dupuy & Vignes eds. 1985, *supra* n. 12, at 320.
72. *Cf.* A. D'Amato, The Concept of Custom in International Law 104-105 (1971) and *The Law Generating Mechanisms of the Law of the Sea Conferences and Convention*, in Van Dyke ed. 1985, *supra* n. 2, at 136-137; Koers & Kwiatkowska, *supra* n. 7, at 201; and Treves, *supra* n. 60, at 687.
73. Churchill, *supra* n. 45.
74. ICJ Rep. (1984) para. 80, at 290. *See also id.* para. 82.
75. *Id.* para. 81.
76. *See id. Cf. also* ICJ Rep. (1969) para. 72, at 42.
77. As Oxman indicates: "The duty of optimum utilization is ... a response to the global interest in ensuring the maximum feasible supply of animal protein from the sea consistent with sound conservation practices ...". B. H. Oxman, *the Two Conferences*, in Oxman *et al.* eds., Law of the Sea, U.S. Policy Dilemma 137 (1983).
78. *Cf.* Fleischer, *supra* n. 3, at 255.
79. The consensus on the term "marine environment", as including marine life has been reached at the 1978 session of UNCLOS III. *See* Third United Nations Conference on the Law of the Sea, Official Records, vol. X 97 (1978).
80. *Cf.* C. de Klemm, *Living Resources of the Ocean*, in D. M. Johnston ed., The Environmental Law of the Sea 137 (1981).
81. For detailed survey *see* UN Doc. FAO COFI/85/INF. 6 (February 1985). *Cf. also* Carroz, *supra* n. 46, at 513-540 and Koers, *supra* n. 46.
82. For details *see* UN Doc. UNEP/GC. 13/2 55-58 (1985) and GC. 13/8 64-69 (1985).
83. *See, e.g.*, UN Doc. UNEP Regional Seas Reports and Studies, no. 12 40-55 (1982).
84. Such protocols have so far been adopted for the Mediterranean and Eastern African regions.
85. UN Doc. FAO Report of the World Conference on Fisheries Management and Development 17 (1984).
86. *See* UN Doc. FAO COFI/85/2 (February 1985).
87. *See id.*, at 2-3 (text of the resolution reprinted at 9).
88. For similar views *see* references *supra* ns. 19 and 42. As to the sedentary species, in spite of their exclusion from the EEZ fisheries regime established in the LOS Convention (*see supra* p. 255), they are covered by coastal state's obligation of conservation and rational management on the basis of provisions discussed at 257 *supra*.
89. Copes, *supra* n. 50, at 221.
90. For details on this latter question *see, e.g.*, M. Bos, A Methodology of International Law 247-255 (1984); A. Gros, *Separate Opinion in the Nuclear Tests Case (Australia v. France)*, ICJ REP. (1974) paras. 17-21, at 286-289; and H. W. A. Thirlway, International Customary Law and Codification 109-124 (1972).

91. The U.S. dissent is evidenced by: an explicit exclusion of tuna from the scope of 1976 and 1983 legislation; U.S. opposition to efforts of other states to apply any control over American fisher men harvesting tuna; compensating American fishermen for losses due to seizures by foreign states in their zones; and imposing import embargoes upon states seizing American vessels. *Cf.* Rasmussen, *supra* n. 54, at 761-764. For the opposite view *see, e.g.*, Burke 1985, *supra* n. 2, at 335-336.
92. *Cf. e.g.*, Clingan, *supra* n. 2, at 63; Drewry, *supra* n. 18, at 92; Harrison, *supra* n. 33, at 356-357; Tsamenyi, *supra* n. 56, at 36; Silva & Westermeyer, *supra* n. 14, at 343. After this contribution was completed, the controversy in question *has* resolved by virtue of the 1987 Pacific Fisheries Treaty between the U.S. and sixteen member states of the SPFFA. *See* 81 Am. J. Int'l L. 940-943 (1987).
93. As to the enforcement authority of the state of origin beyond 200 miles, even though the U.S. legislation does not provide (as the 1984 Decree of the USSR does) for enforcement on the basis of treaties with the states concerned, this applies in practice only to Japanese high seas fishery for salmon which is regulated by the 1978 International Convention for the High Seas Fisheries of the North Pacific Ocean. *Cf.* comment by D. Colson, in Van Dyke 1985 ed. 1985 *supra* n. 2, at 369.
94. *Cf.* the 1984 World Fisheries Strategy, III-14 (xvii-xix).
95. In this context it seems worth recalling views of those scholars who doubt the likelihood of development of customary law rules in this respect. *See supra* n. 45. For most complex examination of bioeconomic and scientific considerations justifying such view *see* S. Garcia, J. A. Gulland and E. Miles, *The New Law of the Sea and the Access to Surplus Fish Resources*, 10 Marine Policy 192-200 (1986).
96. This remains true, even if one would call upon the theory of "quasi-custom" (or "quasi-universal treaties"), according to which the fisheries provisions of the LOS Convention (because they were agreed by consensus and the Convention has been widely signed) could stand in for practice themselves. For general critique of this theory *see, e.g.*, Bos, *supra* n. 90, at 252-255.
97. Disputes related thereto are excluded from compulsory settlement, but they may under certain conditions be submitted to conciliation. *See* art. 297, para. 3 (b).
98. *Cf., e.g.*, Burke 1985, *supra* n. 2, at 317-320; J. Castaneda, *Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea*, in Makarczyk ed. 1984, *supra* n. 11, at 618; Krueger & Nordquist, *supra* n. 14, at 330; Moore 1980, *supra* n. 3, at 158.
99. Castaneda, *supra* n. 98, at 613.
100. I mean rules with regard to coastal state's authority, as I share the opinion of Burke 1985, *supra* n. 2, at 316, that a better system in a sense of replacement of this authority by international cooperation was "not within the realm of political feasibility" at UNCLOS III.
101. For details on this program *see* UN Doc. FAO COFI/83/14 (June 1983).
102. For details *see supra* ns. 81 and 86; and UN Doc. A/40/923 (27 November 1985), at 20-23.
103. *See* UN Doc. A/40/923 (27 November 1985), at 29.

104. *Cf.* comment by W. T. Burke, in Van Dyke ed. 1985, *supra* n. 2, at 340; Nandan, *supra* n. 54, at 387; S. Oda, *Fisheries under the United Nations Convention on the Law of the Sea*, 77 AM. J. Int'l L. 742-749 (1983); comment by B. H. Oxman, in Van Dyke ed., 1985, *supra* n. 2, at 395.
105. *See, e.g.*, D. P. O'Connell, The International Law of the Sea (ed. by I.A. Shearer) VOL. I 565 (1982).
106. For details *see, e.g.*, J. A. Gulland, *Conditions of Access to Fisheries: Some Resource Considerations*, in UN Doc. FAO Report FIPP/R 293, *supra* n. 2, at 81-83; and Klemm, *supra* n. 80, at 82-84.
107. *See supra* n. 15.
108. *Cf.* the 1984 World Fisheries Strategy, I-8 (viii).
109. *Cf.* Fleischer, *supra* n. 3, at 264; Koers 1985, *supra* n. 2, at 29; M. R. Shyam, *The Emergency Fisheries Regime: Implications for India*, 8 Ocean Dev't & Int'l L. 40 (1980).
110. For details on practice of various states *see supra* ns. 22-29. For critical remarks with regard to the rigid application of the surplus rule with respect of the shared stocks (requiring first and foremost agreement on an overall management scheme) *see* G. Saetersdal, *Problems of Managing and Sharing of Living Resources under the New Ocean Regime*, 4 Ocean Y. B. 45-49 (1983).
111. *See also* III-14 (xv). *Cf., e.g.*, Aprieto, *supra* n. 22, at 48; Munro & Pontecorvo, *supra* n. 28, at 291 and 299-301; Narokobi, *supra* n. 52, at 373; UN Doc. FAO no. 27, *supra* n. 3, at 3.
112. The 1984 World Fisheries Strategy, I-7.
113. For a thorough examination *see, e.g.*, Burke 1985, *supra* n. 2, at 322-328; Fleischer, *supra* n. 3, at 269-271; Oda, *supra* n. 104, 745-746.
114. *See, e.g.*, Churchill & Lowe, *supra* n. 58, at 284.
115. Such concern has, for instance, been expressed by Burke 1985, *supra* n. 2, at 315 and B. H. Oxman, *Customary International Law and the Exclusive Economic Zone*, in Van Dyke ed. 1985, *supra* n. 2, at 155 and 157.
116. Similar conviction has, for instance, been expressed by Copes, *supra* n. 50, at 227 and E. Mann Borgese in her comment, in Van Dyke ed., 1985, *supra* n. 2, at 392-393.
117. *See* Koers 1985, *supra* n. 2, at 14.

THE CONTROL OF MARINE POLLUTION FROM SHIPS: RESPONSIBILITIES AND RIGHTS

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The Development of Marine Pollution Responsibilities

Developments to 1967[1]

General concern over oil pollution appears to have originated in the first decade after World War I when first the United States and then the League of Nations undertook to obtain explicit international agreement on measures to combat oil pollution. Very few states had, in the past, sought to extend legislation regarding pollution beyond their territorial sea, and no states had, until the present, sought to apply prohibitory regulations beyond this area. It can, therefore, be said that almost all prescriptive activity has taken the form of international agreements.

In 1926 the International Maritime Conference in Washington produced the first international convention relating to oil pollution. The problem was discussed in both technical and legal terms, but the convention failed to be ratified by any nation.

Oil pollution, particularly on the shores of the Atlantic Ocean, was very considerable during and after World War II as a direct result of the many torpedoed, sunken, and otherwise damaged vessels. By the 1950s a rising world economy, resulting in an ever-increasing demand for hydrocarbon fuels, contributed to a renewed concern over the pollution problem. Nothing concrete, however, was achieved until 1954 when the International Convention for the Prevention of Oil Pollution was concluded after a conference in London. This Convention, known as OILPOL '54, entered into force in 1958 and prohibits the intentional discharge of oil and oily mixtures from certain vessels in specified ocean areas. Although it has contributed to cleaner seas, it did not establish any enforcement system other than flag state enforcement. Although the OILPOL Convention has been superceded by MARPOL 73/78, it will be the law for a number of states for some time to come.

Following the formation of the Intergovernmental Maritime Consultative Organization (IMCO), as a specialized agency of the United Nations in 1958, another international conference on the subject of oil pollution was held in Copenhagen in 1959. This conference resulted in a number of recommendations to extend the effectiveness of the 1954 Convention. Amongst these was the recommendation that preparation, under IMCO auspices, should be made for a further governmental conference on oil pollution which should considerably extend the prohibited ocean zones. This preparatory work resulted in the second conference on oil pollution, held in London early in 1962, during which most of the early recommendations were adopted.

In 1958 and 1960 the first and second United Nations Law of the Sea Conferences took place in Geneva. The conferences also considered the question of marine pollution -- if only superficially -- by including in the High Seas Convention the requirement for states:

> . . . to draw up regulations to prevent pollution of the sea by discharges of oil from ships or pipelines or resulting from exploitation of the seabed and its subsoil, taking account of existing treaty provisions on the subject. (Article 24).

Article 25 of the Geneva High Seas Convention also concerns radioactive marine pollution.

The Torrey Canyon *Disaster*

In March 1967 the tanker *Torrey Canyon* grounded off the southwest coast of England illustrating, for the first time, how the physical evidence of a major shipping/pollution disaster, enjoying wide media coverage, can influence public policy. The subsequent investigation found that the grounding was caused solely by the human error of the master. The accident caused the largest single oil spill in maritime history up to 1967. Some 80,000 tonnes of crude oil spread along British and French coasts, causing pollution in a 200-mile arc. The oil was released subsequent to the initial grounding and after the vessel had been bombed on orders of the British government after the decision that no other way was left to deal with the unsalvageable wreck.

In every respect, whether scientific, ecological, or legal, the *Torrey Canyon* disaster caught the maritime world completely unprepared. For example, scientific research into oil dispersal was then, at best, still experimental. Yet over 2.5 million gallons of various chemical dispersants were used, often with more disastrous effects on the marine environment than the crude oil itself. Damage claims in Great Britain amounted to GBP 6,000,000 and to FRF 40,000,000 in France. Most of these claims found no settlement. However, there is no question that for those concerned about pollution the incident was a blessing in disguise! Public concern, aroused by the wide variety of problems caused by the wreck, resulted in relatively rapid action by various governments as well as by several international organizations. Suddenly the anti-pollution campaign was no longer only the concern of environmentally conscious individuals and organizations which had persuaded only a few governments to voice their concerns. The campaign was quickly taken over by a large number of states who saw the dangers of a major oil spill to their own vulnerable coastlines. Such states consisted not only of coastal states without shipping interests, but also shipping states with coastal interests.[2]

New Marine Pollution Conventions and Compensation Schemes[3]

The direct results of the *Torrey Canyon* disaster, its subsequent debate at IMCO and within the shipping and oil industries, were two new international conventions and one private international agreement. Firstly, in 1969 IMCO completed the *International Convention on Civil Liability for Oil Pollution Damage* (known as the CLC Convention). This Convention most significantly changed the traditional damage liability base from one of proven fault or negligence to one of strict liability. More specifically, it effectively doubled shipowner's liability limits from those set out in the *Convention on Limitation of Liability of Owners of Seagoing Vessels* of 1957. Finally, the CLC Convention introduced a system of certification, making pollution damage insurance basically compulsory and giving a right of direct action against the insurer if the shipowner did not pay.

Secondly, also in 1969, IMCO completed the *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollu-*

tion Casualties, (known as the Intervention Convention). This Convention allows coastal states to take early action on the high seas against vessels which pose a threat to their coastlines. The fact that coastal states are thus given the right to take action *outside* their own area of maritime jurisdiction indicates how seriously the threat of large-scale ship-source marine pollution was taken in the post-*Torrey Canyon* period. It shows how a single act of navigational negligence can change maritime history!

During the IMCO debates leading to the CLC and Intervention Conventions, it became clear to the oil and tanker industries that whilst both conventions would take a number of years to enter into force, public pressure could lead coastal states to take unilateral action, unless an alternative interim compensatory regime was quickly available. This resulted in 1969 in the *Tanker Owner's Voluntary Agreement Concerning Liability for Oil Pollution* (TOVALOP).[4] This Agreement was designed originally to encourage tanker owners to clean up spills, regardless of fault, with the assurances of recovering their costs from their P. & I. club. In addition, the schemes also had funds to compensate governments for their own clean-up costs.

The fact that TOVALOP was a voluntary scheme, brought forward fairly rapidly by the industry itself, illustrates the very high visibility which environmental questions were enjoying in the public eye at that time. The "environmental decade" had truly commenced and the many new anti-pollution initiatives, which were about to emerge nationally, regionally, and internationally, illustrate the intense pressure which shipping would face during this period. Naturally, there was considerable resistance to this unwelcome attention by all sectors of the shipping industry. It was felt, quite rightly, that shipping was being singled out as a villain in the environmental battle when, in actual fact, at that time, shipping contributed only about 10 percent of the pollutants entering the sea. On the other hand, there was a general lack of coordination in the industry between its cargo, vessel, and underwriting sectors about the problem. The shipping sector fought anti-pollution innovation in any form vigorously to the extent that shipping was quickly considered to be intransigent and inflexible. Cargo interests, however, stated that it was all an operational problem and thus completely within the control of the carrier despite the fact that the pollutant cargo actually caused the pollution. This problem has persisted to this day. Underwriters at that time were justifiably cautious about being faced with "strict liability" in a manner which, during certain parts of the 1970s, almost assumed hysteric proportions. There were clearly serious doubts about the proper quantification of pollution damage. As a result much energy was expended in the early 1970s on "haggling" about upper limits of pollution liability and the ceiling of USD 14.4 million was considered to be absolute. Since then the experience in insurance claims has contributed to much greater confidence and has also resulted in frequent reviews of upper limits. In 1984 it stood at up to USD 300 million per incident.

However, in the early 1970s, with environmental concern at its peak, there was, unfortunately, greater concern about preserving the *status quo*, ill defined as that was, than in improving operating procedures, developing clean-up technology, and generally bringing all sectors of the shipping industry together. As a result, the anti-pollution decisions which were being made in a number of international forums were less and less influenced by the industry which would be most affected by these decisions. Of course, the "polluting" image of

shipping was regularly reinforced by periodic spectacular marine disasters resulting in large, well-publicized pollution incidents. In addition, the traditional maritime states, which in past years had consistently supported their shipping industries with little question, were starting to react to the very considerable public interest in the environment. At that stage the matter became political, which often results in expediency rather than consistency. This permitted coastal states to bring forward, particularly at IMCO, their concerns about increasing ship-sources marine pollution and argue that, even after CLC and TOVALOP, the upper limits of liability were insufficient for large spills. This was, of course, the advent of the supertanker and VLCC era and there was ample evidence that major spills in an environmentally or economically sensitive area could cause disastrous damage.

At IMCO it was decided that a supplementary convention to the CLC was needed and, in 1971, the *International Convention on the Establishment of an International Fund for Oil Pollution Damage*, (the Fund Convention) was concluded. The Fund Convention considerably extended the CLC limits, particularly for significant shipping disasters. However, once again, the industry, realizing that the Fund Convention would take a number of years to enter into force, decided to provide an additional voluntary interim agreement. This time the major international oil companies introduced a new scheme entitled, *Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution* (CRISTAL). CRISTAL, which commenced in 1971, like the Fund Convention, extended the oil pollution liability ceiling considerably. There were some differences between the Fund Convention and CRISTAL. In retrospect, it is interesting to note that CRISTAL was also an important precedent illustrating that the international oil industry, fully aware of the concerted environmental pressures, could and would take some responsibility for pollution claims. Unfortunately this cooperative spirit, based on the fact that the producer of the pollutant must have some responsibility for pollution damage, did not last long. However, shipping did not make cooperation exactly easy. Increasing tanker accidents, invariably due to human error/negligence, did not compare well with the oil industry which had a much better safety/pollution record in both its onshore and offshore operations.

The Evolution of a New International Environmental Regulatory Regime[5]

At this stage, the ever-increasing concern about the environment shifted to a variety of other international forums. At the national level, a number of coastal states were in the process of radically adjusting their marine pollution legislation. In particular, the U.S. and Canada developed new legislative trends which would in time set the standard for other states. In other regions states were taking action at the regional level such as: (1) the *Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil* (the Bonn Agreement) concluded in 1969 by Belgium, Denmark, France, Federal Republic of Germany, Netherlands, Norway, Sweden and the U.K.; and, (2) the *Agreement Between Denmark, Finland, Norway and Sweden Covering Cooperation in Measures to Deal with Pollution of the Sea by Oil* concluded in 1971.

Until this time, marine pollution from substances other than oil had not received any international attention, despite the known fact that there were many polluting substances, other than oil, which were carried at sea and which could cause serious damage. However this was about to change.

Firstly, the *International Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials* was concluded in Brussels in 1971. This Convention not only recognized the danger of nuclear materials carried at sea, but also illustrated the marine insurance industry's willingness to accept strict liability provisions in this area.

The question of dumping at sea was also considered at this time. The dumping of industrial wastes and redundant materials at sea was (and continues to be) on the increase due to ever-more stringent regulations on land, which is running out of suitable dumping sites. As a result, vessels were (and are) being increasingly used to dump at sea. In 1972 the *Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft* (the Oslo Dumping Convention) was concluded. It covers the Northeast Atlantic, Arctic Ocean, and North Sea, and sets out strict standards of dumping practices.

In 1972 environmental concerns reached a new peak and the United Nations Conference on the Human Environment took place in Stockholm. For the first time *all* aspects of environmental deterioration were under the scrutiny of a major international gathering. The Conference adopted a *Declaration on the Human Environment* and an *Action Plan* which included special sections on marine pollution. The Conference also laid the groundwork for the establishment of a new United Nations institution, the United Nations Environment Program (UNEP). UNEP through its "regional seas action plans" would henceforth become the organization which would monitor pollution in a variety of regional seas areas, thus completing the preventive work carried out by IMCO. The Stockholm Conference directly led to another international conference which, late in 1972, adopted the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters* (the London Dumping Convention). This Convention extended the Oslo Dumping Convention globally.

At that stage the focus shifted back to IMCO, which, in late 1973, adopted the *International Convention for the Prevention of Pollution from Ships, 1973* (MARPOL) as well as the *Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil.*[6] MARPOL was the result of considerable dissatisfaction with OILPOL '54, which could no longer satisfy the demands of a much more environmentally conscious world. OILPOL was also technically out of date. In addition, both MARPOL and the Intervention Protocol recognized the danger of pollutants other than oil. Unfortunately, it would take exactly a decade before MARPOL would enter into force. There is no question that the leap from OILPOL to MARPOL, however, was one of quantum proportions.

In 1973 attention had also shifted once more to the global level with the commencement of the Third United Nations Conference on the Law of the Sea (UNCLOS III), which had been in preparation for a number of years since the inception of the United Nations Seabed Committee in 1968.[7] Although UNCLOS III was initially to be convened to develop a new legal regime for the resources of the deep seabed beyond national jurisdiction, it had quickly become apparent that the failure of the 1958/1960 Geneva Law of the Sea Conferences, as well as a number of other political developments, necessitated a complete re-examination of the total law of the sea. Thus, for the next decade the world's nations would participate in the most ambitious-ever undertaking which would culminate with the signing of the United Nations Convention on the Law of the Sea in 1982. UNCLOS III was much more than a law of the sea debate -- it was a law reform movement which radically readjusted

questions of equity and allocation of all ocean resources and uses. As a result, shipping, once the prime ocean use, was relegated in importance to be only one of many ocean uses at a time when states were regarding the ocean as a "last frontier" in their oceanic development.

UNCLOS III, in its Third Committee, focused special attention on the protection of the marine environment and was able to draft an "umbrella" of legal provisions which would enable IMCO and UNEP to develop their more specific legislative instruments. Furthermore, the Law of the Sea Convention laid down guidelines for the measures which coastal states, flag and port states might take to prevent and alleviate ship-generated marine pollution.

Arising out of UNEP's Regional Seas Action Plan a number of significant regional measures were taken between 1974 and 1978.[8] Firstly, the *Convention on the Protection of the Environment Between Denmark, Finland, Norway and Sweden* (the 1974 Stockholm Convention) included an extremely wide pollution coverage. Secondly, in 1974, the *Convention on the Protection of the Marine Environment of the Baltic Sea Area* (the Helsinki Convention) augmented the Stockholm document. Next, in 1976, the very important *Convention for the Protection of the Mediterranean Against Pollution* (the Barcelona Convention) was concluded amongst almost all Mediterranean littoral states. The Convention includes protocols on dumping, as well as emergency measures, in cases of oil and other pollution. In 1978, the *Kuwait Regional Convention for Cooperation in the Protection of the Marine Environment from Pollution* (the Kuwait Convention) was concluded amongst Gulf states. Included is a protocol on emergency measures. All of these UNEP-administered regional conventions oblige states to take decisive actions to protect their marine environment and have led directly to new national legislation, which includes not only stiffer penalties for contraventions but a whole series of new preventive requirements.

There is no question that during the 1970s there was a significant reduction in the amount of pollutants entering the sea from vessels. Firstly, of course, the many new international legislative measures led to tighter national laws and regulations which, in turn, had a certain effect. More significant, however, were the new developments in ship construction technology, which led to better and safer oil discharge and ballasting methods. Improved tank stripping pumps, the load-on-top (LOT) system, and other technological advances all reduced pollution. On the other hand, the 1971 OILPOL amendments, which called for compulsory limits on the size of tanks in tankers, did not find favour in the industry, particularly in its construction sector, and have not so far entered into effect.

Probably the most notable factor affecting the reduction of oil pollution at this time was the "energy crisis" which, after 1973, by raising oil prices radically, also greatly increased the value of oil cargoes. Thus if it had been commercially expedient to pump oil residues overboard, when such oil was valued at less than USD 3 per barrel, it was no longer expedient to discharge oil valued at USD 30 a barrel into the ocean! Thus indirectly OPEC improved the marine environment!

Pollution Prevention and Tanker Safety, 1970-1980

Unfortunately, there was little room for complacency as the safety record of the tanker industry reminded a much more environmentally conscious world of the continuing pollution problem. In 1974 the VLCC *Metula* grounded in the Strait of Magellan, causing a serious spill, and during the same year the VLCC *Showa Maru* caused considerable pollution

in the Strait of Malacca. Fortunately a disaster of very major proportions was averted in both cases. Perhaps the blackest period in shipping history occurred during a two-month span, from December 1976 to January 1977, when a whole series of major tanker disasters received world wide media coverage. It is certain that all in the shipping industry still recall names such as: *Argo Merchant*; *Sansinena*; *Oswego Peace*; *Olympic Games*; *Daphne*; *Grand Zenith*; *Barcola*; *Mary Ann*; *Universe Leader*, and *Irene's Challenge*. Almost all of these disasters were caused by human error or negligence.

These disasters led directly to a demand by the U.S. and other coastal states for the *Conference on Tanker Safety and Pollution Prevention*, held by IMCO in February 1978.[9] This Conference resulted in the 1978 MARPOL Protocol which was designed to speed up the adoption of MARPOL itself. Yet just a few weeks after this meeting the much feared "total" tanker disaster took place off the coast of France. This was, of course, the well-chronicled story of the VLCC *Amoco Cadiz* and the total loss of its 230,000 tonne crude oil cargo, resulting in the largest single ship-generated oil spill in history. It also resulted in France changing its attitude from a pragmatic maritime state into a fiercely regulatory environmental coastal state! The *Amoco Cadiz* disaster had, of course, a number of other important repercussions, not the least being a complete re-examination of the ancient law of salvage, which had been found to be seriously inadequate in cases where a total loss involving serious oil spillage occurs.

Once again, it was a disaster which, although initially caused by a technical failure, escalated to its full impact due to human error. This was one of the reasons why IMCO concluded the *International Convention on Standards of Training, Certification and Watchkeeping for SeaFarers* (STCW Convention) later in 1978. The STCW Convention was designed to raise standards of training for seafarers and thus directly lead to a general increase in the safety of navigation. The need for this increase was illustrated by subsequent disasters such as: the collision between the VLCC *Aegean Captain* and the ULCC *Atlantic Empress* which eclipsed the *Amoco Cadiz*'s unenviable record of amount of oil spill; the collision between the ULCC's *Venoil* and *Venpet*; the *Betelgeuse* and *Independenta* explosions; the negligent loss of the *Energy Concentration*, and a number of other similarly notable accidents.

Towards New Pollution Liability Regimes

When the CLC finally entered into force in 1975 discussions took place within the industry to decide whether TOVALOP would be made redundant. It was, however, decided to keep TOVALOP but to adjust its terms to conform closer to the CLC. This also meant that CLC non-member states would still have coverage under TOVALOP. This decision was repeated regarding CRISTAL, which remained in place in amended form after the Fund Convention became operative in 1979. However, by 1982 there was a general consensus that all four compensation schemes were in need of revision. In particular, the upper limits appeared to require readjustment. Although the limits were adequate for most pollution incidents, they were not high enough to cover major disasters, as illustrated by the *Amoco Cadiz* case. Accordingly, IMCO -- which had become IMO -- the International Maritime Organization, in May 1982 -- convened a conference in 1984 at which the CLC and Fund Conventions were revised.

The 1984 IMO Diplomatic Conference resulted in complete revisions of both the CLC and the FUND instruments. The *Amoco Cadiz* disaster, in

particular, had shown that the CLC and FUND limits were not sufficient for a major disaster and after considerable negotiations the revisions were developed. The revisions resulted in two new protocols, not yet in force: the *Protocol of 1982 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969*; and the *Protocol of 1982 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.*

Both protocols substantially raised the ceilings of the CLC and FUND, although not as high as demanded by some states. The 1984 Protocols also extended the geographical limits of the parent conventions to the exclusive economic zones of contracting states up to 200 miles from the coast. Future amendment procedures for the conventions have been also simplified.

The 1984 Protocols will take a number of years to enter into force but further illustrate the continuing international concern about the marine pollution problem as well as the considerable financial risk exposure now required in order to meet marine pollution liability obligations.

It should be noted that during the 1984 IMO meeting an attempt was also made to conclude a new *Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances* (HNS Convention). A draft convention had been prepared, but the Conference was unable to agree on a final text. It appeared that the complexity of the issues involved made immediate resolution impossible. As a result the matter was referred back to the IMO for further study. Nevertheless, there was unanimous agreement for such a scheme and it can be expected that the issue will re-emerge in the future. Of course, questions relating to liability and compensation arising out of accidents involving these substances, therefore, remain presently uncertain.

The Codification of Marine Pollution Rights

Developments to 1973

During the period between the end of World War II and the beginning of UNCLOS III, the developments described above did not proceed as smoothly as it might seem. Broadly speaking, the shipping industry, backed by the major maritime states, fought these developments most of the way. In retrospect, it might even be said that had this group been a little more accommodating, some of the problems which would arise during and out of the codification process could have been lessened. On the other hand, there was also, at times, the tendency for some of the major coastal states to be unreasonable in their demands. However, as already indicated, the international shipping industry's safety record did little to reduce the real environmental fears that had been generated, particularly after 1967.

The formation of IMCO (as it then was) in 1958, some ten years after the IMCO Convention had been concluded, resulted in the new organization becoming responsible for ship-generated marine pollution. Accordingly, IMCO took over the OILPOL '54 Convention from its previous custodian -- Great Britain.[10] In 1959 another international conference on the subject of oil pollution, held in Copenhagen, resulted in a number of relatively minor recommendations designed to extend the effectiveness of OILPOL '54. One recommendation was that there should be a further international conference which should aim to considerably expand the ocean zones in which pollution from ships was prohibited. This preparatory work resulted in the Second Conference on Oil Pollu-

tion, held in London in 1962, which adopted many of the 1959 recommendations. Although these amendments were, at best, marginal, they did not enter into effect until 1967.

The question of pollution was also considered, although almost peripherally, by UNCLOS I in 1958 which, in its Convention on the High Seas, requires states to "draw up regulations to prevent pollution of the sea by discharges of oil from ships or pipelines or resulting from exploitation of the seabed and its subsoil, taking account of existing treaty provisions on the subject."[11] This provision, obviously, had OILPOL '54 in mind, but did not require the adherence of states. Another article in the High Seas Convention also deals with radioactive pollution, pointing to the fact that all legislative attempts to date had dealt only with oil pollution.[12]

As already shown in Part I, the 1967 *Torrey Canyon* disaster had wide-ranging effects on the whole marine pollution field. Even the Secretary-General of IMO has considered this disaster to be almost a positive catalyst for pollution prevention.[13] Its direct results were, of course: the strengthening of IMCO; the much sharper interest in the area of many coastal states; and the positive reaction of the shipping and oil industries in terms of liability and compensation. More indirect effects were also apparent. A number of major maritime states, but with long and vulnerable coastlines, such as the United States, the Scandinavian states, France, and India, carefully reassessed their maritime interests in terms of their environmental policies.

On the other hand, there were still many problems at the international level and the maritime *versus* coastal state confrontation was never clearer than during this time. On one side the UN Sea Bed Committee (UNSC) had been formed, which quickly became a full preparatory commission for a new law of the sea conference. As the whole law of the sea had been opened up for discussion, marine pollution was a major agenda item which was part of the mandate of Committee Three of the UNSC. However, as already shown, the marine pollution debate also raged vigorously at IMCO at the same time. However, at that stage, IMCO was still very restricted in its mandate to be only "technical and consultative." As a result it had no clear overall, international legislative "umbrella" beneath which it could advance its early "safe ships and clean seas" policies. Accordingly, the development of IMCO conventions during these years was severely retarded by the position of the maritime states which held that IMCO had no competence to discuss "jurisdictional" questions, as this belonged to the UNSC.[14] Obviously, a number of the pending IMCO marine pollution conventions could not proceed without at least deciding where they should apply.

However, at the UNSC, the maritime states turned the argument around. During Committee Three discussions the view was put forward that operational aspects of marine pollution from ships were matters for IMCO, although it must have been quite clear that operation and jurisdiction must be considered together in terms of environmental protection.[15] Fortunately, apart from unnecessary delays, most members of the UNSC were not really fooled by this approach and were able to prepare reasonably widely accepted drafts for UNCLOS III on this matter.

It was, on the eve of UNCLOS III, of course, abundantly clear that the projected law of the sea convention would need to provide exactly the regulatory "umbrella" needed by IMCO to give it the necessary powers to strengthen international marine pollution conventions and ensure that such instruments enter into force more expeditiously.

Furthermore, although the "shipowners' club" stigma had been removed from IMCO, a number of coastal states were still concerned that IMCO would develop the "lowest compromise" of environmental protection due to its limitations. As a result it has been suggested that if IMCO could not carry out the suggested UNCLOS III mandate then coastal states would have to undertake measures to protect the marine environment as a world community responsibility.[16]

UNCLOS III and the New Convention

As is well known, the Third Committee of UNCLOS III had the primary mandate for developing provisions for the protection of the marine environment. In the early sessions of the Conference the coastal *versus* maritime states' confrontation continued. At times shipping bodies, such as the International Chamber of Shipping (ICS), and the oil industry's various lobbies, aided and abetted by a number of traditional maritime states, attempted to block progress at all levels of discussion and negotiation. The argument, as always, bordered on the emotive -- i.e., the curtailment of the freedom of the seas; the so-called "crazy patchwork quilt" of multiple national/unilateral coastal legislation; and the often expressed, but rarely proven, fear of maritime strategic interests, that coastal environmental regulation was the "thin edge of the wedge" of "creeping jurisdiction," which could be used to curtail other freedoms in coastal areas.

The end result was, as was everything at UNCLOS III, a carefully negotiated package of compromises. Due to the very skillful leadership of the chairman of the Third Committee, aided by the general realization that environmental protection was a necessary step forward for international shipping, the resulting Part XII of the new UN Convention on the Law of the Sea (LOSC) is a masterpiece of international agreement in a complex area. To be sure, there remain problems, and neither coastal nor maritime states were "winners." However, the forty-five articles in this part of the Convention do, indeed, provide new international guidelines for the control of ship-generated marine pollution.

It is neither necessary nor appropriate to go into details of all the relevant articles here. The overall admonition that "states have the obligation to protect and preserve the marine environment"[17] says it all.

There are, of course, fairly specific provisions in the various articles. For example, Article 194 sets out quite clearly the measures which states must undertake to prevent, reduce, and control all types of pollution of the marine environment. Subsection 3.(b) includes pollution from vessels, including measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of such installations or devices. This is, without question, a very clear direction for states' responsibilities. On the other hand, Subsection 4 also provides protection for the rights of other states by requiring states taking preventive measures "to refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights. . ."

Article 211 deals even more directly with pollution from ships and the controls which may be imposed on such ships. Here we find the requirement that states should act through "competent international organizations" in order to achieve international rules and standards to prevent, reduce and control pollution. As has been generally accepted,

this clearly refers to the IMO and provides that organization's needed legislative "umbrella."[18]

Article 211 is one of the most complex and difficult sections in the LOSC, and it is far too early to even analyze how it will be interpreted or even understood. What is clear is that it attempts to lay down general guidelines of what states should do within their own power to prevent, reduce and control marine pollution from ships.

Section 6 on Enforcement is particularly relevant. Here is the new "frontline" between traditional flag-state responsibility and new directions in the international enforcement process against marine pollution. It is here that the basic ground rules for what states can and cannot do are found.

Article 217 codifies the traditional flag state responsibilities. These are, of course, the basic rules which IMO has attempted to lay down for its member states. It is also an area with persistent problems, as sovereign states cannot be forced to implement rules except as interpreted by such states. As a result, in the past, flag state rules have been nothing more than advisory admonitions which were often not followed. Article 217 now sets out very clear legal responsibilities for flag states which incorporate much of the language drawn directly from a number of IMO operational conventions. It is, for example, quite clear that allowing a sub-standard vessel in operation would indicate an illegal act by the vessel's flag state.

Article 220 covering marine pollution enforcement by coastal states was another very difficult compromise. For most coastal states it is still not considered totally satisfactory. For Canada it was considered almost a defeat. The language of the article is complex and the escalation of right of action by the coastal state is almost unworkable. The article attempts to do too many things and to foresee problems so far unknown. However, it reflects the fears of the maritime states that coastal states might interfere in legitimate navigation and that safeguards must thus be clearly spelled out.

Article 220 sets out reasonably clearly the different enforcement regimes permitted for coastal states to follow for pollution incidents occurring in the territorial sea and the Exclusive Economic Zone (EEZ), with a further safeguard related to the type and magnitude of pollution damage. It may well be that this Article is not completely compatible with the IMO Intervention Convention which appears to give coastal states broader powers.[19]

Article 218 on enforcement by port states breaks totally new ground in international maritime law. It is probably in this area that most future preventive enforcement is expected to take place. The feared spectre of coastal states' excessive zealousness in interpreting Article 217 has not so far arisen. This may well be due to the progress which is being made under port state jurisdiction which will be discussed further below. In any case, it appears that, with very few exceptions, states so far are not eager to even utilize the new powers available under Article 220. For most states the increased costs related to coastal surveillance and pollution control are simply not feasible.[20]

As is well known, Section 7, on safeguards against excessive regulation and interference, provides fairly adequate protection for vessels and interested parties in cases where states have exceeded their powers under the Section 6 articles. The section also lays down specific rules of how investigations, penalties, restrictions etc., by coastal states should proceed. Furthermore, coastal state liability and

responsibility for delay and improper procedure is also laid down in this section. Obviously, claims and other procedures under these articles might not be easy as this would involve the normal, difficult state-to-state procedures. In private law terms it remains to be seen if a shipowner could proceed under these articles in order to make a claim for delay, etc.

As has been previously written, the LOSC also provides fairly specific rules under which coastal states may make rules relating to navigation in offshore areas. In particular, traffic regulation, seen generally as a very effective system for marine pollution control, can be developed under a number of articles which give coastal states fairly broad powers.[21] Under Article 17, marine pollution is now clearly considered to be prohibited as an act "prejudicial to the peace, good order or security" of the coastal state, and would suspend innocent passage. Under Article 21 coastal states are permitted to make laws and regulations for the protection of the marine environment. Again, these are "umbrella" articles which must be read with Part XII and some of the IMO conventions. There are similar, although somewhat more restricted, provisions in the articles relating to straits and archipelagoes.

It is, therefore, apparent that the LOSC provides a fairly comprehensive regulatory system for complex new rules relating to the protection of the marine environment, combined with the safety of navigation in the territorial sea, international straits, archipelagic waters and, to a more limited extent, in the international seabed area, the EEZ, and the high seas. Furthermore, the Convention's strict requirements to protect the marine environment implies that where direct protection is required, the lack of action may well be a breach of international law.

Post-UNCLOS III Developments

The fact that the LOSC is not in force, or that it probably will not be in effect for a few years, has not deterred a large number of states from implementing provisions which bear a remarkable resemblance to the marine environment protection provision in the LOSC. For example, a recent survey of some ninety countries revealed that over half had, in recent years, implemented new legislation to protect the marine environment. A large percentage of the remainder had new legislation pending.[22] The influence of ship-generated marine pollution and the work of IMO and UNCLOS III had clearly had far-reaching effects.

In general, much of the new legislation either followed IMO conventions implicitly or was of a lower magnitude in terms of regulatory scope. There was little evidence of states exceeding their powers as foreseen by IMO and the LOSC. On the contrary, there seems to be some worrying evidence that many states are far from eager to accept some of the new environmental responsibilities. This was a particular problem with many developing states which are fearful of the cost and other administrative implications of marine pollution control.

There are some examples of states which may be considered to be "exceeding" the envisaged LOSC regime. For example, Brazil links pollution fines to basic wage inflation, which results in extraordinarily high fines for even minor offences; the Soviet Union and Cuba have developed a new demand for costs for "restorative damages" to the marine environment, which are extremely difficult to quantify; the United States has far-reaching powers under its Deepwater Ports legislation which appears to extend jurisdiction considerably, and some U.S. States still require pollution liability guarantees for pollutant car-

riers prior to entry; Canada, Indonesia, and Australia have implemented vessel traffic regulation systems which may well exceed the guidelines under the LOSC; some Gulf states and Japan have established very high, escalating fines for pollution offenses; the Federal Republic of Germany routinely jails serious polluters, etc.

However, it is quite apparent that these are generally small problems which are dealt with on a routine basis by the shipping indemnity insurance arrangements which all vessels carry. It simply means that trading to a "problem state" means an additional insurance risk. In general, even the above examples do not illustrate jurisdictional overzealousness but rather a strong concern for environmental protection. It is, of course, conceded that this trend must be carefully monitored.

The completion of the LOSC has had a particularly laudatory effect on IMO, the principal competent international organization in terms of marine pollution control. The former slow rate of convention acceptance and ratification has speeded up drastically as has the organization's membership. As can be seen from *Table 1*, there are presently some forty international instruments concerned directly and indirectly with marine pollution from ships. The most important are those emanating from IMO. There is no question that the real catalyst has been the entering into force of MARPOL 73/78 in 1983, which has had a resoundingly positive effect on marine pollution control.[23] Its construction standards have made many of the older problem vessels obsolete and its operational requirements have made deliberate pollution unnecessary.

On the other hand, there are also difficulties at IMO. Several of the important MARPOL Annexes are not yet in effect and an attempt, in 1984, to conclude a liability regime for the sea carriage of hazardous and noxious substances failed to find sufficient support.[24] This means that there is still a heavy concentration of oil pollution at the expense of pollution from substances other than oil. This could be particularly serious in case of a serious pollution incident involving such substances.

However, IMO is also developing a new international regime for marine salvage which will be more in line with LOSC requirements.[25] Furthermore, it is hoped that the 1984 FUND and Civil Liability Convention Protocols will soon enter into force and thus raise the ceiling for compensation for pollution damage.[26]

Probably the most significant progress arising out of the LOSC marine pollution from ships provisions has occurred under Article 218 on port state enforcement. It appears that this may well be the area where positive progress will continue.

At this stage there is only one region where "port state enforcement" occurs. In 1982 a high level Ministerial Conference on maritime safety, held in Paris, resulted in the signing of the "Memorandum of Understanding on Port State Control" by fourteen European states.[27] This Memorandum sets out guidelines for an improved and harmonized system of port state control and strengthens cooperation in the exchange of information. Although specifically related to the implementation of IMO and ILO conventions and regulations, the Memorandum also gives effect to and, in some aspects, exceeds the port state control provisions of Article 217 of the LOSC.

Under the Memorandum the signatory states have agreed to carry out substantial inspections of vessels in each other's ports to check on all safety matters. Inspection rigour is escalated in accordance with deficiencies found. Particular attention is given to vessels carrying

pollutant and hazardous and noxious cargoes. The inspection authorities are given the power to demand rectification of serious problems before the vessel is allowed to proceed. In other cases, if the vessel is permitted to proceed, authorities at the next port will be notified to ensure further inspection.

The progress of the Memorandum's intent was recently reviewed at a further high level conference held in The Hague early in April 1986.[28] It was found that the Memorandum had reached its target of inspections corresponding to 25 percent of the estimated number of individual foreign merchant ships which entered the ports of signatory states during a twelve-month period. As the 1984-85 Annual Report of the Memorandum Secretariat reveals this target was reached during this period.[29]

The 1984-85 statistics speak for themselves. During the year 10,044 inspections were carried out on 7,665 individual ships of 112 different flag states. Out of this total 428 ships were detained or delayed due to serious deficiencies.

It appears that what has been achieved in Europe is truly preventive action and exceeds the expectations of Article 217 of the LOSC. Under the LOSC, port states are given the power to take action when requested to by a state which has suffered pollution damage from a ship which is now within the jurisdiction of the port state. It was envisaged that this rule would be particularly useful in cases where the flag state fails to take action. However, under this rule the question of incentive and costs involved were never clearly answered. Although the Article 217 rule is still useful, the next step, taken under the Memorandum, is far superior. It will now, however, be necessary to establish other Memoranda elsewhere.

Conclusions: Balancing Rights and Responsibilities

Ship-generated marine pollution which, we must remember, now represents considerably less than five percent of all pollutants entering the marine environment, has received probably more attention than it really deserves. Its emotional, environmental base has been reinforced by the fear of those interested in commercial and strategic navigation that marine pollution controls can be used by coastal states as a pretext for "creeping jurisdiction" purposes other than environmental protection. On the other hand, coastal states feared the repercussions from large-scale marine pollution incidents, which occur with frightening regularity and are generally caused by human error in an industry which has yet to sufficiently raise its own environmental consciousness.

As often happens, the implementation of the environmental provisions of the LOSC has not resulted in overzealous coastal states taking liberties, nor has there been any large-scale discernible reduction in pollution incidents. However, it appears that many states have taken the LOSC provisions seriously and have implemented them in national regulations. Much of this actually appears to have had a positive effect. Environmental protection has become a very functional aspect of ship operation and coastal state control and the LOSC appears to be a reasonable balance.

The rights and responsibilities of coastal and maritime states can thus be summarized as follows: coastal states have the right to be protected from ship-source marine pollution, but they have also responsibilities relating to pollution prevention, contingency planning, port state control, pollutant reception facilities, navigational aids and

hydrography, vessel traffic systems and the expansion of training required by all of these. Maritime states have the absolute right to pursue legitimate international commercial navigation in their own interest and for the community benefit of international trade and commerce. At a time when the shipping industry is in a particularly depressed state, delays and interference are even less acceptable. However, maritime states have the responsibility to ensure, either individually or multilaterally, through port state control, that their ships are safe, comply with accepted international standards and are adequately covered by sufficient liability insurance.

The new Convention is, certainly at this early stage, unable to balance these interests more equitably. It is not designed to do this. It provides directions, guidelines, and principles but the details have to be filled in at the operational level. As has been advocated before it may well be that a wide-ranging, subsidiary convention on maritime transit may have to be developed in the future. However, in the interim, the environmental provisions of the LOSC must be given a chance to develop. Early indications are that it can work if both sides co-operate on the common, entirely functional goal -- protecting the marine environment.

NOTES

1. For a general background to this period use, Timagenis, Gr. J., *International Control of Marine Pollution*, New York: 1980, vol. I, Part 1.
2. See Gold, Edgar, *Maritime Transport* -- The Evolution of International Marine Policy and Shipping Law, Lexington, Mass.: 1981, Chapter 7.
3. Churchill, Robin, "The Role of IMCO in Combating Marine Pollution," in Cusine, Douglas J. and Grant, John P., eds., *The Impact of Marine Pollution*, London: 1980, p. 73.
4. See, for example, Becker, Gordon L., "The Role of the Oil Majors and Others as Oil Transporters," in Cusine & Grant, note 3 above, p. 119.
5. Timagenis, note 1 above, Vol. I, Ch. 3.
6. *IMO, International Conference on Marine Pollution*, 1973 and *IMO, 1978 Protocol Relating to the International Convention for the Prevention of Pollution from Ships*, 1973, London: 1977 & 1982.
7. Gold, Edgar, "The Rise of the Coastal State in the Law of the Sea," in Johnston, D.M., ed., *Marine Policy and the Coastal Community*, London: 1976, p. 13.
8. Timagenis, note 1 above, vol. I, ch. 3.
9. *IMO, International Conference on Tanker Safety and Pollution*, 1978, London: 1978.
10. Gold, note above 2, p. 285.
11. Art. 24.
12. Art. 25.
13. Secretary-General C.P. Srivastava has expressed this in numerous speeches.
14. This position was taken by a number of maritime states during the negotiations leading to MARPOL in 1973, for example.
15. The author observed this problem at the meetings of the UNSC Committee Three at Geneva in 1972 and 1973.

16. See, Gold, E. and Johnston, D.M., "Ship-Generated Marine Pollution: The Creator of Regulated Navigation," in T.A. Clingan, Jr., ed., *Law of the Sea: State Practices in Zones of Special Jurisdiction*, Honolulu, 1982, pp. 155-197.
17. Art. 192.
18. See the speech by IMO Secretary-General C.P. Srivastava in E.D. Brown, ed., *Law of the Sea: Impact and Implementation*, Honolulu, 1987, pp. 419-425.
19. See, McDorman T., and Gold, Edgar, "Intervention at Sea" in S. Mankabady, ed., *The International Maritime Organization*, London: 1984, pp. 280-299.
20. Gold, Edgar, "The Future of Maritime Transit," in J. Van Dyke, L. Alexander, and J. Morgan, *International Navigation: Rocks and Shoals Ahead?* Honolulu, 1988, pp. 394400.
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Table 1
List of International Conventions and Instruments
Related to Ship-Generated Marine Pollution

	Responsible Organization	In Force
A. General Conventions : Global		
1. Geneva Convention on the Terroritorial Sea and the Contiguous Zone, 1958	U.N.	10 Sept. 1964
2. Geneva Convention on the High Seas, 1958	U.N.	30 Sept. 1962
3. Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958	U.N.	20 March 1966
4. Geneva Convention on the Continental Shelf, 1958	U.N.	10 June 1964
5. Stockholm Declaration and Action Plan on the Human Environment	UNEP	----
6. United Nations Convention on the Law of the Sea, 1982	U.N.	Not in force
B. Marine Pollution: Global		
7. International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (OILPOL '54) Amended in 1962 and 1969	IMO	26 July 1958
a) 1971 (Great Barrier Reef) Amendment	IMO	Not in force
b) 1971 (Tanks) Amendment	IMO	Not in force
8. International Convention Relating to Interventions on the High Seas in Cases of Oil Pollution, 1969 (INTERVENTION 1969)	IMO	6 May 1975
a) 1973 (Substances other than Oil) Protocol. (INTERVENTION PROT 1973)	IMO	30 March 1983
9. International Convention on the Dumping of Wastes at Sea, 1972 (LDC 1972)	IMO	30 Aug. 1975
10. International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 1973)	IMO	2 Oct. 1983
i. Annex I: Regulations for the Prevention of Pollution by Oil	IMO	2 Oct. 1983

ii. Annex II: Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk.	IMO	Not in force
iii. Annex III: Regulations for the Prevention of Pollution by Harmful Substances carried by Sea in Packaged Forms, or in Freight Containers, Portable Tanks on Road and Rail Tank Wagon.	IMO	Not in force
iv. Annex IV: Regulations for the Prevention of Pollution by Sewage from Ships	IMO	Not in force
v. Annex V: Regulations for the Prevention of Pollution by Garbage from Ships	IMO	Not in force
a) 1978 (Tanker Safety and Pollution Prevention) Protocol (MARPOL PROT 1978)	IMO	2 Oct. 1983

C. Marine Pollution: Regional

11. Agreement for Co-operation in dealing with Pollution of the North Sea by Oil, 1969 (The Bonn Agreement)	FRG Govt	Adopted 1969
12. Agreement between Denmark, Finland, Norway and Sweden concerning Co-operation in Measures to deal with Pollution by the Sea by Oil, 1971 (The Copenhagen Agreement)	Danish Govt	Adopted 1971
13. Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 1972 (Oslo Convention on Dumping)	Norwegian Govt	Adopted 15 Feb. 1972
14. Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden, 1974 (Stockholm Convention)	Swedish Govt	Adopted 19 Feb. 1974
15. Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1974 (Helsinki Convention)	UNEP	Adopted 22 March 1974
16. Convention for the Protection of the Mediterranean Sea against Pollution, 1976 (Barcelona Convention)	UNEP	12 Feb. 1978
a) Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft	UNEP	12 Feb. 1978

b) Protocol concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency	UNEP	12 Feb. 1978
17. The Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 1978 (The Kuwait Convention)	UNEP	30 June 1979
a) Protocol concerning Regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency	UNEP	30 June 1979
18. Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region.	UNEP	Not in force
a) Protocol concerning Co-operation in Combating Pollution in Case of Emergency	UNEP	Not in force
19. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region	UNEP	Not in force
a) Protocol Concerning Co-operation in Combating Pollution in Cases of Emergency	UNEP	Not in force
20. Convention for the Protection of the Marine Environment and Coastal Areas of the South-East Pacific (The Lima Convention)	UNEP	Not in force
a) Agreement on Regional Co-operation in Combating Pollution of the South-East Pacific by Hydrocarbons and Other Harmful Substances in Cases of Emergency	UNEP	Not in force
b) Complementary Protocol to the Agreement on Regional Co-operation in Combating Pollution in Cases of Emergency	UNEP	Not in force
21. Regional Convention for the Conservation of the Marine Environment of the Red Sea and the Gulf of Aden (The Jeddah Convention)	UNEP	Not in force
a) Protocol concerning Regional Co-operation in Combating Marine Pollution by Oil and other Harmful Substances in cases of Emergency	UNEP	Not in force
22. Convention for the Protection and Development of Natural Resources and Environment of the South Pacific Region	UNEP	Not in force
a) Protocol for the Protection of the South Pacific Region by Dumping	UNEP	Not in force

b) Protocol concerning Co-operation in Combating Oil Pollution Emergencies in the South-Pacific Region	UNEP	Not in force
23. Memorandum of Understanding on Port State Control	Netherlands Govt	1 July 1982

D. Liability & Compensation Schemes: Intergovernmental

24. International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957	Govt of Belgium	1957
a) Amending Protocol 1979	Govt of Belgium	Not in force
25. International Convention on Civil Liberty for Oil Pollution Damage, 1969 (CLC 1969)	IMO	19 Jan 1975
26. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (FUND 1971)	IMO & IOPC Fund	16 Oct. 1978
a) Protocol 1976 (Unit of Account Revision)	IMO & IOPC Fund	Not in force
27. Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material 1971 (NUCLEAR 1971)	IMO	19 July 1975
28. Liability for Maritime Claims, 1976 (LLMC 1976)	IMO	Not in force
29. Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969	IMO	Not in force
30. Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971	IMO	Not in force

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E. Liability & Compensation Schemes: Industry

31. Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution, 1969 (TOVALOP) as revised to 1978	ITOPF	18 Sept. 1969
32. Contract Regarding and Interim Supplement to Tanker Liability for Oil Pollution, 1971 (CRISTAL), as revised to 1978	CRISTAL	14 Jan. 1971

33.	Pollution Liability Agreement among Tanker Owners (PLATO), 1985	ITOPF/ PLATO	Not in force

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F. General Maritime Safety

34.	International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, 1910	Govt Belgium	Adopted 23 Oct. 1910
35.	International Convention for the Safety of Life at Sea, 1960 (SOLAS 1960) 1960)	IMO	Adopted 26 May 1965
a)	Amendments of: 1966, 1967, 1968, 1969, 1971 & 1973	IMO	Not in force
36.	International Convention on Load Lines 1966 (LL 1966)	IMO	Adopted 21 July 1968
a)	Amendments of: 1971, 1975 & 1979	IMO	Not in force
37.	Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 1972)	IMO	Adopted 15 July 1977
a)	Amendment 1981	IMO	Adopted 1 June 1983
38.	International Convention for Safe Containers, 1972 (CSC 1972) as amended	IMO	Adopted 6 Sept. 1977
a)	Amendment of 1983	IMO	Adopted 1 Jan. 1984
39.	International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974)	IMO	Adopted 25 May 1980
a)	1978 Protocol (SOLAS PROT 1978)	IMO	Adopted 1 May 1981
b)	Amendment of 1981	IMO	Adopted 1 Sept. 1984
c)	Amendment of 1983	IMO	Adopted 1 July 1986 (expected)
40.	International Convention on Standards of Training, Certification and Watch-keeping for Seafarers, 1978 (STCW 1978)	IMO	Adopted 28 April 1984

RECENT EXPERIENCE OF THE UNITED STATES IN CONDUCTING MARINE SCIENTIFIC RESEARCH IN COASTAL STATE EXCLUSIVE ECONOMIC ZONES

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The 1982 Convention on the Law of the Sea gives the coastal state jurisdiction over marine scientific research (MSR) in the exclusive economic zone (EEZ). The nature of that jurisdiction is found in Part XIII of the Convention. This paper examines state practice with respect to marine scientific research in the EEZ and draws certain limited conclusions on what the Convention implies for the future of that research. As yet marine scientists have relatively little experience in conducting their programs under the EEZ regime; the Convention is not yet in force. Although many states have now established EEZs, few have published rules and regulations for the conduct of MSR, and to the best of the authors' knowledge, there are no systematic reviews of the experiences of scientists in living under the EEZ except from the United States, which we reported in an earlier paper (Knauss and Katsouros, hereafter referred to as KK).

Law of the Sea (LOS) Provisions for MSR

Detailed analyses of those provisions of the Convention that apply to MSR have been presented elsewhere (Soons). For purposes of this review we sketch the principal provisions that apply. A number of articles in the Convention are strongly supportive of marine scientific research: all states have a right to conduct marine scientific research (Article 238) as well as a duty to promote and facilitate marine scientific research (Article 239); to create favorable conditions through bilateral and multilateral agreements (Article 243), and to make a special effort to cooperate in marine scientific research efforts which are important to the health and safety of people and to the marine environment (Article 242). States have a responsibility to make the results of scientific research widely available (Article 244). At the same time MSR must be conducted for peaceful purposes (Article 240), cannot interfere with other legitimate uses of the ocean, and cannot be a basis for claim on marine resources (Article 241).

The rules of conduct for marine scientific research within the EEZ are given in Articles 246-254. Marine scientific research within the EEZ and on the continental shelf within the EEZ shall be conducted with the consent of the coastal state; however, this consent shall be granted in normal circumstances and the coastal state shall establish rules and procedures to ensure that consent is not delayed or denied unreasonably (Article 246). Article 246 lists the conditions under which consent may be withheld. The condition open to the widest range of interpretation is when the research "is of direct significance for

the exploration and exploitation of natural resources." Another reason for withholding approval is outstanding obligations from a previous research program in the EEZ of the same researching state.

Article 248 lists information required by the coastal state, essentially the who, what, when and where of the proposed research program; Article 249 lists certain duties and conditions, including allowing coastal state participation in the research program and sharing data and information resulting from the program.

Communications about the proposed research program must be made through official channels unless otherwise agreed (Article 250). The coastal state must be informed of the plans at least six months in advance and must be kept informed of any major changes in the program. In return the coastal state must inform the researching state of its approval or its reason for disapproval within four months of the request or the researching state can assume consent has been granted (Article 252). Finally, the coastal state can order cessation of an ongoing research program if it has reason to believe there has been a major change in the program from that described in Articles 248 and 249 (Article 253).

State Practice as Observed in the United States

One can investigate the extent to which state practice conforms to LOS provisions by examining the published rules and procedures of coastal states or by examining the practice and experience of researching states. Both are useful; neither is complete by itself. Published procedures do not yet exist for many states. Given the many issues a coastal state must face in implementing its jurisdiction over the EEZ, preparing a formal set of guidelines for the occasional research vessel that wishes to work within its EEZ cannot rank as high priority. On the other hand, gathering comprehensive information on experience of researching states wishing to work in coastal state EEZs is not easy because of scattered and often incomplete records. We have limited our study to those records available in the files of the U.S. State Department. We believe they show a reasonably comprehensive picture of recent U.S. experience, and given the wide-ranging oceanographic research activities of the United States, we believe the results have some statistical significance. However, we must emphasize that what we present is the U.S. experience only. We make no claim that the U.S. experience is similar to that of other researching states such as the USSR, France, the F.R.G., the U.K., or Japan.

The number of requests processed by the U.S. State Departrent for work in waters claimed by other states has increased steadily. Wooster reviewed the number of requests for the years 1972-78 from information in the files of the U.S. State Department (Wooster), and in an earlier paper we extended that review from 1979-84 (K.K). In 1972 there were thirty-seven requests. During the period of the LOS negotiations between 1973 and 1982, the average number was seventy-two. The number has steadily grown since then. (*Table 1*) We do not believe the increase is a measure of increased oceanographic research activity in the United States, but rather a measure of increased percentage of the ocean coming under the jurisdiction of coastal states as more and more claim 200 nautical mile EEZs.

Wooster and we attempted to determine the extent of missed opportunities for marine scientific research resulting from difficulties directly attributed to extended coastal state jurisdiction. Our earlier paper suggested that approximately nine percent of the requests to the

Table 1

Year	Number of Requests	Number of States
1972	37	23
1973	62	39
1974	50	21
1975	59	26
1976	60	27
1977	92	31
1978	81	36
1979	100	34
1980	67	18
1981	78	24
1982	72	25
1983	109	31
1984	162	47
1985	276	59

Data from 1972-1978 is from Wooster, 1981. Data from 1979-1984 was discussed by Knauss and Katsouros (in press).

State Department resulted in no research activity, a figure not dissimilar from Wooster's, although as we noted, the method of analysis was sufficiently different that the results are not strictly comparable (K.K). We also noted that the number of lost opportunities was artificially low because requests were seldom made to work in areas where the probability of success was low. In this paper we extend our earlier work and attempt to determine the extent to which the missed opportunities were a consequence of nonconformity with the provisions of the Law of the Sea Convention.

The Data Set

Records of each request by a researching organization to work in the water claimed by one or more coastal states are kept by the Bureau of Oceans and International Environmental and Scientific Affairs of the U.S. State Department. We further broke down the State Department files into events. If the request was for a single program, but the ship would work in waters claimed by four coastal states, we called that four events. On occasion the request would be canceled by the researching organization for lack of funding, ship breakdown, or other reasons. If the cancellation notice came before the coastal state response, the event was removed from our list; otherwise the event was kept in our analysis. The division of events amongst the coastal states is given in *Table 2* for calendar years 1979-1985.

All events were divided into "successes" and "lost opportunities." A success was any program that was carried out in essentially the same form as requested. On occasion approval came so late the program was delayed for a few days or a few weeks. Sometimes modifications had to be made to meet coastal state requirements. These were still listed as successes. If the program was not carried forward because of some action (or a lack of action) by the coastal state, it was listed as a lost opportunity. Lost opportunities were further divided into four

Table 2

Summary of Clearance Requests

	1985	1984	1983	1982	1981	1980	1979	Total Requests
Antigua	8	1	1					10
Argentina	1	3			3		1	8
Australia	2	1					2	5
Bahamas	10	7	5	4	5	4	3	38
Bahrain			1					1
Barbados	8	5	5	1	3	1	1	24
Belize	3	1			1			5
Brazil	7	4	3	5			4	23
Canada	36	35	27	16	14	22	14	164
Chile	1	6	5	2	2	1	4	21
China	1							1
Costa Rica	2	1		1	1	1	1	7
Colombia	2		1					3
Cook Islands	2							2
Cuba						1	3	4
Denmark	2	1	3		1			7
Dominica	8	2			1		2	13
Dominican Rep.	7	6		1		4	2	20
Ecuador	6	1	3	3				13
Egypt		4	1					5
Fiji	2	2		1				5
France	15		4	3	1	2	2	27
French Guiana			1					1
Grenada	8	2					1	11
Guatemala	2	1			2			5
Guinea-Bissau	1							1
Guyana	5	1					1	7
Haiti	8	5	2	2	2	1	1	21
Honduras	6	3	1	1	1			12
Iceland	2		3					5
Indonesia	1					1	1	3
Italy	1							1
Ivory Coast			1					1
Jamaica	3	1	3	1	1	1	1	11
Japan	2	3						5
Kiribati	4	1						5
Liberia	1							1
Mauritania	1							1
Mexico	20	13	11	12	26	19	33	134
Micronesia	1							1
Morocco	3		2	1	1		1	8
Netherlands	2		1	1			1	5
New Zealand	3	1	1				1	6
Nicaragua					1		1	2
Norway		3	5					8
Oman	3							3
Palau	1							1

Table 2: Summary of Clearance Requests (continued)

	1985	1984	1983	1982	1981	1980	1979	Total Requests
Panama	1	3	2				2	8
Papua New Guinea	3	2					1	6
Peru	3	3	4	4	2	1	1	18
Philippines	1					2	2	5
Portugal	1	6						7
Rep. of Cape Verde	1							1
Rep. of Korea	1							1
Romania		1						1
Saudi Arabia		2	2					4
St. Kitts-Nevis	4							4
St. Lucia	8	3		2	2	1	2	18
St. Vincent	9	4		1	2	1	1	18
Solomon Islands	2	1		2				5
Somalia		1			1		1	3
South Africa		1	1					2
Spain	3		2	2	2			9
Suriname		1					1	2
Tonga	3	1		1			1	5
Trinidad & Tobago	6	1						8
Turkey		1						1
Tuvalu	1							1
United Arab Emirates			1					1
United Kingdom	18	10	5	3	2	3	3	44
Uruguay		2						2
USSR		2					2	4
Vanuatu	2	1		1				4
Venezuela	6	2	2	1	1	1	2	15
Western Samoa	2							2
Number of requests	276	162	109	72	78	67	100	864
Number of countries	59	47	31	25	24	18	34	75

categories. If the request was denied for whatever reason, it was listed as denial. On occasion approval was so late in coming that the program was canceled by the researching organization; this was called a late response. Sometimes there was no response whatsoever from the coastal state and without a response the research organization was unwilling to go forward with its planned research program. On occasion the coastal state stipulated conditions that were unacceptable to the researching agency, such as an unplanned port stop, program modification, or a requirement to approve publication of results. The sum of successes and lost opportunities is given in *Table 3*. *Table 4* is a subset of *Table 3* and lists only those events since the Reagan proclamation of 10 March 1983 establishing the EEZ of the United States.

The percentage of lost opportunities is significantly less since the United States declared its own EEZ. We suspect one reason for this

Table 3

	1979	1980	1981	1982	1983	1984	1985	Total
Events	100	67	78	72	109	162	276	864
Lost Opportunities								
Denials	5	1	6	3	4	5	7	31
No response	2	4	0	0	2	2	1	11
Late response	4	5	1	1	1	2	1	15
Unacceptable Conditions	1	0	2	0	0	2	3	8
Total	12	10	9	4	7	11	12	65
Percent Lost Opportunities	12	15	12	6	6	7	4	8

Table 4

	1983*	1984	1985	Total
Events	83	162	276	505
Lost Opportunities				
Denials	3	5	7	15
No response	0	2	1	3
Late response	1	2	1	4
Unacceptable conditions	0	2	3	5
Total	4	11	12	27
Percent	4	7	4	5

*Events in 1983 occurring after the 10 March Reagan Proclamation on the exclusive economic zone.

reduction is the difference in the way in which the State Department processes requests now and before the Reagan proclamation. Prior to March 1983, the United States only recognized coastal state jurisdiction over marine scientific research on the continental shelf and within a narrow territorial sea, which in turn often resulted in some rather convoluted arrangements between the researching organization, the U.S. State Department, and the coastal state in order to satisfy the research needs as well as the juridical position of both the United States and the coastal state. See our earlier paper for a discussion (KK). It has also been suggested that coastal states may have become

less concerned about allowing research within their EEZ once the negotiations for the Convention were concluded. A third reason is that researching organizations are learning to adapt to these new conditions. One method of adapting is to ensure that research requests are submitted in a timely manner and contain all of the required information. Another is not to request permission where permission is likely to be denied.

Self-Selection

It is well known that certain coastal states are more likely to generate lost opportunities than others. Thus one might assume there would be fewer requests to conduct research in such areas. If a scientist or a research agency has a choice of research areas in which to work, that area where permission to work is either assured or not required will likely be chosen over that where permission to work is questionable. Success in science is difficult enough to achieve under the best of conditions without assuming the added burden of uncertainty of response from a coastal state.

As an example, consider the limited number of requests by U.S. scientists to work in Cuba's EEZ. According to *Table 2*, there have been 4 requests to work off Cuba; all have been denied. Cuba is only fifty miles from the United States. By comparison there have been 11 requests to work off Jamaica, 20 off the Dominican Republic, 21 off Haiti, 38 off the Bahamas, and 134 off Mexico. Given the proximity of Cuba to the United States, and the fact that the Gulf Stream runs along two sides of Cuba, one might assume that if U.S.-Cuba relations were such that permission to do research off Cuba could be as reasonably assured as are requests to work off other nearby Caribbean states, the number of requests to work in the Cuban EEZ between 1979 and 1985 would be closer to 25 than 4. If this form of self-selection with respect to Cuba had not occurred, we assume an additional 20 or so lost opportunities would have to be added to the total in *Table 3* for Cuba alone.

The Cuban data are sufficiently dramatic as to be obvious that a certain level of self-selection occurs with Cuba. We have been unable to devise a statistical test to quantitatively estimate the amount of self-selection on a worldwide basis, but we have reason to believe the practice is pervasive. It would be extraordinary if it were not. We can only offer anecdotal evidence. For example, the site of a continuing study of processes occuring at deep sea vents in the eastern Pacific is in the high seas. Similar vents along the same ridge axis are known to occur within the EEZs of both Mexico and Ecuador. The scientists responsible for directing the program had no reason to believe permission would be denied if they had chosen to work in either Mexico's or Ecuador's EEZ, but given the investment of time and effort they had planned for the program, and because this is a program that calls for repeated investigations in successive years, they made a conscious decision to eliminate the risk of possible political difficulties which might have resulted if they had chosen a site within a foreign EEZ. This was done even though the choice of site for the study off the west coast of the United States was less attractive because of weather problems (F. Spiess, personal communication).

One of the few documented examples of reduced clearance problems because of self-selection of area is a program called Subtropical Atlantic Climate Study which requires returning to the same area on a regular basis to repeat observations. When Trinidad and Tobago effectively denied access to its EEZ because of its imposed conditions, the

study dropped that leg from its program and has not since requested clearances for this region because the study required a continuing set of observations over a number of years. Failure to receive permission to conduct the program during the first year resulted in cancellation of that section of the program in future years.

Conformity or Non-Conformity with LOS Convention

We define state practice as being in conformity with the LOS Convention when its rules, regulations and practices are no more restrictive than that allowed by the Convention. For example, the United States does not require researching states to request permission for marine scientific research within the U.S. EEZ (KK). We judge such a practice to be in conformity with the Convention. Similarly, many coastal states provide consent for U.S. researching vessels wishing to work within its EEZ with as little as one to two months' notice. Requiring less than six months' notice is within the discretion of the coastal state, and we accept this practice as being in conformity with the LOS Convention, as, of course, is the decision by Mexico to require the full 180 days' notice allowed under the Convention even though this decision by Mexico has resulted in a number of "lost opportunities."

We have attempted to determine the extent to which lost opportunities for research can be attributed to the coastal state not being in conformity with the LOS Convention. We limit ourselves to an examination of those events since March of 1983 when the United States declared its own EEZ and indicated it would abide by the non-deep seabed portions of the Convention including those that apply to MSR. Although the U.S. State Department has always attempted to secure authorization for U.S. scientists to work in waters claimed by others before the Reagan Proclamation on the EEZ, the United States did not recognize a coastal state's EEZ and, as noted previously, arrangements were often of an *ad hoc* nature (KK).

There were 505 events between 10 March 1983, the date of the Reagan EEZ Proclamation, and 31 December 1985. The number of lost opportunities during this period is 27, or slightly more than five percent (*Table 4*). We have examined each event to determine whether or not the lost opportunity was because either the United States or the coastal state failed to act in conformity with the Convention.

Less Than Six Months' Notice

Article 248 reads in part, "States . . . which intend to undertake marine scientific research in the exclusive economic zone or on the continental shelf of a coastal state shall, not less than six months from the starting date of the marine scientific research project provide the state with . . ." As previously noted, most states do not require six months' lead time and some that do, such as Mexico, have indicated they will consider special circumstances in waiving the six-month requirement (Cocke, personal communication). It is the practice of the U.S. State Department to forward to a coastal state all requests for *bona fide* research programs of U.S. institutions for work in these EEZs regardless of the lead time. In well over half of the events examined since the U.S. EEZ Proclamation in March 1983, the lead time was less than six months and, as *Table 4* indicates, the vast majority of these requests were approved.

For purposes of this study we judged the coastal state to be in conformance with the LOS Convention if the request was made less than

six months prior to the intended start of the research program, and the research did not take place because (a) the coastal state denied the request, whether or not the coastal state gave less than six months prior notice as the reason; (b) coastal state approval came too late; or (c) the coastal state failed to respond to the request. Of the 27 lost opportunities, 14 fall into these categories. If, however, the request was made less than six months in advance and the coastal state approved the request but, as part of that approval, required conditions that were unacceptable to those conducting the research, the decision as to whether these lost opportunities were in conformance with the Convention was made on the basis of our judgment as to whether or not the conditions imposed were in conformance with the Convention.

Unacceptable Conditions

Of the remaining 13 examples, five were because the coastal state insisted on conditions the scientists concerned found unacceptable. Four of the five cases appear to be examples of coastal states requiring more than is allowed in the Convention. The fifth appears to be an example of the coastal state exercising its rights, but the United States finding the cost of that exercise too high. Two were generated by Trinidad and Tobago, which is the only one, of the 75 coastal states in whose EEZs the United States has attempted to conduct marine scientific research in recent years, to insist that the results of such work can only be published with its express consent. Article 249, paragraph 2 provides some basis within the Convention for such a position. It reads:

> This article is without prejudice to the condition established by the laws and regulations of the coastal state for the exercise of its discretion to grant or withhold consent pursuant to Article 246, paragraph 5, including requiring prior agreement for making internationally available research results of a project of direct significance for the exploration and exploitation of natural resources.

The primary purpose of this paragraph was to provide some opportunity for the coastal state to control the availability of information on the resources of its EEZ. The paragraph, however, would appear to limit the types of research for which this condition could be invoked. An examination of the proposed research programs of the two projects suggests that Trinidad and Tobago would be hard-pressed to sustain the position that projects were of "direct significance for the exploration and exploitation of natural resources" if the cases were ever carried to dispute settlement under Part XV of the Convention. One was an air-sea interaction study and the other concerned the mixing of different water masses.

Trinidad and Tobago is one of the few coastal states that has published guidelines for marine scientific research in areas under its jurisdiction. These were published prior to the establishment of Trinidad and Tobago's EEZ but apparently are used as guides for research in the EEZ as well as its continental shelf. Paragraphs v and vi read:

v. results of scientific research done on its continental shelf are the property of the Government of Trinidad and Tobago; these results may be published only with its express consent.

vi. all data and specimens are the property of the Government and where specimens cannot be duplicated the originals must reside in its museums and laboratories.

Paragraph v is more restrictive than Article 249, paragraph 2 and paragraph vi is more restrictive than Article 249, paragraph 1(c) which reads:

> undertake to provide access for the coastal state, at its request, to all data and samples derived from the marine scientific research project and likewise to furnish it with data which may be copied and samples which may be divided without detriment to their scientific value.

Two other examples of unacceptable conditions resulted from Venezuela requiring a Venezuelan port stop by the researching vessels. Arrangements had previously been made to pick up Venezuelan observers before entering Venezuela's EEZ. Special port stops are not required under the Convention. The cost in time for the programs to make these detours from the planned itinerary were considered excessive, and in each case the U.S. scientists decided to cancel that part of their program which was bringing them into the Venezuelan EEZ.

The fifth case of unacceptable conditions appears to be an example of where the coastal state was within its rights under the Convention. Morocco wished to exercise its right to be represented and to participate in a marine scientific research program that was planning to spend approximately one day in its EEZ. Apparently the research program was unable to arrange for the Moroccan representation except by a special detour to a mutually acceptable port that would have added an additional two days to the program. Given the time and funding constraints the scientists reprogrammed their activities to omit the incursion into the Moroccan EEZ.

Denials

During the period under study there were six denials of requests made six months or more in advance to do marine scientific research within the EEZ of a coastal state.

Article 246 reads in part:

1. Coastal states. . .have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone . . .
2. Marine scientific research...shall be conducted with the consent of the coastal state.
3. Coastal states shall, in normal circumstances, grant their consent for marine scientific research . . . To this end coastal states shall establish rules and procedures ensuring coastal consent will not be delayed or denied unreasonably.
4. . . . .normal circumstances may exist in spite of the absence of diplomatic relations between the coastal state and the research state.
5. Coastal states may however in their discretion withhold their consent to the conduct of a marine research project of another state or competent international organization in the exclusive economic zone or on the continental shelf of the coastal state if that project:

(a) is of direct significance for the exploration and exploitation of natural resources whether living or nonliving;
(b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
(c) involves the construction, operation or use of artificial islands and structures referred to in articles 60 and 80.
(d) contains information communicated pursuant to Article 248 regarding the nature and objectives of the project which is inaccurate or if the researching state or competent international organization has outstanding obligations to the coastal state from a prior research project.

None of the six denials cited any of the reasons in Article 246, paragraph 5 as the reason for the denial. The two denials from the USSR gave no reason whatsoever, and the other four (two from Brazil and one each from Spain and Oman) gave reasons other than those allowed in paragraph 5. In our judgment Article 246 imposes an obligation on the coastal state to grant permission for marine scientific research within its EEZ in normal circumstances assuming the procedures outlined in Articles 248-250 are followed. Reasons for denial of consent are limited to those listed under Article 246, paragraph 5. Failure either to cite one or more of the reasons listed in paragraph 5 or to claim that "normal circumstances" do not prevail is, in our judgment, not acting in conformance with the Convention.

Delayed Response

Permission was delayed so long for one request made more than six months in advance that significant changes in the program were required. The delay was not so much for lack of communication, but a series of delays caused by misunderstanding of what the coastal state was requesting, further exacerbated by one package of material being lost in the mail. In our judgment this lost opportunity cannot be tied to either the United States or the coastal state not acting in conformance with the LOS Convention, but was simply a breakdown in the system. One lost opportunity because of system breakdown in 505 events since the Reagan declaration of an EEZ speaks well for the system, unless of course you are that group of scientists wishing to work off Costa Rica who had followed all procedures correctly but were frustrated in their efforts because of circumstances beyond their control.

Discussions and Conclusions

The number of requests from organizations in the United States to conduct marine scientific research in the EEZs of coastal states has increased rapidly in recent years. This increase is clearly a result of the increasing number of coastal state claims to EEZs as permitted under the 1982 LOS Convention. It is not a measure of increased marine scientific research in the United States. As this analysis has shown, research programs did not go forward in only five percent of the 505 events processed by the State Department between March 1983, the date of the Reagan Proclamation claiming an EEZ for the United States, and December 1985. The vast majority of requests were processed routinely. However, there are also a significant number of events that end up in the success column of this analysis where the processing was not routine; where the files show many telephone calls, cables and letters

between the State Department and its embassy in the coastal state. Issues range from requests for more information to significant schedule and program changes, to discussions on how to accommodate foreign observers. Occasionally clearances are not finalized before the ship is underway, and on rare occasions when negotiations break down, the research program must be drastically altered after the ship has left port to accommodate the failure to receive coastal state permission. These situations extract a heavy toll on all concerned. We believe one result is that scientists are systematically reducing requests to work in areas where either the chances of receiving permission are low, or where there are high costs in terms of time and effort to satisfy coastal state requirements. Statistical documentation is difficult except in rare cases such as Cuba, but there is significant anecdotal evidence to indicate this is happening. Perhaps because the problem areas are relatively few, and because the overall success rate for requests is high, the U.S. science community has accepted these difficulties to date with limited protest. Along with inadequate funding, storms at sea, and malfunctioning instruments, "EEZ problems" are simply added to the list of difficulties one must accept if one is to be a seagoing scientist.

One of the most difficult requirements for U.S. scientists is that of Article 248 which requires the researching state to provide the coastal state with information about the proposed program six months in advance. Six months' advance notice may not be an unreasonable requirement for a program that is planned for the western Pacific, the Mediterranean or the Indian Ocean, but given the nature of the U.S. marine science enterprise it is a difficult requirement to meet for many of the programs that occur closer to home. To date many have found it difficult to provide the information required in Article 248 six months in advance of a research program that may be at sea only a few weeks and may not be more than a few hundred miles from its home port. Fortunately for the United States, most coastal states have not invoked the six month's requirement. If they had, there would have been a significant increase in number of lost opportunities in *Tables 3* and *4*.

There are significant differences between Article 5, paragraph 8 of the 1958 Continental Shelf Convention which gives jurisdiction to the coastal state over marine scientific research conducted on the continental shelf and Part XIII of the 1982 Convention on the Law of the Sea which delineates the jurisdiction and procedural rules for conducting marine scientific research on the continental shelf and within the EEZ. One specific difference is that Article 246, paragraph 5 limits the range of reasons a coastal state has for denying access to its continental shelf and EEZ for purposes of conducting marine scientific research. Our interpretation of the six outright denials for requests made more than six months in advance is that none of the reasons for denial (in two of the cases no reason was given at all) fell within the reasons listed in Article 246, paragraph 5. The State Department files do not indicate any protest, formal or otherwise, for the denial not conforming with Article 246.

Another difference in the marine scientific research provisions between the 1958 and 1982 conventions is Article 252, "implied consent." A number of times in the past a request for permission to conduct marine scientific research on a coastal state's continental shelf would go unanswered, or not answered until a day or two before the researching vessel was to enter the jurisdiction of the coastal state. Article 252 states that if the researching state has requested

permission at least six months in advance and the coastal state has not replied within four months, the researching state may proceed under "implied consent." Of the 13 lost opportunities where the request was made more than six months in advance, only one was for lack of response. As noted, this was a case of lost documents and misunderstandings of messages. The United States did not attempt to invoke the implied consent provisions of Article 252, and we believe it was correct in not doing so.

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COASTAL STATE PRACTICE IN THE EXCLUSIVE ECONOMIC ZONE: THE RIGHT OF FOREIGN STATES TO USE THIS ZONE

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Purpose and Limits of This Paper

This paper is intended to deal with coastal state practice in the exclusive economic zone (EEZ) as regards matters different from those which have already been considered by the three previous papers, namely fishing, prevention of pollution, and marine scientific research. It will in particular focus on the right of foreign states to use the zone, a somehow general and perhaps residual topic. It will then try to assess to what extent present state practice does comply with the relevant provisions of the United Nations Convention on the Law of the Sea (LOSC).[1]

It must first of all be recalled that a minority of "territorialist" states still claim a territorial sea exceeding the generally recognized breadth of 12 miles, and ranging from 15 (Albania) to 20 (Angola), to 30 (Nigeria, Togo), to 35 (Syria), to 50 (Cameroon, Tanzania), to 70 (Mauritania), to 100 (Gabon, Ghana) or to 200 nautical miles (Argentina, Benin, Brazil, Congo, Ecuador, El Salvador, Liberia, Panama, Sierra Leone, Somalia, Uruguay).[2] Some of them have established an EEZ covering the area between the external limit of their territorial seas and the 200 miles off the coast (Mauritania, Nigeria, Togo).[3] In other cases the 200-mile territorial seas do not affect some of the traditional freedoms of the high seas. It will therefore be necessary to take account also of territorialist legislation in order to determine how much they diverge from the prevailing EEZ model.

What this paper will not consider is national legislation relating to the baseline from which coastal zones are measured. No doubt, the Libyan claim to historic waters in the Gulf of Sidra or the 1985 Canadian Order on straight baselines in the Arctic region may constitute a hindrance to the possibility of other states using waters that could still be regarded as high seas. But the lawfulness of state practice on baselines is a question which goes far beyond the scope of this paper.

Suggested Interpretation of the Relevant Provisions of LOSC

The problem with this paper is that national practice has to be examined in the light of some of the most abstract rules of LOSC, such as Article 56 (Rights, jurisdiction and duties of the coastal State in the EEZ), 58 (Rights and duties of other States in the EEZ) and 59 (Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the EEZ). This is certainly not the place to discuss the legal nature of the EEZ.[4] But a general key to the interpretation of the above-mentioned provisions must nevertheless be suggested, however questionable it may seem.

From Art. 55 it can be inferred that the EEZ does not follow either the concept of sovereignty, prevailing in the territorial sea, or the concept of freedom, which characterizes the high seas. It is just an area where "the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention." In other words, the EEZ is more

similar to a list and allocation of rights or corresponding duties than to an abstract legal category.[5]

Under the LOSC regime, rights within the EEZ can be distinguished according to three different situations.

Rights Attributed to the Coastal State

Article 56 is quite clear in giving a list of rights which are attributed to the coastal state, namely "sovereign rights" relating to the natural resources, whether living or non-living, 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." (Emphasis added.) The coastal state has furthermore a "jurisdiction," as provided for in the relevant provisions of LOSC, with regard to the establishment and use of artificial islands, installations, and structures, marine scientific research, and protection and preservation of the environment.

The idea behind Article 56 is that, in addition to matters explicitly mentioned in this provision, all activities relating to the economic uses of the resources of the EEZ fall in principle within the rights pertaining to the coastal state. Since the latter state is not the full sovereign within the zone, in exercising its rights it shall have due regard to the rights of other states (Article 56, para. 2).

Rights Attributed to Other States

In giving the list of the rights attributed to other states, Article 58 expressly mentions the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, as well as other internationally lawful uses of the sea *related to these freedoms*, such as those associated with the operation of ships, aircraft, submarine cables, and pipelines. Article 58, paragraph 2, in referring to the subsequent Articles 88 to 115, preserves the right of other states to engage in a series of non-economic activities, such as the assistance and rescue of persons and ships, the repression of piracy, the suppression of illicit trade in narcotic drugs and psychotropic substances, the suppression of unauthorized broadcasting, the visit of ships, and hot pursuit.

The idea behind Article 58 is that, in addition to matters explicitly mentioned or referred to, all activities related to navigation, overflight, or laying of submarine, cables and pipelines fall in principle within the rights attributed to other states.

Since other states are not fully free within the EEZ, in exercising their rights they shall have due regard to the rights of the coastal state. They shall furthermore comply with the laws and regulations adopted by the coastal state in accordance with the provisions of LOSC and other rules of international law as far as they are not incompatible with the rules of the EEZ (Art. 58, para. 3). This means that the laws and regulations of the coastal state cannot have the effect of abolishing or unreasonably hindering the rights attributed to other states.

Residual Rights

The so-called "Castaneda formula" embodied in Article 59 can perhaps be considered a skillful political and diplomatic device which reconciles different positions by means of an elastic formulation. It provides that in cases where LOSC does not attribute rights or jurisdiction to the coastal state or to other states and a conflict arises

between the interests of the coastal state and any other state, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Article 59 may seem more a procedural than a substantial rule. But, if we want to give any sense to this provision, it must at least be admitted that a third category of rights does exist according to the LOSC scheme. It concerns the so-called residual rights, which are in principle attributed neither to the coastal state nor to other states, since they regard neither the economic exploitation of the zone nor activities related to navigation, overflight, or the laying of cables and pipelines.

Residual activities can in principle be conducted both by the coastal and by other states. But if a conflict arises between their respective interests it will be resolved in the light of the general criteria provided for in Article 59. This article gives rise to a kind of "no-man's land," where priorities in the exercise of activities cannot be presumptively attributed, but are to be established according to the particular circumstances.

The scheme of interpretation of the relevant provisions of LOSC that is here proposed is the following: in order to determine whether and to what extent other states are entitled to a particular activity within an EEZ, it must previously be assessed whether such activity falls within either Article 56 (roughly, resource-related activities) or Article 58 (roughly, navigation- and communications-related activities) or Article 59 (residual activities).

General State Practice on Rights Within the EEZ

Once it has been stressed that residual activities do exist in LOSC, it must also be added that present state practice does not seem to accept such a subtle concept. Yet, while residuality is an elegant solution for an internationally negotiated text,[6] individual states are mostly concerned in asserting the rights they claim in their own EEZ and, as the case may be, in the EEZ of others. States are not actually happy with formulations which could cast doubts on the full range of their individual legal positions. The "Castaneda formula" reflects at the moment more a trend towards the progressive development of international law than the codification of an existing rule. National legislation embodying a provision correspondent to this formula has still to be enacted. Two interesting trends may be distinguished in state practice.

States Claiming Within Their Own EEZ More Rights Than LOSC Would Allow

A 200-mile territorialist approach is clearly inconsistent with the LOSC model and, as pointed out by the Federal Republic of Germany, "the notion of a 200-mile zone of general rights of sovereignty and jurisdiction of the coastal state cannot be sustained either in general international law or under relevant provisions of the Convention".[7]

It has been stated by Uruguay that "regulation of the uses and activities not provided for expressly in the Convention (residual rights and obligations) relating to the rights of sovereignty and to the jurisdiction of the coastal State falls within the competence of that State".[8] But this interpretation can hardly be acceptable, since LOSC does not attribute residual rights directly to any state.[9]

Some domestic legislation -- by Colombia,[10] Comoros,[11] Equatorial Guinea,[12] France,[13] Iceland,[14] Oman,[15] Togo,[16] Vietnam[17] -- does not expressly mention the rights that foreign states will enjoy within the EEZ. It is nevertheless clear that these states claim an EEZ, and not a 200-mile territorial sea, and that they intend to exercise specific rights relating to the resources of the zone. It can thus be inferred that the rights of foreign states are not jeopardized by such legislation, which does not depart from the generally accepted concept of the EEZ.

An interesting provision, which can be interpreted as leading towards a model of creeping territorialism, can be found in the Indian legislation (reproduced below),[18] which is followed, *mutatis mutandis*, by the acts of Pakistan,[19] Mauritius,[20] Guyana,[21] Barbados,[22] Seychelles:[23]

> The Central Government may . . . (a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the exclusive economic zone or any part thereof; and (b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the exclusive economic zone or any part thereof to which it has been extended is a part of the territory of India.

This kind of provision could be considered compatible with LOSC, if it were understood as regarding matters falling within the rights of the coastal state. If, on the contrary, the provision were to be interpreted as referring to any matter whatsoever, it would result in an encroachment upon rights not directly attributed to the coastal state.

An article of the legislation of Sri Lanka[24] is less liable to be suspected of territorialism:

> In order to give effect to the principles and provisions of this Law, all written laws in force in Sri Lanka shall be read and construed as though the applicability of such laws, wherever relevant, extends to the limits of the contiguous zone, the exclusive economic zone, the continental shelf, or the pollution prevention zone, as the case may be.

It is quite evident here that the laws of the coastal state will be extended to the EEZ only as far as it is necessary for giving effect to the provisions on the EEZ.

While it is unquestionable that there are states claiming too much within their 200 miles, a symmetrical but opposite conclusion is dependent upon the relevance that has to be given to the concept of residual rights.

The position of the United States is quite interesting in this regard. The representative of the United States declared in Montego Bay that the Convention retained the international status of the EEZ "in which all States enjoy the freedoms of navigation, overflight, the laying of submarine cables and pipelines and *other internationally lawful uses of the sea*."[25] (Emphasis added.) Furthermore, the United States, in replying to statements made by certain countries, stressed that "all States continue to enjoy in the zone traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea

related to these freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of that zone."[26] Following consistently this position, the 1983 Reagan Proclamation on the EEZ[27] does not affect the "high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and *other internationally lawful uses* of the sea." (Emphasis added.)

Other states, like the Federal Republic of Germany,[28] Japan[29] and France,[30] share the same position as the United States. This position can be considered as an accurate statement on the present customary law of the sea. But does it fully correspond to all the legal niceties and "residualities" of LOSC?

If the statements were to be understood as implying *all* internationally lawful uses of the sea different from those falling within the rights of the coastal state, they would give an incomplete picture of LOSC, since they would ignore the presence of Article 59 with all its residual rights. Under the LOSC regime, there are actually some high seas rights which can be exercised within a foreign EEZ only after having passed the test of the balance of interests provided for in Article 59. But if the above-mentioned position were to be interpreted as claiming the internationally lawful uses of the sea *related* to the three traditional freedoms of navigation, overflight, and laying of cables, they would not substantially depart from the spirit of LOSC.

State Practice on Particular Activities Within the EEZ

Navigation

Freedom of navigation[31] is expressly mentioned in Article 58 as one of the rights that all states enjoy in the EEZ and it will be useless to quote the various national legislations which recognize this fundamental right in the area between 12 and 200 miles off the coast. It is more interesting to dwell upon instances where such a freedom is denied or hindered.

The most territorialist of the territorialist states is Somalia. Not only does it limit itself to providing a right of "innocent passage" within its 200-mile territorial sea, but it also refuses passage to "vessels having the nationality of States not recognized by the Somali Democratic Republic,"[32] in spite of the fact that, according to LOSC, ships of all states enjoy the right of innocent passage within a 12-mile territorial sea. Brazil, another territorialist state, only allows innocent passage for ships of all nations,[33] adding that they must comply with the regulations which have been imposed for the purpose of guaranteeing peace, good order, and security. The actual behaviour of the Brazilian authorities may however be different from the restrictive legislation it has enacted, since Brazil, in signing LOSC, has declared that the regime which is applied in practice in maritime area adjacent to its coast is compatible with the provisions of the Convention.[34]

Uruguay, though claiming a 200-mile territorial sea, is creeping towards . . . freedom. Vessels of any state enjoy the right of innocent passage through the territorial sea in a zone of 12 miles from the coast, while beyond that zone the provisions of the legislation of Uruguay do not affect the freedoms of navigation and overflight.[35] Freedom of navigation is not prejudiced within the 200-mile territorial seas of Argentina,[36] El Salvador[37] and Peru,[38] but it not clear, at least to the present writer, whether these states make any distinction between the first 12 and the other 188 miles off the shore.

The different zones of the 200-mile territorial sea of Ecuador that "shall be subject to the regime of free maritime navigation or of innocent passage for foreign ships shall be established by executive decree."[39] In 1980 Ecuador notified IMO of a special area to be avoided and of mandatory navigational routes established to keep vessels at least 78 miles north and 145 miles south of the archipelago of Galapagos.[40]

As regards states which claim an EEZ, two cases seem unusual. The first is the military boundary zone that was established in 1977 by the Democratic People's Republic of Korea, "to reliably safeguard the economic sea zone of the Republic and firmly defend militarily the national interests and sovereignty of the country".[41] This zone "is up to 50 miles from the starting line of the territorial waters in the east sea and to the boundary line of the economic sea zone in the west sea." In the zone "civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval."

The second rather unusual case is given by a provision in the legislation of the Maldives, stating that "ships of all States enjoy the right of innocent passage through the territorial waters and other exclusive economic zone" of the Republic.[42] Apart from a provision of difficult interpretation in the legislation of Portugal,[43] the coupling of innocent passage and EEZ seems a singular instance in state practice. Incidentally, it appears to be the contrary of the association between freedom of navigation and territorial sea, which, as already mentioned, has been proposed by certain Latin-American countries.

A worrisome provision, from the point of view of freedom of navigation, can be found in the enactments of Guyana, India, Mauritius, Pakistan (quoted below) and Seychelles:[44]

> The Federal Government may . . .
>
> (a) declare any area of the exclusive economic zone to be a designated area; and
> (b) make such provisions as it may deem necessary with respect to all or any of the following matters, namely . . .
> (vi) the regulation of entry into and passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interest of Pakistan.

LOSC does not give coastal states any general right to establish in the EEZ designated areas where navigation may be regulated. In some specific cases, coastal states can reasonably interfere with navigation, as happens with the safety zones around artificial islands, installations and structures (Art. 60). Though in exercising its rights the coastal state may adopt laws and regulations in its EEZ, it shall always pay due regard to the rights of other states and it is bound to act in accordance with the provisions of LOSC and other rules of international law, relating *inter alia* to the freedom of navigation.

Some specific problems arise from the navigation of fishing vessels in the EEZ.[45] They enjoy the freedom of navigation, as no distinction can be made according to the nature of a ship, but they cannot engage in fishing activities, which fall within the sovereign rights of the coastal state. The provisions of Spain -- according to which in the

exercise of freedom of navigation fishing vessels must comply with Spanish laws designed to prevent fishing in the EEZ, including the laws concerning the carrying of fishing tackle[46] -- or of Morocco -- relating to the stowing of fishing gear during navigation in the EEZ[47] -- may be accepted as not unreasonably interfering with freedom of navigation. On the contrary, the legislation of the Maldives can hardly be recommended, in that it forbids foreign fishing vessels to enter the EEZ without prior consent of the government.[48]

Overflight

Freedom of overflight, included by Article 58 among the rights of other states in the EEZ, is in general expressly recognized by the legislation of coastal states claiming an EEZ. One important exception is nevertheless given by the already quoted provisions of Democratic Korea on the military zone,[49] where overflight by civilian planes is subjected to prior agreement or approval. A provision in the declaration of Haiti (*"La République d'Haiti exerce sa souveraineté exclusive sur l'espace aérien de son territoire et de ses eaux juridictionnelles jusqu'aux limites ci-dessus fixées"*)[50] could generate some uncertainties, since it is not clear enough whether the expression "jurisdictional waters" means the 12-mile territorial sea or the 200-mile EEZ of this country.

As regards territorialist states, few of them preserve "freedom of air traffic" (Argentina)[51] or "freedom of overflight" (Uruguay)[52] within their extended territorial seas. Peru, though granting freedom of navigation, claims for instance the exercise of a "sole sovereignty over the air space above its territory and jurisdictional waters within a distance of 200 miles".[53]

The particular problem of air security zones, which were established by a few states like the United States and Canada, several years before the present codification of the law of the sea, has already been specifically dealt with in a previous Conference held by the Law of the Sea Institute.[54] For example, according to the regime of the Air Defense Identification Zones, flight plans and position reporting are required for aircraft entering the United States, when such aircraft is not less than one hour average cruising distance via the most direct route from the United States. It can be sustained that for security reasons a coastal state may impose notice requirements on aircraft entering its territory, provided that it does not impose permanent limitations on the use of the airspace.[55] Under the LOSC regime, air security identification over the EEZ could perhaps be regarded as regulated by the residual provision of Article 59.

Laying of Submarine Cables and Pipelines

Freedom to lay submarine cables and pipelines is explicitly listed by Article 58 among the rights of other states in the EEZ.[56] Since within 200 miles from the coast the sea-bed of the EEZ coincides with the continental shelf, a more detailed regulation of this activity is given by the subsequent Article 79, relating to submarine cables and pipelines on the continental shelf. It provides that all states are entitled to lay cables and pipelines, whose maintenance cannot be impeded by the coastal state, subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources, and the prevention, reduction and control of pollution from pipelines. The delineation of the course for laying

pipelines -- but not cables -- is subject to the consent of the coastal state.

It may happen that some states, while mentioning the freedoms of navigation and overflight, do not add any further provisions on cables and pipelines.[58] The freedom in question seems to be denied by Sao Tome and Principe, inasmuch as the laying of submarine cables and pipelines can be done only under agreement with the state.[59] In proclaiming the freedom of laying submarine cables and pipelines, India, Guyana, Mauritius, Pakistan and Seychelles[60] reserve the right of the government to consent to the delineation of their course. This does not comply with LOSC, as far as cables are concerned.

The legislation on the continental shelf by the Federal Republic of Germany[61] offers an example of reasonable measures which can be taken by the coastal state without jeopardizing the freedom of laying pipelines. The granting of authorization for the installation and operation of a transit pipeline may be denied only where there is reason to fear a danger to human life, health, or material property, or a threat to overriding public interests, which cannot be prevented or removed by means of conditions or restrictions. A specific executive order of Denmark concerning pipeline installations in the Danish continental shelf for the transport of hydrocarbons set forth a very detailed list of conditions upon which the granting of permits is made dependent.[62]

Other Internationally Lawful Uses Related to the Three Above-Mentioned Freedoms Etc.

According to Article 58, paragraph 1, all states enjoy in the EEZ other internationally lawful uses of the sea related to the freedoms of navigation, overflight, and of the laying of submarine cables and pipelines, "such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions" of LOSC. This wording leaves an impression of both superabundance and mysteriousness. The problem is how to identify the precise content of the activities referred to.

Some of the activities associated with the operation of ships, aircraft and cables and pipelines are already covered by specific provisions of LOSC, such as those granting the possibility of repairing existing cables and pipelines, (Article 79, paragraph 5) or of rendering assistance to ships in danger (Article 98). What is then left? The answer could be that with its superabundant and mysterious words Article 58 mainly intends to deal with the somehow delicate and discreet category of the military uses of the sea or at least with some of them.

There are few national legislations which reproduce the sophisticated wording of LOSC in all its details. The law of Morocco can be recalled, according to which "*l'institution de la zone economique exclusive n'affecte pas . . . l'utilisation de la mer à d'autres usages internationalement licites se rapportant a l'exercise de ces libertés, tels que ceux qui sont liés a l'exploitation des navires, d'aéronefs, de câbles et de pipe-lines sous-marins*."[63] On the contrary, certain other states, like Spain[64] and Thailand,[65] simply do not mention anything more than the three traditional freedoms of the high seas.

Many states - like Barbados,[66] Cuba,[67] the Ivory Coast,[68] Kenya,[69] Mexico,[70] the Philippines,[71] Sao Tome and Principe,[72] the Soviet Union,[73] Suriname[74] - are willing to grant other countries the other internationally lawful uses relating to "navigation and communications" or relating to the three traditional freedoms. The fact that such

legislations do not add any reference to the "uses associated with the operation of ships, aircraft and submarine cables and pipelines" does not appear as a substantial departure from LOSC.

Other countries, however, follow a more liberal trend, in giving other states more rights than LOSC would demand. All states enjoy the "other internationally lawful uses of the sea" within the EEZ of the United States,[75] or "other legitimate and reasonable international uses of the sea" within the EEZ of the Dominican Republic,[76] even if the uses in question are not related to the three traditional freedoms.

The prudence of Guatemala does not appear as totally complying with LOSC, for the other internationally lawful uses of the sea relating to navigation and communications can be enjoyed "subject to the participation of a representative of the Government".[77]

Military Uses of the Sea

As is well-known, LOSC does not expressly state who has the right to engage in military uses of the EEZ. It seems, however, misleading to dwell upon military uses of the sea in an abstract way, without distinguishing among different activities which can be performed according to military purposes (by the same token as it would be unproductive to discuss generally the civilian uses of the EEZ as such).[78]

It goes without saying that any aggressive activity, being a threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the principles embodied in the Charter of the United Nations, is prohibited by a peremptory norm of general international law, as confirmed by Articles 88 and 301 of LOSC. Aggressive activities are prohibited everywhere,[79] whether undertaken with or without the consent of the coastal state. But there is no basis either in LOSC or in general international law for affirming that military uses of the sea compatible with the UN Charter are to be considered as not peaceful.

The major powers, both in the Western and the Eastern groups, have always firmly pointed out that military mobility is one of their preeminent concerns, as well as one of the key issues of the package deal embodied in LOSC.[80] There can be no serious doubt that, in preserving freedom of navigation, overflight and laying of cables, Article 58 is applicable also when such activities are done for military purposes.

As states are not entitled to claim a 200-mile zone for security or defense purposes, the territorialist legislation of Somalia falls short of international law, inasmuch as it requires prior authorization for the "passage" of foreign warships through its 200-mile territorial sea.[81] The same can be said, *mutatis mutandis*, for Brazil, which has established detailed regulations that must be observed by foreign warships during passage through its 200-mile territorial sea, limiting to not more than three the number of warships of the same nationality which may be present simultaneously in Brazilian ports or territorial waters and exacting that foreign submarines cannot enter the territorial waters while submerged, nor submerge when in such waters.[82]

The 200-mile territorial sea of Panama has been established "of sufficient breadth to ensure the defense of its territory and the maintenance of the neutrality of the interoceanic route constructed therein".[83] In the previously mentioned military boundary zone of Democratic Korea, acts of foreign military vessels and planes are prohibited and civilian vessels and planes cannot "conduct acts for military purpose" (this last provision would seem to cover acts of intelligence).

Difficult problems of interpretation of the pertinent LOSC rules arise as regards military uses of the EEZ different from a mere activity of navigation, overflight, and laying of cables. On the one side, the United States and other countries, like France[84] and Italy,[85] point out that "military operations, exercises and activities have always been regarded as internationally lawful uses of the sea" and "that the right to conduct such activities will continue to be enjoyed by all States in the EEZ."[86] On the other side, certain countries, like Cape Verde,[87] Uruguay[88] and Brazil, understand that "the provisions of the Convention do not authorize other states to carry out in the EEZ military exercises or maneuvers, in particular those that imply the use of weapons or explosives, without the consent of the coastal state.[89]

In facing this delicate question, two points could perhaps be retained. Firstly, a right to engage in internationally lawful uses related to the freedoms of navigation, overflight, and laying of cables must surely mean a right to do something more than simply travel through the EEZ. Secondly, a distinction among the various activities could be relevant in order to assess the pertinent rules of LOSC to be applied, namely whether Article 58 or Article 59 is applicable. Warships, for instance, can engage in military maneuvers, collect information, carry out tests of weapons of any kind, lay mines and other arms on the sea-bed, at least when the latter activity is not prohibited by general international law or treaties. A simple naval maneuver could be considered to be associated with the freedom of military navigation and thus as falling within Article 58 of LOSC. It would be more difficult to sustain that an extended exercise with weapons, such as launching torpedos and firing artillery, or the secret laying of arms within an EEZ, are to be included among the uses associated with the operation of ships, aircraft, and submarine cables and pipelines. Even if it would sometimes be hard to make a clear-cut distinction, there are cases where the interest in the operation and testing of arms prevails over the interest in navigation or overflight. Such cases could constitute residual instances falling under Article 59 and the related activities could be conducted only after taking into account the respective importance of the interests involved to the parties, since it can hardly be said that the international community as a whole has any interest in military uses of the EEZ.

It can perhaps be added that, in the instance of operations with weapons, the balance of interests established by Article 59 would in most cases play in favor of the coastal state. While the latter could easily put forward its right and responsibility to ensure the management of resources which are located in the zone, the foreign state would be asked to explain why the operations have to be conducted precisely within this particular EEZ, and not on the high seas or within its own EEZ. Of course, as Article 59 does not confer residual rights to any state, even the coastal state is bound to consider the importance of the interests of other states before engaging in operations with weapons in its own EEZ.

Another controversial question linked with military uses of the EEZ concerns the legal regime of military installations, structures and devices on the sea-bed.[90] Article 60 of LOSC gives the coastal state the exclusive rights to construct and regulate the construction, operation and use of: artificial islands; installations and structures for the purposes provided for in Article 56 and other economic purposes; installations and structures which may interfere with the exercise of the rights of the coastal state in the zone. It seems clear enough

that, as stated by Italy and by the Federal Republic of Germany,[91] apart from artificial islands, the coastal state enjoys rights in the EEZ only with respect to those installations and structures which have an economic purpose or interfere with the exercise of its rights in the zone. It follows that installations and structures used for non economic purposes, such as military intelligence, do not fall in general within the rights of the coastal state and are regulated either by Article 58 or by Article 59. The same could be said about devices, which are not even mentioned in Article 60, if the very existence of a legal concept of "device" could be assumed as something different from installations, structures, and cables.

National legislations which limit the rights of coastal states to economic-oriented installations and structures are, however, scarce. The most literal in following Article 60 are Venezuela[92] and, though to a lesser extent, the Soviet Union.[93] An appreciable compliance with LOSC is shown by Democratic Yemen ("In the EEZ the Republic has . . . exclusive rights and jurisdiction with regard to the construction, repair, operation and use of artificial islands, installations, facilities and other structures necessary for the exploration and exploitation of the EEZ")[94] and by Barbados ("There is vested in the Government of Barbados all rights in, and jurisdiction over the Zone is respect of: . . . the construction, maintenance or use of structures or devices relating to the exploration or exploitation of the resources of the Zone, the regulation and safety of shipping or any other economic purpose").[95]

In many other cases states are nevertheless willing to claim, more or less explicitly, "the exclusive rights to construct and to authorize and regulate the construction, operation and use of all types of installations and structures, without exception, whatever their nature and purpose," as stated by Brazil[96] and, in the same sense, by Uruguay[97]. The national practice in this direction is impressive and includes states which do not distinguish among the purposes served by the installation, structure or, in certain cases, device -- for example, Cuba,[98] Dominican Republic,[99] Equatorial Guinea,[100] Guatemala,[101] Indonesia,[102] Kenya,[103] Malaysia,[104] Mauritania,[105] Mexico,[106] Morocco,[107] New Zealand,[108] Tokelau,[109] Cook Islands,[110] Western Samoa,[111] Norway,[112] Philippines,[113] Sao Tome and Principe,[114] Seychelles,[115] Suriname,[116] Thailand,[117] Vietnam,[118] -- as well as states which clearly claim rights over installations, structures, and, sometimes, devices and terminals established for any purpose -- for example, Burma,[119] Guyana,[120] India,[121] Ivory Coast,[122] Mauritius,[123] Pakistan,[124] Sri Lanka,[125] Vanuatu.[126]

A state having suffered the destruction or the usurpation of the intelligence devices it has covertly collocated in the EEZ of another state is not likely to address any complaints to the responsible state, but rather to improve its intelligence ability. Nevertheless, if complaints were to be made, the regime of LOSC would be less detrimental to non-economic installations and structures than present state practice.[127]

Archaeological Objects

Apart from the presumption set forth in Article 303 with regard to objects found in the contiguous zone, the coastal state does not enjoy any particular rights relating to archaeological and historical objects located in its EEZ.[128] As archaeological research is likely to fall under the category of residual rights, the legislation of Morocco does

not seem to be in accordance with LOSC in submitting archaeological exploration and research to the prior consent of the coastal state (*"Toute recherche ou exploration scientifique ou archéologique entreprise par un Etat étranger ou par les ressortissants d'un Etat étranger dans la EEZ est soumise a l'autorisation préalable de l'administration marocaine"*).[129]

Archaeological research is actually a good test for the balance of interests set forth in the "Castaneda formula." In addition to the particular position of the coastal state, a foreign state could also have an appreciable interest (for instance, if it is the country of origin of the object) and the international community as a whole could be seen as bearing a general interest in the recovery of archaeological and historical objects and in their display to the public.

Tourism and Sporting Activities

The distinction between tourism and scientific research is in principle clear, for tourists are inspired by non-professional and recreational aims, and tourism in the EEZ could also be considered a residual activity. The coastal state could perhaps try to put forward a particular interest according to Article 59, but it is surely not entitled to any sovereign right or jurisdiction over tourist activities as such.

The legislation of Ecuador, a territorialist state, provides, however, that any foreign vessel intending to visit its 200-mile territorial sea, its coast or islands for the purpose of tourism or scientific research must obtain the appropriate written authorization from the Ministry of National Defense.[130] Further provisions specify the documents and data that shall accompany an application and provide for two particular undertakings, namely that an Ecuadorian tourist guide, to be paid for by the organizers, will be taken on board, and that the tourist expedition will observe the rules for the preservation of national parks and protected natural species, and will compensate for any damages caused thereto. This latter provision can perhaps be considered compatible with the jurisdiction with regard to the protection and preservation of the marine environment which is vested in the coastal State by Article 56.

The same considerations can apply to marine sporting activities, which, like tourism, are inspired by a purpose of recreation. Fishing for sporting purposes may, however, be reasonably regulated, as being strictly linked to the sovereign rights of the coastal state over the living resources of the zone. The acts of New Zealand,[131] Tokelau,[132] Cook Islands,[133] Western Samoa[134] and Bahamas[135] include general provisions on sporting fishing.

Other Activities

Several national legislations follow to the letter the text of Article 56, paragraph 1, by claiming for the coastal state sovereign rights with regard to any activity for the economic exploitation and exploration of the EEZ, such as the production of energy from the water, currents, and winds. All activities related to the exploitation of the natural resources of the zone, even if they are not specifically mentioned by Article 56, fall within the sovereign rights of the coastal state and cannot be regarded as regulated by the residual Article 59.

Canada is thus fully entitled to require a license for the harvesting of marine plants in its coastal waters, namely the harvesting

of "all benthic and detached algae, marine flowering plants, brown algae, red algae, green algae and phytoplankton."[136] The exploitation of icebergs as fresh water reservoirs -- an activity which has been studied, but not yet conducted on a substantial scale -- could also be covered by the sovereign rights of the coastal state in its EEZ.[137] But is Bangladesh allowed to claim exclusive sovereign rights for producing energy from the sun within its EEZ?[138] The answer could be yes, considering that, though the sun is not properly a natural resource located in the zone, the sense of Article 56 is that the coastal state can enjoy sovereign rights with regard to any resource-related activity which takes place in the EEZ.

Conclusion

It can be assumed that the legislation of several states falls short of complying with LOSC and seems too restrictive towards the rights of foreign states within the EEZ. Of course, LOSC is not yet a binding legal instrument and it would be difficult to determine how far many of its detailed provisions presently correspond to general international law. Nevertheless, the concept of a reasonable balance of rights and duties within the EEZ is one of the cornerstones of the new law of the sea and can be considered more than a mere trend in customary international law.

Furthermore, certain states seem too eager to put forward that the Convention "shall not be constructed as amending in any manner any pertinent laws and presidential decrees or proclamations" of the state concerned -- the quotation is taken from the statement of the Philippines,[139] but declarations in more or less similar terms have been made by Angola,[140] Brazil,[141] Cape Verde,[142] Guinea,[143] Sao Tome and Principe,[144] and Uruguay.[145]

States cannot claim to impose unilateral interpretations of an international treaty. If LOSC should come into force, parties could not invoke the provisions of their internal law as any justification for failure in performing the convention (see Art. 27 of the Vienna Convention on the Law of Treaties).[146]

It must, however, be added that, since residuality cannot be eradicated from LOSC, states which are willing to preserve the freedom of engaging in non-economic activities within a foreign EEZ should be very cautious before ratifying the Convention. Entering the no-man's land of residuality could result in a serious hindrance to the activities they seek to protect.

Post Scriptum

After the submission of this paper, the author was informed of the new law of Mexico of 20 December 1985 (now published in *International Legal Materials*, 1986, p. 889). Two provisions of this law, concerning maritime zones, are particularly relevant for the purposes of the paper. Article 6, paragraph IV, gives a detailed list of competences relating to "the economic development of the sea, including the utilization of loose minerals in its waters; the production of electrical or thermal energy from said water, the currents, and from the wind; the harnessing of solar energy in the sea; the development of the coastal zone; marine culture; the establishment of national marine parks; the furtherance of recreation and tourism; and the establishment of fishing communities." Article 10 introduces a criterion of reciprocity, by providing that "enjoyment by foreign ships of the rights conferred by this Law shall be contingent upon whether the State whose flag they fly

accords Mexican ships reciprocity, provided the provisions of the political Constitution of the United Mexican States and international law are complied with."

NOTES

1. The topic covered by this paper has already been analyzed in depth by Burke, "National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea," *Ocean Dev. Int. Law* 9 (1981):289. The conclusion that "states are acting quite independently in determining how to frame national legislation establishing an economic zone" (Burke, *op. cit.*, p. 312) is also shared by the present paper. For a recent accurate survey see Juda, "The Exclusive Economic Zone: Compatibility of National Claims and the UN Convention on the Law of the Sea," *Ocean Dev. Int. Law* 16 (1986):1.
2. For a survey of claims see: United States Department of State, *Limits in the Seas*, No. 36, National Claims to Maritime Jurisdictions, 5th Rev., 1985; Moore, *Coastal State Requirements for Foreign Fishing*, FAO Legislative Study no. 21 Rev. 2, Rome, 1985, p. 28.
   Recent legislation of Senegal (Law no. 85-14 of 25 February 1985, reproduced in the document of the UN LOS/4/85) has established a 12-mile territorial sea and has repealed the previous breadth of 150 miles.
3. "This 200-nautical-mile zone, known as the exclusive economic zone, shall include the 70 nautical miles of territorial sea and the 130-mile economic zone located beyond the territorial sea and adjacent to it" (Law 78-043 of 28 February 1978 of Mauritania, in *New Directions in the Law of the Sea*, edited by Lay, Churchill, Nordquist, Welch and Simmonds, Dobbs Ferry - London, vol. IX, p. 76).
4. It will go far beyond the scope of this paper to mention the doctrinal contributions on the question of the legal nature of the EEZ and of its present emergence as a customary rule of international law. A recent survey can be found in Kwiatkowska, "New Soviet Legislation on the 200 Mile Economic Zone and Certain Problems of Evolution of Customary Law," *Neth. Int. Law Rev.*, 1986, p. 38 (this article can also be quoted as a complete evaluation of the 1984 Soviet decree, which is the first national act on the EEZ to incorporate to a large extent many of the detailed provisions of LOSC).
5. This paper will not focus on the theoretical distinction between the "sovereign rights" and the "jurisdiction" attributed to coastal States by Art. 56. It may be interesting to add that the law decree 15/78 of 16 June 1978 of Sao Tome and Principe distinguishes between "*droits souverains*", "*droits exclusifs et juridiction*", "*juridiction exclusive*" and "*juridiction*" (UN, ST/LEG/SER.B/19, p. 248).
6. On the subtleties of the wording of several articles of LOSC see Pardo, "The Convention on the Law of the Sea: A Preliminary Appraisal," *San Diego Law Rev.* 20 (1983):490; Pueyo Losa, "*La indeterminación del nuevo orden jurídico-marítimo internacional: reflexiones sobre al caracter consuetudinario de la zona económica exclusiva y el valor de la nueva Convención sobre el derecho de mar*, *Rev. Esp. Der. Int.*, 1985, p. 323. The difficulties inherent

in interpreting the provisions on the EEZ have been pointed out, even while the negotiations were still going on, by Oxman, "The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions," *Amer. Jour. Int. Law*, 1977, p. 247; and Oxman, "An Analysis of the EEZ as Formulated in the Informal Composite Negotiating Text," in Clingan (ed.), *Law of the Sea: State Practice in Zones of Special Jurisdiction*, Proceedings of the XIII Annual Conference of the Law of the Sea Institute (Mexico City, 1979), p. 77.

7. Statement of 9 March 1983 (III UNCLOS, Off. Doc., XVII, p. 241).
8. UN, *Law of the Sea Bull.*, no. 5, p. 24.
9. "According to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone" (declaration of Italy, UN, *Law of the Sea Bull.*, no. 5, p. 15).
10. Act. no. 10 of 1978 (UN, ST/LEG/SER.B/19, p. 14).
11. Order 76-038/CE of 15 June 15 1976 (UN, ST/LEG/SER. B/19, p. 15).
12. Act. no. 15 of 12 November 1984 (UN, *Law of the Sea Bull.*, no. 6, p. 19).
13. Law no. 76-655 of 16 July 1976 (Rev. Gen. Dr. Int. Publ., 1976, p. 1226).
14. Law no. 41 of 1 June 1979 (UN, ST/LEG/SER.B/19, p. 43).
15. Decree of 10 February 1981 (UN Law of the Sea Bull., no. 1, p. 33).
16. Order no. 24 of 16 August 1977 (UN, ST/LEG/SER. B/19, p. 130).
17. Statement of 12 May 1977 (Nordquist and Park, *North America and Asia-Pacific and the Development of the Law of the Sea*, sub *Vietnam*, p. 4).
18. Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (UN, ST/LEG/SER.B/19, p. 47).
19. Territorial Waters and Maritime Zones Act, 1976 (UN, ST/LEG/SER. B/19, p. 85).
20. Maritime Zones Act, 1977 (*New Dir. Law Sea*, VII, p. 414).
21. Maritime Boundaries Act, 1977 (U.N., ST/LEG/SER.B/ 19, p. 33).
22. Act no. 3 of 1978 (*New Dir. Law Sea*, VII, p. 337).
23. Maritime Zones Act (UN, ST/LEG/SER.B/19, p. 102).
24. Law no. 22 of 1976 (UN, ST/LEG/SER.B/19, p. 120).
25. Statement by Mr. Clingan (III UNCLOS, Off. Doc., XVII, p. 117).
26. Statement of 8 March 1983 (III UNCLOS, Off. Doc., XVII, p. 244). According to Richardson, "Power, Mobility and the Law of the Sea," *Foreign Affairs* 58 (1979-80):916, in the group which negotiated Art. 58 "it was understood that the freedoms in question, both within and beyond 200 miles, must be *qualitatively* and *quantitatively* the same as traditional high-seas freedoms recognized by international law: they must be qualitatively the same in the sense that the nature and extent of the right is the same as the traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete -- and allow for future uses no less inclusive -- than traditional high seas freedoms".
27. Proclamation of 10 March 1983 (*Int. Leg. Mat.*, 1983, p. 465).
28. Letter dated 24 September 1982 (III UNCLOS, Off. Doc., XVII, p. 223).
29. Letter dated 24 September 1982 (III UNCLOS, Off. Doc., XVII, p. 224).
30. Letter dated 24 September 1982 (III UNCLOS, Off. Doc., XVII, p. 225).
31. See Treves, "*La Navigation*," in Dupuy and Vignes (eds.), *Traite du nouveau droit de la mer*, Paris - Bruxelles, 1985, p. 687; Robertson, "Navigation in the Exclusive Economic Zone," *Virg. Jour. Int. Law* 24 (1984):865.
32. Law no. 37 of 10 September 1972 (*New Dir. Law Sea* VII:56).

33. Decree law 1098 of 25 March 1970 and decree 56.515 of 28 June 1965 (UN, ST/LEG/SER.B/16, pp. 3 and 55).
34. UN Law of the Sea Bull., no. 5, p. 6.
35. Presidential decree No. 604 of 3 December 1969 (Szekely, *Latin America and the Development of the Law of the Sea* sub *Uruguay*, Doc. 7).
36. Law no. 17.094 of 29 December 1966 (UN, ST/LEG/SER.B/15, p. 45).
37. Constitution of 7 September 1950 (UN, ST/LEG/SER.B/6, p. 14).
38. Decree no. 781 of 1 August 1947 (UN, ST/LEG/SER.B/1, p. 16).
39. Art. 628 of the civil code, as amended by decree no. 265 of 27 February 1970 (UN, ST/LEG/SER.B/18, p. 15).
40. *Limits in the Sea*, no. 36, 5th rev., p. 54.
41. Information reproduced in Nordquist and Park, *op. cit.* (*supra*, note 17), *sub* Korea, p. 6.
42. Law no. 32 of 5 December 1976 (UN, ST/LEG/SER.B/19, p. 134).
43. Act no. 33 of 28 May 1977 (UN, ST/LEG/SER.B/19, p. 93), Art. 3: "Establishment of the exclusive economic zone shall take into account the rules of international law, namely those concerning passage and overflight."
44. All quoted *supra*, notes 21, 18, 20, 19, 23.
45. See Burke, "Exclusive Fisheries Zones and Freedom of Navigation," *San Diego Law Rev.* 20 (1983):595.
46. Law no. 15 of 20 February 1978 (UN, ST/LEG/SER.B/19, p. 250).
47. Law no. 1-81 of 18 December 1980 (Bull. Off. no. 3575 du 6 mai 1981).
48. *Supra*, note 42.
49. *Supra*, note 41.
50. Declaration of 6 April 1977 (UN, ST/LEG/SER.B/19, p. 43).
51. *Supra*, note 36.
52. *Supra*, note 35.
53. *Supra*, note 38.
54. Christol, "Unilateral Claims for the Use of Ocean Airspace," and Heller, "Air Space over Extended Jurisdictional Zones," in Gamble (ed.), *Law of the Sea: Neglected Issues*, Proceedings of the XII Annual Conference of the Law of the Sea Institute (The Hague, 1978), pp. 122 and 135. See also, in general, Hailbronner, "Freedom of the Air and the Convention on the Law of the Sea," *Amer. Journ. Int. Law*, 1983, p. 490.
55. Christol, *op. cit.* (*supra*, note 54), p. 133. According to this writer, "the mere carving of an EEZ out of previously high seas areas has not reduced the powers of coastal states to engage in protective measures in areas beyond the sovereign areas of states. The problem is to be able to identify whether the state is in fact threatened" (p. 130).
56. See Nelson, "*Câbles et pipelines sous-marins*," in DuPuy and Vignes, *op. cit.* (*supra*, note 31), p. 811.
57. Territorial Sea and Maritime Zones Law, 1977, of Burma (UN, ST/LEG/SER.B/19, p. 8). The laws of Portugal and Uruguay are quoted *supra*, notes 43 and 35.
58. Decree law 126/77 of 31 December 1977 (*New Dir. Law Sea* VII:363.
59. *Supra*, note 5.
60. *Supra*, notes 18, 21, 20, 19, 23.
61. Act of 24 July 1964, as amended on 2 September 1974 (UN, ST/LEG/-SER.B/18, p. 155).
62. Executive order no. 141 of 13 March 1974 (UN, ST/LEG/SER.B/18, p. 150).

63. *Supra*, note 47.
64. *Supra*, note 46.
65. Proclamation of 21 February 21 1980 (Nordquist and Park, *op. cit.* (*supra*, note 17), *sub* Thailand, p. 16).
66. *Supra*, note 22.
67. Act of 24 February 1977 (UN, ST/LEG/SER.B/19, p. 190).
68. Law no. 77-926 of 17 November 1977 (*New Dir. Law Sea* VII:409).
69. Proclamation of 28 February 1979 (UN, ST/LEG/SER.B/19, p. 228).
70. Act of 10 February 1976 (UN, ST/LEG/SER.B/19, p. 233).
71. Presidential decree no. 1599 of 30 April 1979 (Nordquist and Park, *op. cit. supra* note 17, *sub* Philippines, p. 18.)
72. *Supra*, note 5.
73. Decree of 28 February 1984 (UN, *Law of the Sea Bull.*, no. 4, p. 31).
74. Law of 1978 (UN, ST/LEG/SER.B/19, p. 127).
75. *Supra*, note 27.
76. Act No. 573 of 1 April 1977 (UN, ST/LEG/SER.B/19, p. 26).
77. Legislative decree no. 20-76 of 9 June 1976 (UN, ST/LEG/SER.B/19, p. 30).
78. On the military uses of the sea in general see: Booth, "The Military Implications of the Changing Law of the Sea," in Gamble, *op. cit.*, (*supra*, note 54), p. 328; Booth, "Historic Compromise or Paradigm Shift? Naval Mobility versus Creeping Jurisdiction in the 1982 UN Convention on the Law of the Sea," in Koers and Oxman (eds.), *The 1982 Convention of the Law of the Sea*, Proceedings of the XVII Annual Conference of the Law of the Sea Institute (Oslo, 1983), p. 312; Arias Schrieber, "The Exclusive Economic Zone: Its Legal Nature and the Problem of Military Uses," in Orrego Vicuna, (ed.), *The Exclusive Economic Zone -- A Latin-American Perspective*, Boulder, 1984, p. 123; Larson, "Security Issues and the Law of the Sea: A General Framework," *Ocean Dev. Int. Law* 15 (1985):99; Shyam, "The UN Convention on the Law of the Sea and Military Interests in the Indian Ocean," *Ocean Dev. Int. Law* 15 (1985):147. Lowe, "Some Legal Problems Arising From the Use of the Seas for Military Purposes," *Marine Policy*, 1986, p. 171.
79. On the concept of peaceful uses of the sea: Vukas, "*L'utilisation pacifique de la mer, dénucléarisation et desarmement*," in DuPuy and Vignes, *op. cit.* (*supra*, note 31), p. 1047.
80. See Richardson, "Law of the Sea: Navigation and Other Traditional National Security Considerations," *San Diego Law Rev.* 19(1982):572
81. *Supra*, note 32.
82. *Supra*, note 33.
83. Act no. 31 of 2 February 1967 (UN, ST/LEG/SER.B/15, p. 105).
84. Statement of 28 July 1983 (III UNCLOS, Off. Doc., XVII, p. 241).
85. Statement of 7 March 1983 (III UNCLOS, Off. Doc., XVII, p. 241).
86. Statement of 8 March 1983 (III UNCLOS, Off. Doc., XVII, p. 244).
87. UN Law of the Sea Bull., no. 5, p. 8.
88. Declaration quoted *supra*, note 8.
89. Declaration quoted *supra*, note 34.
90. See Treves, "Military Installations, Structures and Devices on the Seabed," *Amer. Jour. Int. Law* 1980, p. 808 (see also the response by Zedalis and the reply by Treves, *Amer. Jour. Int. Law*, 1981, pp. 926 and 933).
91. Statements of Italy (UN Law of the Sea Bull., no. 5, p. 15) and of the Federal Republic of Germany (III UNCLOS, Off. Doc., XVII, p. 241).
92. Act of 26 July 1978 (UN, ST/LEG/SER.B/19, p. 261).

93. *Supra*, note 73.
94. Act no. 45 of 1977 (UN, ST/LEG/SER.B/19, p. 21).
95. *Supra*, note 22.
96. Declaration quoted *supra*, note 34.
97. Declaration quoted *supra*, note 8.
98. *Supra*, note 67.
99. *Supra*, note 76.
100. *Supra*, note 12.
101. *Supra*, note 77.
102. Declaration of 21 March 1980 (Nordquist and Park, *op. cit. supra* note 17, *sub* Indonesia, p. 18).
103. *Supra*, note 69.
104. Proclamation of 25 April 1978 (Nordquist and Park, *op. cit. supra* note 17, *sub* Malaysia, p. 18).
105. *Supra*, note 3.
106. *Supra*, note 70.
107. *Supra*, note 47.
108. Territorial Sea and Exclusive Economic Zone Act, 1977 (UN, ST/LEG/-SER.B/19, p. 65).
109. Tokelau Act 125 of 1977 (Nordquist and Park, *op. cit. supra* note 17, *sub* Tokelau, p. 4).
110. Cook Islands Act 16 of 1977 (Nordquist and Park, *op. cit. supra* note 17, *sub* Cook Islands, p. 4).
111. Western Samoa Act of 1977 (Nordquist and Park, *op. cit. supra* note 17, *sub* Western Samoa, p. 4).
112. Act No. 91 of 17 December 1976 (UN, ST/LEG/SER.B/19, p. 241).
113. *Supra*, note 71.
114. *Supra*, note 5.
115. *Supra*, note 23.
116. *Supra*, note 74.
117. *Supra*, note 65.
118. Statement of 12 May 1977 (Nordquist and Park, *op. cit. supra* note 17, *sub* Vietnam, p. 4).
119. *Supra*, note 57.
120. *Supra*, note 21.
121. *Supra*, note 18.
122. *Supra*, note 68.
123. *Supra*, note 20.
124. *Supra*, note 19.
125. *Supra*, note 24.
126. Maritime Zones Act no. 23 of 1981 (UN *Law of the Sea Bull.*, no. 1, p. 64).
127. The problem of the emplacement of weapons, devices, structures, or installations on the continental shelf must also be considered in the light of the provisions of the Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof (London, Moscow, Washington, 1971), which has been ratified by several countries. See, for instance, the statement made by India and the reply by the United States (UN, Status of Multilateral Arms Regulation and Disarmament Agreements, 2nd ed., 1982, p. 117). On the Treaty see Migliorino, *Fondi marini e armi di distruzione di massa*, Milano, 1980.
128. See Migliorino, *Il recupero degli oggetti storici ed archeologici sommersi nel diritto internazionale*, Milano, 1984.
129. *Supra*, note 47.

130. Regulations of 17 February 1973 (UN, ST/LEG/SER.B/18, p. 36).
131. *Supra*, note 108.
132. *Supra*, note 109.
133. *Supra*, note 110.
134. *Supra*, note 111.
135. Fisheries Resources Act, 1977 (UN, ST/LEG/SER.B/19, p. 179).
136. Fisheries Act, as amended in 1970 (UN, ST/LEG/SER.B/16, p. 273.
137. See Epperson, "International Legal Issues Regarding Towing of Icebergs and Environmental Effects of Iceberg Exploitation," in Gamble, *op. cit* (*supra*, note 54), p. 209.
138. Territorial Waters and Maritime Zones Act, 1974 (UN, ST/LEG/-SER.B/19, p. 4).
139. UN, *Law of the Sea Bull.*, No. 5, p. 18.
140. UN, *Law of the Sea Bull.*, No. 5, p. 2.
141. UN, *Law of the Sea Bull.*, No. 5, p. 6.
142. UN, *Law of the Sea Bull.*, No. 5, p. 8.
143. UN, *Law of the Sea Bull.*, No. 5, p. 13.
144. UN, *Law of the Sea Bull.*, No. 5, p. 20.
145. UN, *Law of the Sea Bull.*, No. 5, p. 24.
146. On the declarations made according to Art. 310 of LOSC see Vignes, "*Les déclarations faites par les Etats signataires de la convention des Nations Unies sur le droit de la mer sur la base de l'art. 310 de cette convention*," *Ann. Franc. Dr. Int.*, 1983, p. 715. On the obligation not to defeat the object and purpose of a treaty between signature and entry into force see Gamble and Frankowska, "The Significance of Signature to the 1982 Montego Bay Convention on the Law of the Sea," *Ocean Dev. Int. Law* 14 (1984):123.

DISCUSSION

Tullio Treves: I invite discussion from the floor on such interesting papers.

Bernard Oxman: I'm going to limit myself to the comments of Dr. Knauss and Professor Gold.

With respect to Dr. Knauss's remarks, because I believe that the dissemination of information and knowledge is essential to human progress, I also consider that Part XIII of the Convention is one of the more disappointing results of the Conference. Nevertheless, it is a somewhat richer source of law than many may think if they only look at Articles 246 and 249. For example, some scientists here from South Asia have pointed out that it is necessary to do research on the monsoon on the western fringes of the Indian Ocean. Note that Article 242, Paragraph 2, of the Convention requires that states be afforded a reasonable opportunity to obtain information necessary to prevent and control damage to health and safety. That provision was written with weather problems in mind. Dr. Knauss referred to the power of the coastal state to require prior agreement on the dissemination of research results. This is a very difficult problem. This is a limited power even under Article 249 itself, but much more important, Article 244 places an obligation on *all* states to ensure that the results of research are publicly disseminated. Under Article 300, the coastal state would have to fulfill that duty in good faith. The picture is not necessarily as grim as some might have inferred.

Turning to Professor Gold, I want to preface my remarks by saying that the very strong environmental provisions of the Convention, including the categorical duty to protect and preserve the marine environment, are largely the result of work by Canadian scholars like Professor Gold and of Herculean diplomatic efforts by the Canadian delegation at the Conference. I don't want what I'm about to say in any way to detract from that extraordinary contribution which benefitted not only Canada but of the world as a whole, including the United States.

Many developing countries have complained, rightly or wrongly, that they've spent years trying to accommodate the concerns of the United States regarding Part XI on deep seabed mining only to be told in the end that it was not good enough. Without expressing an opinion on that question, I'd like to respectfully suggest to Professor Gold that some Americans may feel the same way about Canada. Years were spent trying to write provisions that accommodated Canadian positions on coastal state control of navigation for the purposes of preventing pollution. Many of the concessions in the general provisions on pollution in Articles 211 and 217 were designed to accommodate Canadian concerns. Article 234 of the Convention was directly inspired by Canadian concerns and yet, as of today, Canadian regulations in that area go beyond what is permitted by the Convention. Then, having obtained Article 234 specifically to accommodate a Canadian concern in the Arctic, Canada has now made a unilateral declaration of internal waters in precisely the same area.

We will never know if one would have had to go that far if Canada were not present at the Conference or were not interested in the subject. But I would be doing a disservice to the Canadian delegation to say that its presence made no difference. The provisions went as far as they did accommodating coastal state concerns in part because of very

strong Canadian arguments, many of which were justified. Compromises emerged, and yet Professor Gold tells us here that the coastal state powers are not good enough, they are not strong enough. He then turns around in the very next breath and says, "But we don't have to worry about coastal state interference with navigation." I suggest that you really can't have it both ways. It's either one position or the other.

I conclude by quoting Prime Minister Trudeau. His words are as applicable to Americans as they are to Canadians. He was asked why Canada had not achieved more in the Treaty than it did. He replied publicly that there is such a thing as asking for too much.

Tullio Treves: I suggest that members of the panel takes notes on the interventions and respond at the end.

Daniel Cheever: I'd like to address the admirable presentation by Dr. Knauss. First, has your view of the Convention and practice under it, whether formally in effect or not, changed radically in the last two years since your banquet address at San Francisco? You were pretty gloomy about "creeping jurisdiction" at the time, and you anticipated more severe restrictions on scientific research than appear to have transpired. Am I correct in this? Have you any explanation why things have turned out better than you predicted?

The second question has to do with the no-consent response you presented. Would it not be possible for the United States, although not a signatory, to accept no response the way the rest of the world accepts it -- as a signal to go ahead -- but just not contribute to practice that might in time have the effect of enforceable custom? Is it the government that stops you or is it the scientists who feel they must not go ahead in the no-response situation?

Hasjim Djalal: With regard to the paper presented by Professor Edgar Gold, I think one of the best examples of trying to overcome pollution from ships is the experience of the states in the Straits of Malacca and Singapore. They have cooperated in the last couple of years by establishing rules and regulations. With the cooperation of the user states, the three coastal states of the Straits of Malacca and Singapore, namely, Indonesia, Malaysia, and Singapore, have established traffic separation schemes coupled with the limitation of the underkeel clearance of the passing ships; they have improved navigational charts and aids; they have cooperated also with the major user countries with regard to the establishment of traffic separation schemes; and finally they have established revolving funds to meet the emergency when there is an accident. These examples prove that cooperation and positive actions between coastal states and the user states are possible. For instance, in the 1970s major accidents in the Strait of Malacca averaged one a month, but in the 1980s we don't hear that any more. Finally, I consider that this fear of coastal states is sometimes unfounded or exaggerated. When you come to tests of the willingness to cooperate, they show a positive attitude.

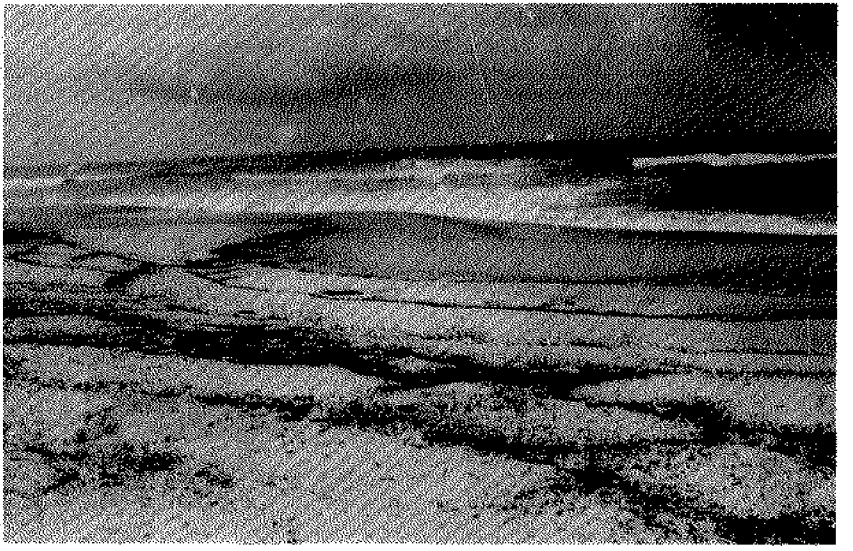
The second question is to Professor Knauss. Of the 748 requests for scientific research in the economic zones of other countries, how many of the requestors try to cooperate with the coastal states? I think the request would be easily met and approved if it meets three requirements: (1) an offer to carry it out together with the coastal states; (2) an offer of transfer of science and technology to the coastal states; and (3) an explanation that the research has some

relation to the coastal state's economic development. Of the 748 how many meet these three requirements?

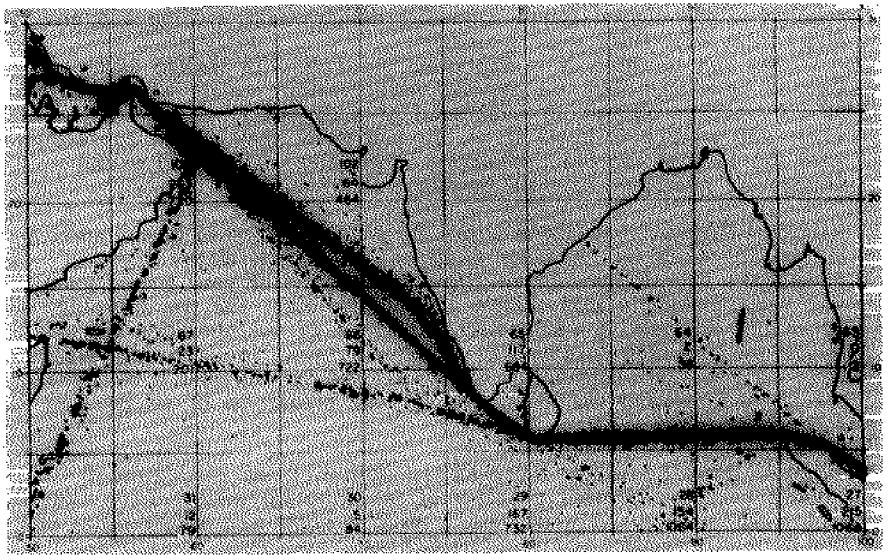
My last question is to Professor Scovazzi. The United States and Canada have so-called "air defense identification zones" which subject all approaching aircraft to some kind of a control from land. Are these zones still applicable now? If so, do you think they are in conformity with the Law of the Sea Convention, especially with regard to the freedom of overflight over the economic zone?

Kilaparti Ramakrishna: I was struck by what appeared to be the ambivalent stand taken by Professor Gold on the coastal state's right to protect the marine environment. Towards the end of your presentation you very forcefully said there's an absolute right for the shipping nations to navigate. I would like some kind of corroboration on that. Given the Canadian practice of unilateral claims in its coastal waters what do you feel about the Ecuadorian extension of what it calls the special zone around the Galapagos for the protection of its peculiar ecosystem?

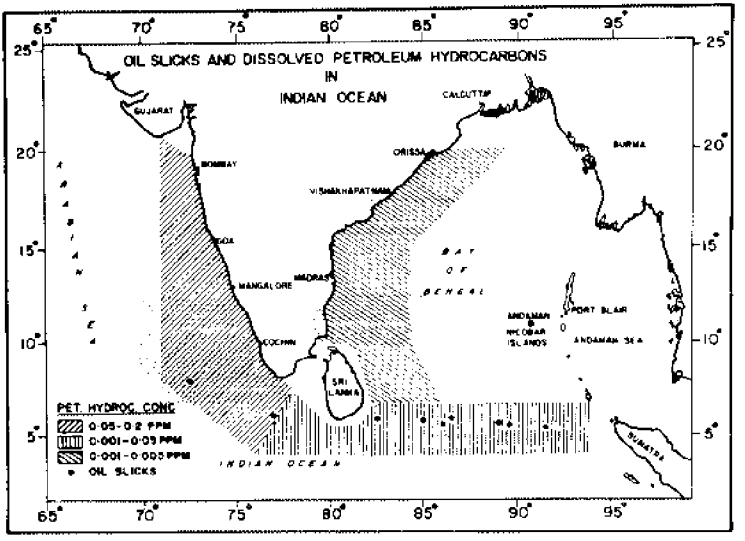
T. S. S. Rao: I wish to bring to the notice of the distinguished experts here a persistent problem of oil pollution arising from the vessel traffic in the Arabian Sea. I want to show you a few slides on this particular subject.



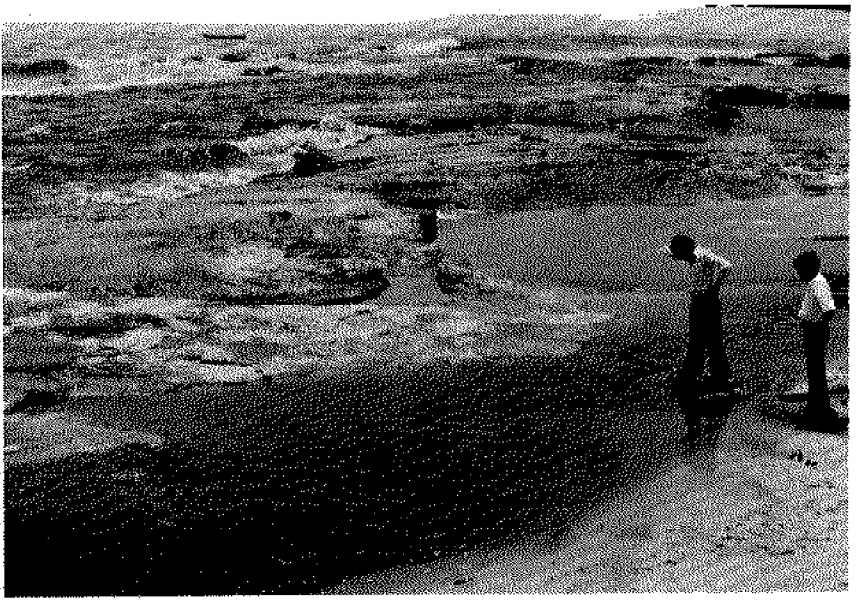
Slide 1: We have had this problem of oil pollution on our west coast of India for the last 20-25 years. When the National Institute of Oceanography was established, we received some complaints that along the beaches of our west coast huge quantities of tar balls were accumulating, particularly with the onset of the southwest monsoon. We examined the entire west as well as the east coast and came up with very impressive figures of about 1-2 kilograms per every square meter of the beach during the months May to September.



Slide 2: We found that this oil pollution of our beaches emanates from the larger tanker traffic which originates from the Persian Gulf and goes towards Europe, Japan, and the Far East.



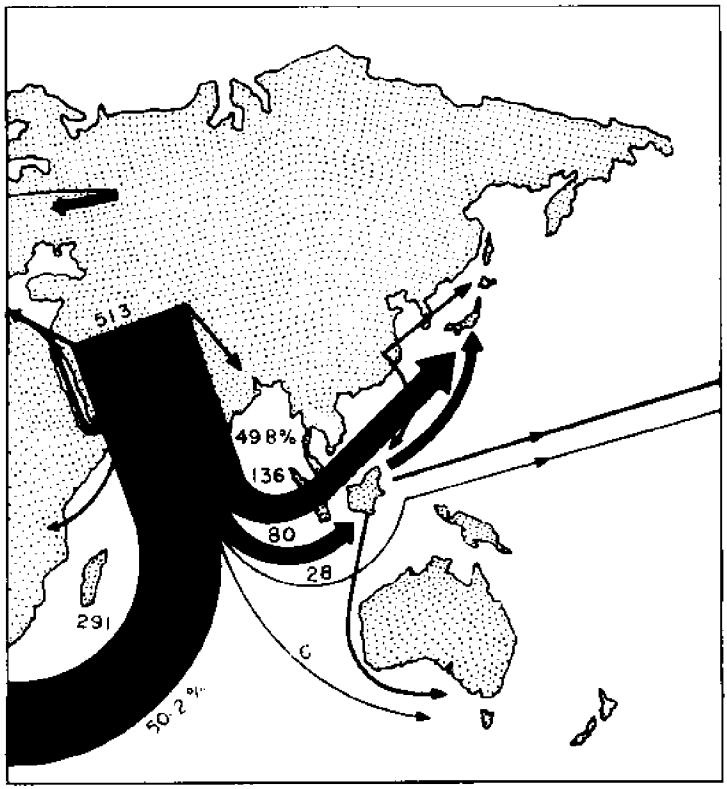
Slide 3: This shows you the number more than 5000 of oil slicks that have been recorded across the Arabian Sea as well as across the Bay of Bengal. During the southwest monsoon, which begins in our area around the end of April or beginning of May, winds bring all the surface waters and whatever floats on it to our south coast. Nearer the coastline it churns up the bottom. In the Arabian Sea, the lighter oil fractions evaporate fast, but the very heavy residual oil accumulates into tar balls and is deposited on our coast.



Slide 4: We have established a regular program of monitoring our entire coastline. Our figures indicate an increase in the oil pollution, particularly of the tar balls, along our beaches during the last few years. Some of our hotels on the west coast have been complaining to the government to do something about it, but we really do not know how to counter this problem.



Slide 5: This shows you the tar balls accumulating on our beaches during the beginning of the southwest monsoon. The only solution that we can think of now is to sweep them away by human endeavor to keep tourist and recreational beaches clean.



MOVEMENT OF OIL FROM MIDDLE EAST COUNTRIES BY SEA 1983 (MILLION TONNES)

Slide 6: This problem persists in spite of the IMO regulations and MARPOL conventions and all that. It is increasing because the oil traffic is also increasing as is the consumption of oil in most countries. In India itself, the amount of oil that is consumed and imported from the Persian Gulf has almost quadrupled over the last twenty years.

Tullio Treves: I would like to thank Dr. Rao for this sobering remark about the activity of international law.

Unidentified Speaker: I have a question for Professor Gold. I must admit to some confusion. As I understand it, the extension of the EEZ does not extend the sovereignty of the coastal states. But if they are extending their pollution control laws out to 200 miles, are they in effect extending their sovereignty? If so, are they in violation of the Law of the Sea Convention?

Eduardo Ferrero Costa: The first question is to Dr. Barbara Kwiatkowska. I agree that there is customary law regarding the economic zone, especially regarding the general provisions. However, what about certain articles in the Convention that, in my opinion, are not customary law? For instance, the provision regarding the optimum utilization of fishing resources by land-locked states.

Second question, to Dr. Scovazzi: You said that the United States position and that of some other developed countries is the accurate statement of the current customary law on the issue of residual rights. If that is your position, I would like you to explain why you say so. I don't think so.

The third question: one of the basic chapters in an introductory course in public international law is sources of law, and among those, of course, are treaties and custom. Everybody now speaks about custom, but what is custom? I would like to ask the three lawyers at the table and our chairman: where do you find the correct definition of custom? Do we maintain the concept of *opinio juris* as an element of custom?

Finally, a question to Dr. Knauss. I am very happy to hear that the provisions regarding scientific research on the EEZ are working and that developed states are not having problems. I don't agree with my friend Bernard Oxman and his position towards these provisions. But I want to ask Dr. Knauss if this 9 percent of cases in which there was a total loss of the programs was for different states or one specific state, because if it is for different states, that means that not all of the states are accepting these conditions. If for one specific state, there will be one or two that are really against these provisions.

Tullio Treves: No reasonable international lawyer could answer the question about international law in less than an hour. As we don't have an hour, I would refer you to the interesting considerations that were contained in at least two of the papers that were read to us where you will have an elaboration of some interest. May I also refer you to a recent paper by Dr. Kwiatkowska in which she tries to address the question in the *Netherlands Journal of International Law*.

Barbara Kwiatkowska: I was asked whether there is a rule of customary law concerning optimum utilization of living resources by the land-locked states. There are no rules of customary law whatsoever concerning participation of the landlocked and other geographically disadvantaged states in the living resources. There may be other opinions to the contrary. I emphasize that the general situation of landlocked and geographically disadvantaged states is complicated. The regime of living resources belongs to the category of rules and principles which may pass into the general corpus of international law, but because the rights of landlocked and other geographically disadvantaged states require the consideration of all relevant characteristics and circumstances in each particular case, this process may encounter difficulties. If you look carefully at its provisions, in particular Articles 69 and 70, the Convention does not offer a clear indication of how the parties concerned should proceed.

John Knauss: First, I have not changed my mind about creeping jurisdiction and other issues that I raised a couple of years ago in the banquet address. Secondly, the U.S. is taking a conservative position with respect to coastal state control over scientific research, namely,

not using implied consent and other kinds of opportunities. Bernie Oxman was saying there was more in Chapter XIII than just a few articles that tell you what you have to do and how you do it. My concern is that the United States is not a signatory to the Convention and the Convention is not yet in place. Up to now, most of us who operate research vessels haven't been prepared to take a chance with the implied consent rule on whether or not we could indeed send our vessels somewhere. I think it's an interesting question and one I suspect we're going to have to look into in the future. Up until now, that's not been the case.

Ambassador Djalal, I believe the reason why we've had 90 percent acceptances is because we do, insofar as possible, all the things that you have suggested. We certainly offer coastal state participation; we attempt to cooperate in various ways. In much of the research we do, there is no immediate economic impact; and it's very hard and not very fair on our part to try to imply that there is. Economic impact isn't a factor in sea floor spreading or some other esoteric subject.

Finally, on the question of where the denials come from, four denials in four requests came from Cuba, three denials out of four requests from the USSR; other than that, they are pretty well spread out amongst the various states where we do research.

Edgar Gold: Professor Oxman, I would have been surprised if you hadn't put one across my bow. You put one through the rigging, too. That's all right. I think your points are quite well taken. I concede that Canada since the early 1970s aimed at extremely high environmental terms, received a lot, and was still not satisfied. The Canadian delegation was quite severely chastised when they came back from Montego Bay, in the end, not having gotten all the environmental provisions which the government wanted. If this is inconsistent, it's also entirely compatible with instructions which delegations very often receive and may well be analogous to the position the United States delegation found itself in regarding the deep seabed or perhaps the United Kingdom in balancing fishing and hydrocarbon policies. But I must concede that the Canadian policy right now is quite confused. For example, our acceptance record of IMO conventions is dismal despite the fact that we pioneered some of these conventions. We find ourselves in the embarrassing position that states which originally opposed us on these conventions are accepting them, while we have not. We should get that house in order before we start making other unilateral declarations. I am not speaking for the Canadian government which has changed and whose policies have also changed.

Dr. Ramakrishna pointed out that perhaps there were inconsistencies in the two absolutes that I spoke about: the absolute right of coastal states to be protected from environmental problems and the absolute right of maritime states to navigate. I said that neither could be at the expense of the marine environment, and it is exactly that point which the Convention is supposed to balance in those specific articles. I simply doubt whether it is able to do that until we know more about how these articles have to be interpreted.

The points raised by Dr. Rao with his slides were very interesting. The problems in those waters are due to two causes. First, tankers on the route to the Gulf are pumping slops over the side, but that region, particularly the central part of the Indian Ocean, is one of the permitted areas for discharge under the MARPOL Convention, as developed in the early 1970s by the GESAMP group of experts.

The second problem is more specific: one of the requirements of MARPOL which has not been met is the adequate provision of reception facilities in the Gulf. Even some of the tankers which are complying with all the provisions have nowhere to put their slops, particularly in some of the major loading ports. They say, "We have nowhere to put it, so we're going to discharge it in permitted areas in the Indian Ocean," and it ends up on your shores.

Finally, the question on whether an extension of environmental protection zones into the economic zone is an attempt at establishing sovereignty. I would hope not. Dealing with such situations is really the main purpose of the Convention, which in those specific articles lays down quite clearly what can be done in the exclusive economic zone and what cannot. This is one of the areas where, as Bernard Oxman points out, we are not totally satisfied; we feel there is no reserve right for coastal states in the economic zone. This is where some of the unilateral attempts are being made and will be made, for environmental rather than sovereignty purposes, I hope.

Tullio Scovazzi: Ambassador Djalal raised a very difficult point relating to the EEZ and to overflight. Profiting from the lack of time, I was really happy to fly over such a difficult problem. Air security zones were established by a few states like the United States and Canada several years before the present codification of the law of the sea. These states require aerial identification for aircraft entering the territory after one hour's flying time outside the national territory, regardless of any limitation of distance from the shore. It could perhaps be said that for security reasons a coastal state may impose notice requirements on aircraft transiting such ocean space provided that it does not impose permanent limitations on such airspace. Professor Christol dealt with the topic during the Law of the Sea Institute conference devoted to neglected issues. He said that the mere carving of an EEZ out of previously high seas areas has not reduced the powers of coastal states to engage in protective measures in an area beyond the sovereign areas of states. The problem is to be able to identify whether the state is in fact threatened. Maybe under the regime of the Convention, air security identification over the EEZ could be regarded as regulated by the residual provision of Article 59. Maybe a balance of interests between the coastal states and other states has to be established according to this peculiar activity.

As regards Professor Ferrero's question, I would say that residual activities exist in the Convention, but it seems to me that neither coastal nor foreign states like residual activities. Some states stress the rights of navigation, overflight, laying of cables, and other activities as internationally lawful activities which can be undertaken in the exclusive economic zone. Other states stress the territorial character of the EEZ. For instance, Uruguay declared that the regulation of the uses and activities not provided for expressly in the Convention, residual rights and obligations relating to the rights of sovereignty and to the jurisdiction of the coastal state, fall within the competence of that state. Residual rights is a very difficult concept to consider within the framework of the Convention, but even more difficult within the framework of customary international law.

Tullio Treves: The EEZ is clearly alive and well three miles off the beach, its legal life nourished and stimulated by compliance and also by non-compliance.

PART V:

AUTHORITY TO MANAGE FISHERIES AND MINERAL RESOURCES OF THE SOUTHERN OCEAN

INTRODUCTION

Eduardo Ferrero Costa
Centro Peruvano de Estudios Internacionales
Lima, Peru

As you all know, in 1959, twelve states signed the Antarctic Treaty, which entered into force in 1961. Since then, twenty more states have acceded to the treaty, and among them six are also consultative parties together with the twelve original members. As we are aware, the main objectives of the Treaty were the use of Antarctica for peaceful purposes, including the prohibition of any nuclear explosives and the freedom of scientific investigation and the promotion of international cooperation in scientific research in the Antarctic. In addition, in order to suspend conflicts regarding claims of sovereignty over portions of Antarctica, the Treaty established that, without affecting previous claims or bases of claim, no new claim to territorial sovereignty in Antarctica shall be asserted while the Treaty is in force.

The Antarctic Treaty has not dealt specifically with the allocation of the resources of the mass of land nor of the adjacent seas, called the Southern Ocean, which are within the area of application of the Treaty. In these waters, there are important living resources such as krill, and in the soil and subsoil non-living resources such as hydrocarbons, gas, and almost surely several hard minerals. Within the Antarctic system regarding living resources, two conventions have been adopted, in 1972 and 1980. And with reference to the negotiations on the regime for Antarctic mineral resources, eight sessions have been carried out since 1982.

Taking into account that the issue of this 20th Annual Conference was "What Lies Ahead?" the Law of the Sea Institute decided to have this panel on the "Authority to Manage Fisheries and Mineral Resources of the Southern Ocean." The issue is quite complex because of the different positions states have regarding the Antarctic. Among the regional members of the Treaty, seven made claims of sovereignty before the Treaty was signed. The other five Treaty participants, including U.S., USSR, and China, have no claims of sovereignty and don't recognize the sovereignty claimed by the seven other parties. Furthermore, during the last years other states not parties to the Treaty have been showing increasing interest in the future regime of the Antarctic and its resources.

To the possibility of reviewing the Treaty in 1991, we must add the fact that the Antarctic issue has been on the agenda of the General Assembly during the last three years. Moreover, related to this we have the Law of the Sea Convention provisions on the seabed and its resources beyond the limits of national jurisdiction. To discuss these issues, today I have the pleasure and honor to chair a panel of distinguished experts on the subject as well as on the law of the sea. They combine diplomatic experience in the negotiation of these aspects with the excellence of academic quality.

Our first speaker is Ambassador Chris Pinto, well known to all of us. He was formerly the ambassador of Sri Lanka to the Federal Republic of Germany, the chairman of the Sri Lanka delegation to the Third United Nations Conference to the Law of the Sea, and the chairman of the International Law Commission. Currently Ambassador Pinto is the

Secretary-General of the Iran - United States Claim Tribunal in The Hague.

Our second speaker, Ambassador Fernando Zegers Santa Cruz, will present the perspectives of a claimant state. He is also a lawyer and has been delegate of Chile to the Antarctic meetings since 1975. He is former head of the Chilean delegation to the UN Conference on the Law of the Sea, former ambassador from Chile to the United Nations, to Brazil, and to Spain. At present he is director of the Chilean Diplomatic Academy.

Dr. Scott Hajost will present the perspective of the non-claimant states that are also parties to the Antarctic Treaty. He has been Attorney-Adviser for Oceans, International Environmental and Scientific Affairs at the Office of the Legal Advisor, State Department, since 1981. He has participated in numerous multilateral and bilateral negotiations and meetings, and for the past one and a half years he has had day-to-day responsibilities for Antarctic legal affairs and has participated also in the last three rounds of Antarctic minerals negotiations. He is presently chairman of the Federal Bar Association's International Law Section Committee on Natural Resources and International Environment.

For the perspective of the non-parties to the Antarctic Treaty we will hear Ambassador Abdul Koroma. He's presently ambassador of Sierra Leone to the European Economic Community, also accredited to Belgium, Netherlands, Luxembourg, France, and the Permanent Representative to UNESCO. He has served as ambassador and permanent representative of Sierra Leone to the United Nations, where he was chairman of the sixth committee for the thirty-fifth session of the General Assembly. He has been Sierra Leone's delegate to numerous international conferences, including the Third United Nations Conference on the Law of the Sea and chairman of the African group in the conference. Ambassador Koroma, a graduate of King's College, University of London, is also a member of the International Law Commission.

The last paper of this panel will be a report on the Antarctic mineral resource negotiations by someone who has knowledge of and insights into these negotiations. Tucker Scully is Director of the Office of Oceans and Polar Affairs at the State Department. He has a Master's degree in Marine Affairs from the University of Rhode Island and has been working for the past ten years in ocean and polar fields. He has been a member of the U.S. delegation to the Law of the Sea Conference and has participated in all Antarctic Treaty negotiations since 1976.

Then we pass to our two commentators. First we have Dr. Budislav Vukas, Professor of International Law at the University of Zagreb, Faculty of Law. He is a former member of the delegation of Yugoslavia to the Law of the Sea Conference and now delegate to the Preparatory Commission for the Seabed Authority and International Tribunal for the Law of the Sea.

Our second commentator is Dr. Lee Kimball, consultant to the International Institute for Environment and Development since 1980. She is also director of the Council on Ocean Law that among other tasks publishes Oceans Policy News with useful current information on ocean issues. She is advisor to the State Department on Antarctic issues and has attended Antarctica meetings as a member of the U.S. delegation.

AUTHORITY TO MANAGE FISHERIES AND MINERAL RESOURCES OF THE SOUTHERN OCEAN: OBJECTIVES OF MANAGEMENT

M.C.W. Pinto*
Secretary-General
Iran - United States Claim Tribunal

Preface

I cannot begin my brief presentation without conveying to John Craven and his associates and to the Executive Board of the Law of the Sea Institute my warm congratulations on having for twenty years provided a neutral forum for the discussion of new ideas on the law of the sea. Through the dialogues they have brought about at meetings such as these, they have made -- and I hope will long continue to make -- their unique contribution to resolving the conflicts of interests associated with the use of the seas and their resources.

Introduction

In the paper which I have the honor to present to you today, I begin by mentioning some of the characteristics of the Southern Ocean which appear to set it apart and thus to warrant its separate treatment at a Conference like ours, which otherwise deals with the law of the sea by topic rather than by reference to discrete geographical areas. I mention the vast area of the continent it surrounds -- over five million square miles -- and its remoteness from centers of human activity and the highways of international commerce, as well as some of its peculiar physical features and its forbidding climatic conditions. I then refer to some of the living and non-living resources of the Southern Ocean that have been subjects of recent study and speculation. Besides the uncertain promise of the krill and indications of vast oil reserves, I mention an important non-traditional resource, and the one currently most effectively exploited: the area's potential for scientific research: for yielding data useful in resolving scientific questions of global significance.

The point that I would like to make is that the area's remoteness and the complex difficulties generated by terrain and climate burden every activity in the Antarctic and the Southern Ocean with logistical problems of an order which is beyond solution by most individual governments. The need for the pooling of facilities and finance in order that these activities may be carried out (other than in circumstances of war or national emergency) in an economic manner, make this a particularly appropriate area for extensive international cooperative enterprise. In resolving such logistical problems, those countries located on the periphery of the Southern Ocean clearly have positions of critical strategic importance and might for that reason, if for no other, claim to be entitled to special rights and responsibilities in the area.

In discussing the objectives of managing the resources of the Southern Ocean, I suggest that they might be considered at two levels. I distinguish those levels -- for want of more accurately descriptive terminology -- as "overall long-term objectives" and "immediate" objectives. I suggest that the overall long-term objective should in all cases and from any point of view be the exploration, exploitation, use, and conservation of a resource to the greatest advantage of the great-

est number over the longest period, and further that this objective might well be regarded as determinative, irrespective of whether the resource were considered to be within national jurisdictional limits or outside them. Important subsidiary objectives are the maintenance of coordination, consultation, and cooperation, and here I want to recall that special characteristics of the Southern Ocean seem to emphasize the importance of these elements. A suggested list of "immediate" resource-management objectives includes the maintenance of safety of life at sea, appropriate environmental controls, a system for allocating areas and competence for the purpose of carrying out activities, assuring security of tenure within allocated areas, providing for the maintenance of order on platforms, promulgation of operational rules and systems for ensuring compliance with them, establishing criteria for limiting exploitation of a resource and the application of those criteria in practice, encouraging optimum use of resources and expanding opportunities for participation in such use, provision for the establishment and collection of dues and charges and distribution of the proceeds, and systems for communicating or making available the observations and results of research.

These "immediate" objectives too, I think, are valid and generally applicable irrespective of whether the resource is within or outside a State's national jurisdiction.

It is when we come to the scope of application, and then to the legal basis for the establishment and pursuit of these objectives, that we arrive at the centre of controversies that could attend resource-management in the Southern Ocean. Thus, the objective of securing the greatest good of the greatest number over the longest period would be seen by a state which considers a Southern Ocean resource to be within its national jurisdiction, as an objective to be pursued primarily if not exclusively for the benefit of its own economy and ultimately the welfare of its own citizens. Implicit in its decisions would be the need to balance the (1) interests of one of its nationals with the desire and the capacity to exploit the resource primarily for its own benefit, with (2) the interests of its other citizens with similar interests and capacities, and the (3) interests of those who might be deprived through such activity of some economic benefit that would otherwise accrue to them, and were thus entitled to a form of compensation. The establishment of what we have called "immediate" objectives and the implementation of the related regulatory and taxation measures through national legislative action may be expected to bring these interests into effective balance in the national context.

On the other hand, when the scope of application of the overall management objective of the greatest advantage of the greatest number is applied to a Southern Ocean resource considered to lie beyond the limits of any single state's jurisdiction, the primary aim would be to reconcile (1) the interests of the individual state which declares for itself or on behalf of its nationals the desire and the capacity to exploit a resource, with (2) the interests of other states with similar desires and capacities, and (3) the interests of yet other states which might be deprived through such activity of some material benefit which might otherwise accrue to them and were thus entitled to a form of compensation. The establishment of "immediate" objectives and the implementation of the related regulatory and taxation measures designed to reconcile these interests must here be effected primarily through

international legislation -- a process substantially different in method and application from law-making and enforcement at the national level.

International law, apart from its customary rules, is made by conferences of state representatives empowered by governments to negotiate, and in large measure commit them to, a treaty or international agreement incorporating the new rules. As these rules must, in order to be agreed and accepted as binding at a conference, represent the reconciliation of a number of divergent interests, the text of the law is often characterized by narrow scope or vagueness reflecting compromise. The binding quality of the law will be recognized by each state only after a further confirmatory process at the national level -- ratification or approval -- has been completed. Aside from the critical part played by a state's internal process in the making of international treaty law, the state's organs are, as a general rule, essential for the enforcement of the law. Lacking in most areas a jointly organized enforcement arm, the technique of international law is to secure its implementation through the internal forces of parties to the treaty creating it. A notable example of the technique is the jurisdiction conferred on the "flag state" and sometimes shared with other states in implementing obligations imposed under or by the law of the sea.

Lack of an independent and impartial system of enforcement has often given rise to the criticism that international law is "inefficient." By "inefficient," we may take it, is meant the failure to achieve objectives economically, by the prudent use of the available facilities and finance. Even if this criticism of international law were justified, what alternative do we have? National law may, to this way of thinking, get good marks for efficiency. But then it is efficient at achieving national objectives, while its record in being able to adopt and pursue international objectives might be found by many to be a feeble one. Indeed, the "inefficiency" of international law may, in part at least, be due to the fact that its implementation must still be left to national laws and forces whose primary function is the achievement of national objectives -- a fact that could gravely impair their application to achieve international objectives. But it seems we have no alternative: a resource which is believed to be beyond national jurisdiction must be managed in accordance with international law, however inefficient its rules and methods of enforcement may be.

In the Southern Ocean, two sets of objectives compete for recognition: (1) the national objectives of seven states with claims to Antarctic territory, and presumably claims to exclusive national jurisdiction with respect to the resources of vast areas of the Southern Ocean, these objectives being pursued on the basis of national regulation and national enforcement; and (2) the international objectives laid down in international agreements such as the Geneva Conventions on the Law of the Sea, the Antarctic Treaty, and treaties concluded under it, and eventually the UN Convention on the Law of the Sea, when it comes into force. These international objectives are to be pursued on the basis of agreed regulatory measures, but by means of the national enforcement agencies of the parties to each treaty.

It may seem astonishing to many that under an international legal order that is basically consensual, seven claims of territorial sovereignty can be maintained in the face of their non-recognition by the rest of the interrnational community. On the other hand, it is true that such claims are not lightly made. Based on security, and perhaps high economic policy, they would be made in full knowledge of the community's negative response, but certainly also following a decision

that it would be more in the national interest to make, rather than to forego, those claims. Considerations of national pride then relate the claims to maintenance of internal order, and they may thus achieve a status that is virtually immutable. It is then a matter for the questioners to weigh carefully the cost, to the point of disrupting friendly relations, of pressing objections to such claims while advocating competing ideas, however progressive socially, and imposing the collective will.

In attempting the reconciliation of the means of pursuing national and international objectives in the Southern Ocean, claims of territorial sovereignty present the thorniest of problems. But this is the very problem that, by a combination of circumstances and far-sighted diplomacy, we find resolved in the context of the Antarctic Treaty. For this reason alone, common sense would seem to suggest that the most economical way to further international objectives in the area would be by means of the continued operation of the Antarctic Treaty. But the Treaty has other outstanding merits as well, *e.g.*, its record of adopting measures and international agreements for the conservation of the living resources of the Antarctic and the Southern Ocean based on up-to-date scientific advice, and the distinction of being the oldest, if not the only, fully verifiable demilitarization agreement to which the major military powers are parties.

Unfortunately, despite the Antarctic Treaty's many merits, it has some shortcomings when considered as the possible means for the furtherance of international management objectives in the Southern Ocean. I shall only mention the most fundamental of these, which I have dealt with in my paper, *viz.*, the method by which the principal organ of the Treaty, the Antarctic Treaty Consultative Parties, is constituted and adopts its decisions. As the Treaty's scope evolved to cover management of the living resources of the Antarctic and the Southern Ocean and seemed set to expand in the direction of mineral resource management, a number of states felt that the Consultative Parties' resource-management decisions might have implications for economic questions going beyond the scope of the Treaty. At that point it became difficult for many states not parties to the Treaty to reconcile the authority exercised by the Consultative Parties with two fundamental principles of the New International Economic Order. These are succinctly expressed in Article 10 of the Charter of Economic Rights and Duties of States:

> All States are juridically equal, and as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems. . . .

My paper examines this question and concludes by suggesting, as the basis for the establishment and pursuit of comprehensive management objectives, an Antarctic Treaty restructured along the lines suggested there.

Achieving a proper balance among the interests of claimant states, non-claimant parties to the Treaty and states not parties to the Treaty is likely to be an extremely complex endeavour -- indeed if it could even begin. To attempt to do so by means of a completely new Treaty would be the most difficult of all approaches to take, regardless of how socially progressive and widely supported the concepts on which it is based. On the other hand, refusal to take account of principles held by the majority of the community to be fundamental will also not be

helpful in the long run nor will non-participation in discussion of the problems involved. It may not be against the various interests today held in balance by the Treaty for States Parties themselves to consider solutions in the longer term. If entry of the Consultative Parties into the management field has raised questions outside the Treaty, it may well have done so within it, and the use of legal artifice to resolve intractable problems -- the so-called bi-focal approach -- may be less helpful as the questions become more specific and therefore more acute. Perhaps by careful efforts to reconcile individual interests with group interests on a practical rather than ideological level, and by building on the foundations laid by the Antarctic Treaty with elements which demonstrate long-term benefits for all, an international legal order for the Southern Ocean might emerge that all can agree is both efficient and equitable.

I have heard the views of some representatives of the Treaty Parties summed up in the homely aphorism: "If it ain't broke, don't fix it!" Of course, there is much to ponder in these words, and we must all heed them. But equally we must, I think, beware the attractions of another piece of potted wisdom -- one that says: "If you can't fix it, it ain't broke."

Special Characteristics of the Southern Ocean

The waters adjacent to the Antarctic continent, comprising the southern reaches of the Indian, Pacific, and Atlantic Oceans, and sometimes called the Antarctic or Southern Ocean, are in many ways unique. In the first place, these waters surround the coldest, highest, and windiest landmass of the planet, temperatures remaining above freezing in some areas for only about four months a year, then plunging to -30° C to -40° C and as low as -89.6° C. All but 1 percent of the continent's 5,400,00 square mile surface is permanently covered by ice, in places over 4 km thick. Exceptionally low energy levels over millions of years appear to have inhibited the evolution of life on land: apart from some three species of flowering plants thought to be recent arrivals, the continent appears to support only species of lichens, minute spiders, and mites. The absence until recently of human interest, let alone human habitation, prevented the development of social and political structures and delayed claims of national sovereignty.

Secondly, while the other oceans tempted man to the adventure of discovery and offered him highways for the exchange of goods and the spread of ideas, hostile climatic conditions, the sea-ice which covers the Southern Ocean in constantly varying extent, and the movement of huge "tabular" icebergs presented navigational hazards that deterred all but the hardiest of travellers and contributed to the isolation of Antarctica.

Thirdly, several other physical features set it apart. For example, its continental shelf is relatively narrow and deep: while the global average shelf width is some 70 km, in the Antarctic it is 30 km. and while the mean shelf depth is about 200 m, in the Antarctic it is as much as two to three times that depth; and the great Antarctic Circumpolar Current rushes clock-wise round the continent.

Resources of the Southern Ocean

The resources of the Southern Ocean have been extensively described and speculated upon elsewhere,[1] and only a brief review of them will be sufficient for our purpose. Currents and the upwelling of deep ocean water have resulted in an accumulation of nutrients in the

Southern Ocean over millions of years. At the heart of its foodweb, feeding on phyto-plankton, are some eleven species of a tiny shrimp-like crustacean, krill. Squid and fish prey upon the krill, and they in turn and the krill are consumed by some eight main types of whales, six types of seals, and forty species of birds, the greater part by mass being penguins. A sharp reduction in whale populations as the result of commercial harvesting has provided greater opportunities for other krill-eating species such as crab-eater seals, squid, and fish. Krill tend to form swarms or super-swarms which may be several kilometers across and contain several million tons wet weight of krill. Since the 1960s krill harvesting has increased, with some fluctuation, to well over half a million tons annually. Although some estimates of krill availability reach as high as tens of millions of metric tons annually, recent studies tend to cast doubt on these figures and to emphasize our ignorance of the effect such harvesting might have on the ecosystem in which krill appear to be the key element.

Finfish are not as plentiful in the Southern Ocean as in other areas. They are slow-growing and are generally found on island-associated shelves. It is thought to be unlikely that fish can be harvested at levels in excess of half a million metric tons annually. Squid fishery potential has still to be determined. With a reduction in sealing achieved through conservation measures and the moratorium on commercial whaling expected to come into effect in 1986, the krill fishery is likely to emerge as the most important form of living-resource exploitation in the area, despite the many technical problems still connected with harvesting, processing, and marketing the organism.

Traces of several metals have been found on the Antarctic continent: coal, copper, molybdenum, cobalt, zinc, gold, tin, manganese, and chromium. The sheer size of the landmass -- one-tenth of the earth's land surface -- and the fact that it was a part of the super-continent Gondwana of which mineral-rich areas such as southern Africa, Australia, and South America also formed a part, have led scientists to conclude that the Antarctic must contain major mineral deposits. Sedimentary deposits in the Ross, Weddell, Amundsen and Bellinghausen Seas indicate important hydrocarbon resource potential, confirmed to some extent by exploratory drilling. However, despite early (1976) predictions of the existence of tens of billions of barrels of oil in the area, and the active interest of some oil companies, it seems likely that severe operational and logistical difficulties and extreme environmental hazards are likely to postpone oil exploitation in the Antarctic well into the future, until after all other sources less fraught with complexity and less costly have been exhausted.

Other non-living resources of the Southern Ocean include polymetallic nodules, icebergs, and geothermal energy. None of these appears to be of proven economic significance, let alone commercial interest, at the present time.

There are two other features of the Southern Ocean and of the Antarctic as a whole which are not generally thought of as "resources," but deserve to be: 1) the role of the Antarctic as the earth's strongest cooling center, in the maintenance of the climatic conditions of the planet; and 2) the Antarctic as a source of knowledge -- knowledge of the earth's structure and geological history -- that would enable us better to understand and perhaps predict the effects of a variety of complex physical and biological processes occurring throughout the world. In this sense the Southern Ocean offers to the

scientists of all countries unparalleled opportunities for research in fields such as oceanography, meteorology, climatology, the behavior, physiology, and ecology of a variety of marine organisms, and global environmental problems, including, in particular, global levels of atmospheric constituents, such as carbon dioxide and ozone.

Management Objectives

The objectives of managing the resources of the Southern Ocean would not seem to differ radically from the objectives of managing any resource, and may be considered at two levels: 1) overall long-term objectives relevant in policy formation and 2) what we may call immediate objectives reflected in regulatory devices giving effect to policy.

Overall Long-term Objectives

The overall long-term objective of managing the resources of the Southern Ocean is, surely, the exploration, exploitation, use, and conservation of those resources to the greatest advantage of the greatest number. It calls for regulation of human activity in such a manner as to maintain, firstly, a balance between individual interest on the one hand and collective or community interest on the other, and secondly, a balance between the needs and desires of present-day populations and the needs and desires of future generations.

Several recent writers have in different ways placed emphasis on the need to develop and apply policies regarding natural resources that maintain a balance between these categories of interests. Thus, one recent writer, quoting Professor McDougal with approval, speaks of the balancing of the inclusive competence of the larger community and the exclusive competences of nation-states to secure common interests:

> Such a balancing must be adequate for the production and fair distribution of resources and of the values produced in the continuous process of resource management. An appropriate balancing should represent a moving line of compromise varying with problems and contexts, between certain complementary, contraposed policies: all free peoples have a common interest in the establishment and maintenance of an inclusive competence adequate to secure common values and designed both to protect democratic access by peoples to participation in decisions which affect them and to achieve an assumption of responsibility adequate to ensure application of inclusive policies in arenas both external and internal to particular states; but such peoples have equally a common interest in the establishment and maintenance of an exclusive competence adequate to protect particular peoples from arbitrary external interference and oppression and to promote the greatest possible freedom for initiative, experiment, and diversity in the effective adaptation of policies to local contexts.[2]

Another writer summarizes his prescription for the evolution of resource policy as "the goal of sustainable development":

> a development strategy that manages all assets, natural resources, and human resources, as well as financial and physical assets, for increasing long-term wealth and well-being. Sustainable development, as a goal, rejects policies and practices that support current living standards by depleting the productive base,

including natural resources, and that leave future generations with poorer prospects and greater risks than our own... The core of the idea of sustainability, then, is the concept that current decisions should not impair the prospects for maintaining or improving future living standards. This is strikingly similar to John Locke's criterion for judging appropriations of natural resources -- that such property claims should be considered valid only if they leave "as much and as good for others." This implies that our economic systems should be managed so that we live off the dividend of our resources, maintaining and improving the asset base. Ironically, this principle bears much in common with the theoretical concept of income that practical accountants seek to measure: the greatest amount that can be consumed in the current period without reducing prospects for consumption in the future. Accountant and philosopher agree on the basis of sustainability.[3]

It is worth noting that these policy prescriptions would seem to apply whether or not the natural resource is within the boundaries of a particular state, whether it is within national jurisdiction, or is thought to be part of what has been referred to as a "global commons" or a resource in respect of which the community's interest is considered to prevail. Natural resources, wherever they are located, are thus to be dealt with in accordance with policies designed to achieve certain over-all long-term management objectives. In the case of a resource located within the limits of a state's jurisdiction the main objective will, in the first instance, be the provision of the greatest good to the greatest number of that state's nationals. However, if the community of states as a whole appears to have an interest in the proper management of this national resource because of some special value that it represents, the community's needs are to be taken into account when formulating management policy; and where the resource is actually located outside the national jurisdiction of any state, management objectives should reflect a proper balance of state and community interests.

This kind of approach to the management of natural resources within national jurisdiction is already reflected to some extent in a number of provisions of the UN Convention on the Law of the Sea: *e.g.*, coastal states are required to promote the objective of optimum utilization of the living resources of their exclusive economic zones and to give other states access to any surplus of the allowable catch (Articles 61, 62); land-locked states and geographically disadvantaged states are given rights under the Convention to exploit a part of the surplus of the allowable catch within exclusive economic zones (Articles 69,70 and 71) (See also Article 297(3)); a state is placed under an obligation to co-operate in the management of stocks occurring within its exclusive economic zone and in areas beyond it (Article 63); by Article 82 a coastal state is required to make payments or contributions in kind in respect of the exploitation of the non-living resources of its continental shelf beyond 200 nautical miles from territorial sea baselines; a state is required to enact national legislation to prevent activities subject to its jurisdiction from polluting the marine environment (Articles 207-212); and the coastal state's discretion to withhold its consent to the conduct by another state of scientific research in its exclusive economic zone is qualified under Articles 246(5) and 246(6). See also Articles 297(2) (a) and (b). If navigation is viewed as the use of a marine resource, rights of

innocent passage through the territorial sea (Article 17), transit passage (Article 38) and innocent passage (Article 45) through straits used for international navigation, and archipelagic sea-lanes passage (Article 53) also offer examples of such an approach.

On the other hand, when the Convention deals with resources beyond the limits of national jurisdiction, it reflects a balance of individual state and community interests: e.g., provisions on the obligation to co-operate to ensure conservation and promote the objective of optimum utilization of highly migratory species (Article 64); apportionment of responsibilities with respect to anadromous and catadromous stocks (Articles 66 and 67); and Part XI of the Convention, which incorporates the so-called parallel system applicable to deep sea-bed mining.

Immediate Objectives

Management objectives at the immediate, or implementational level, may be thought of as being *organizational* or *operational*. The essential organizational objective would be the provision of a system for rule-making, rule-enforcement, and the resolution of any disputes that might arise. For the achievement of that objective three basic elements are of importance and may be stated in terms of subsidiary objectives: coordination, consultation, and co-operation, at the national and the international level. Important as these elements may be in the context of marine resource management generally -- the term "cooperation" and its derivatives occur no less than fifty-seven times in the UN Convention on the Law of the Sea -- they assume vital significance in relation to management of the resources of the Southern Ocean. There, remoteness from normal sources of supply and problems of communication, an inhospitable climate, the sensitivity and vulnerability of ecosystems, and other factors combine to burden any activity with extraordinary logistical difficulty, implying the need for provision of facilities and finance beyond those which would be normally allocated for that purpose by a single state.

Such a system would be the essential means for achieving a variety of operational objectives which would be of importance whether the activity concerned the harvesting of living resources, mineral exploitation, or scientific research. These would include:

(1) maintenance of the safety of persons conducting activities in the area, including in particular, the reduction of navigational hazards through warnings and prohibitions;
(2) promulgation of appropriate environmental controls, including prohibitions where necessary, and ensuring compliance with them;
(3) establishment of a system for the allocation of areas and competence for the purpose of carrying out activities in the Southern Ocean;
(4) assuring security of tenure within an area allocated, for the purpose for which the allocation was made, *e.g.*, fishing, mining, scientific research;
(5) providing for the maintenance of order among personnel on platforms in the area, and for their general security;
(6) promulgation of operational rules, regulations, and procedures appropriate to the activity being carried out, and ensuring compliance with them through requiring regular transmission of information and, where necessary, inspection;

(7) determining the criteria by which limits might be imposed on harvesting or mineral recovery, and their application;
(8) encouraging optimum use of the resources of the Southern Ocean within the limits established, in particular through expanding opportunities for participation, and providing for accommodation among uses wherever possible without detriment to or interference with any one of them; and
(9) providing, where appropriate,
    (a) for the establishment and collection of dues and charges in respect of resource exploitation, and their application for appropriate purposes; and
    (b) for the communication or availability of the observations and results of scientific research.

At this level of generality, neither overall objectives nor those we have called immediate objectives are likely to give rise to serious controversy when examined in the light of different conceptions of the responsibilities of states and different ideologies. The impact of the latter are substantial, however, when we consider the actual establishment and operation of the authority and regulatory devices to achieve those objectives.

Legal Basis for the Establishment and Pursuit of Management Objectives in the Southern Ocean

The basis on which management objectives for the Southern Ocean must be established and implemented is, of course, Law. As Roscoe Pound observes in his famous essay on the philosophy of law, by the beginning of the twentieth century, jurists had come to think of the end of law no longer as "a making possible of the maximum of individual free self-assertion" but rather as "a social institution to satisfy social wants -- the claims and demands and expectations involved in the existence of a civilized society -- by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society."[4] This view of the end of law seems to be consistent with the approaches to management of natural resources which we have noted, and to offer a firm foundation for the establishment and pursuit of the related objectives.

But precisely what law or laws should form the foundation for management of the Southern Ocean? This question leads us to the heart of disagreements which today surround this remotest of continents. It will be convenient to review briefly three of the positions likely to be taken by groups of states in response to this question.

Claimant States

Seven states claim sovereignty over portions of the Antarctic continent: Argentina, Australia, Chile, France, New Zealand, Norway, United Kingdom. By article IV of the Antarctic Treaty of 1959, those states agree to place such claims in suspense, and further, that for the duration of the Treaty, no acts or activities shall constitute a basis for asserting, supporting, or denying a claim to sovereignty. But these undertakings would appear to bind the claimants only in relation to other Treaty Parties and not *erga omnes*, and then only during the existence of the Treaty, which is due to be reviewed in 1991. Some claims overlap and the resulting questions remain unresolved. Non-claimant Parties to the Treaty, notably the United States and the

Soviet Union, recognize no claims of sovereignty, nor do non-party states, which constitute the overwhelming majority of the world community.

If the claimants were to maintain their territorial claims *vis-a-vis* non-parties, they could claim equally that the seas and undersea areas adjacent to each claimed territory were within their national jurisdictions as territorial seas, exclusive economic zones and continental shelves.

It would be open to these states, therefore, to argue that one major management objective, *viz.*, the basic allocation of marine areas as between those subject to national jurisdiction and those which lie beyond it, has already been accomplished under existing international law through the UN Convention on the Law of the Sea, the 1958 Geneva Conventions, or customary law. Allocations of space and competence within areas so determined to be within national jurisdiction *e.g.*, for different purposes or to different individuals or groups, would, from their point of view, be a matter of domestic law. Domestic legislation would be the authority for establishing management objectives, as well as for the action to pursue them by means of implementing and enforcement measures. It would be difficult, however, for these arguments to be sustained in relation to their partners under the Antarctic Treaty, which suspends claims of sovereignty. Legislation pursuant to such claims need not, it seems, be treated as binding by a Party to the Treaty.

Allocation of areas and competence beyond national jurisdiction could, for these states, take place on the basis of international regimes in which they participate by agreement, such as Parts VII, XI, XII (Sections 4-5) and XIII (Section 4) of the UN Convention on the Law of the Sea, the 1946 International Convention for the Regulation of Whaling, regional arrangements including those concluded under the auspices of FAO, IMO, WMO, and other Specialized Agencies, arrangements under the 1959 Antarctic Treaty or the 1982 Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Sea Bed. Similar considerations may apply for these states in all areas of the Southern Ocean and the sea-bed adjacent to the unclaimed sector of Antarctica, territory to which none of them may lay claim while the Treaty is in force (article IV, paragraph 2).

Non-claimant Antarctic Treaty Parties

While the seven claimant states would seem free to assert their territorial claims in relation to well over 120 States not parties to the 1959 Antarctic Treaty, they have undertaken to suspend those claims in dealing with their Treaty partners, currently 25. For these 25 states, the Antarctic Treaty and arrangements concluded under it, *e.g.*, Agreed Measures for the Conservation of Antarctic Fauna and Flora (1964), the Convention for the Conservation of Antarctic Seals (1972), and the Convention on the Conservation of Antarctic Marine Living Resources (1980), as well as recommendations of the Consultative Parties taking effect in accordance with Article IX of the Treaty, together sometimes referred to as the "Antarctic Treaty System," would form the essential legal basis for the management of activities in the Southern Ocean and profoundly influence their dealings with non-party states in relation to it.

Objectives of the 1959 Antarctic Treaty

The Antarctic Treaty, inspired by successful scientific cooperation during the International Geophysical Year (1957), is, by its terms, an agreement of limited scope. Its two great themes are Peace and Science. As emphasized twice in its brief preambular paragraphs, the Treaty is intended to benefit mankind as a whole, as distinct from any individual or organized group, such as a state. The parties to the Treaty first formally recognize "that it is in the *interest of all mankind* that Antarctica shall continue for ever to be used exclusively for peaceful purposes," going further to declare that the continent shall not even become "the scene of international discord." Second, they declare their conviction that the establishment of a scheme for continuing and developing international cooperation on the basis of "freedom of scientific research" would be in accord with "*the progress of all mankind*."

While the establishment of Peace, by its nature the dominant theme, is developed through prohibitions (Article I prohibits any measures of a military nature, and protection of the environment through the prohibition of any nuclear explosions, and the disposal of radioactive waste under Article V seems to supplement it), the Treaty specifies rules of positive conduct regarding the theme of Science. "Freedom of scientific investigation in Antarctica and cooperation toward that end," declared by Article II, is the foundation of those rules. Freedom and co-operation are not, however, without limits: exercise of the principle is guided or limited, first through recalling the manner and scope of activity familiar to the founders of the Treaty who had participated in the International Geophysical Year and, second, by subjection to the provisions of the Treaty. From the latter it should be clearly implied at least that all scientific investigation in Antarctica must be "for peaceful purposes only."

Article VI specified the area of application of the Treaty -- and thus the area in which, according to the Parties "freedom of scientific investigation" would prevail -- to be that area south of 60° South latitude. As was noted above, national claims to territory are placed in suspense by Article IV, thus doing away with the hampering effect of political boundaries implied in claims to national jurisdiction and increasing mobility for the purpose of scientific investigation. Although scientific research is to be carried out in the manner of similar activity during the IGY, the subject matter would not seem to have been limited to geology and related disciplines. Biology is an important element in most research programs.

With the objective of promoting scientific investigation of a kind brought within the scope of the Treaty, the Parties are obliged "to the greatest extent feasible and practicable," to exchange (a) information regarding plans for scientific programmes, (b) scientific personnel, and (c) scientific observations and results from Antarctica. The Parties agree, with respect to all scientific observations and results (no attempt being made to distinguish between the results of basic research and other research of a strategic or applied character), not merely to exchange them (*i.e.*, circulate them among themselves) but also to make them "freely available" (Article III). By this provision, and the Parties' undertaking that:

> 2. In implementing this Article [III], every encouragement shall be given to the establishment of cooperative working relations with those Specialized Agencies of the

the Treaty seems to open a window to the rest of the world by foreseeing close cooperation with appropriate international organizations, perhaps with a view to achieving its stated overall objective of fostering "the progress of all mankind."[5]

The Treaty establishes inspection procedures "in order to promote the objectives and ensure the observance of the provisions" (Art. VII, para. 1) of the Treaty, *viz.*, scientific investigation for peaceful purposes, international cooperation for that purpose, and the maintenance of peace in the area.

Role of the Consultative Parties: Interpretation of the Scope of the Treaty and its Objectives

Article IX is of central importance to the operation of the Treaty because of important functions conferred on, or derived from it by, specified Contracting Parties commonly designated "Consultative Parties." These Parties are the original twelve who appear to have an unqualified and permanent right to exercise these functions (paragraph 1), and any other Party demonstrating its interest in Antarctica by "conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition" (paragraph 2).[6] Six Parties (Brazil, China, India, Federal Republic of Germany, Poland, and Uruguay) have thus far joined the twelve original members of this category. Article IX gives the Consultative Parties (currently eighteen of the thirty-two Contracting Parties) a directive or "steering" function through conferring on them the power of "formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty..." While the scope of measures within the authority of the Consultative Parties is circumscribed by reference to "the principles and objectives of the Treaty" (presumably principles directed at the maintenance of peace and the promotion of international cooperation in scientific investigation), the list of such subjects on which measures may be formulated is not exhaustive, but is stated to include:

(a) use of Antarctica for peaceful purposes only;
(b) facilitation of scientific research in Antarctica;
(c) facilitation of international scientific cooperation in Antarctica;
(d) facilitation of the exercise of the rights of inspection provided for in Article VII of the Treaty; questions
(e) relating to the exercise of jurisdiction in Antarctica;
(f) preservation and conservation of living resources in Antarctica.

Measures formulated become effective only when approved by *all* the Consultative Parties entitled to participate in their consideration (paragraph 4). Unanimous approval of measures would thus make them binding on the Consultative Parties. A practice developed among the Contracting Parties as a whole seems, however, to indicate general acceptance of measures unanimously approved by the Consultative Parties (Recommendation III-VII and Explanatory Statement concerning it, Final Report of the Fourth Antarctic Treaty Consultative Meeting). Signifi-

cantly, the Final Report of the Fourth Consultative Meeting also declares that:

> 2. Recommendations which become effective in accordance with Article IX of the Treaty are, in terms of that Article, 'measures in furtherance, of the principles and objectives of the Treaty';

This would seem to amount to recognition of the Consultative Parties' right to interpret the Treaty, albeit for Treaty parties only: any subject on which the Consultative Parties adopt measures unanimously is, by definition, to be considered to be within the scope ("principles and objectives") of the Treaty.

In order to promote the objectives and the observance of the provisions of the Treaty, the Consultative Parties are empowered to inspect, through their nationals designated as observers for the purpose, any part of the Treaty area, including all stations, installations, and equipment within such an area, and all ships and aircraft at points of discharging or embarking cargoes or personnel. They may also carry out aerial observation of such areas (Article VII). Jurisdiction over personnel in respect of all acts or omissions occurring while they are in Antarctica for the purpose of their functions (presumably for the purpose of enforcement) lies with the state of the person's nationality only. Disputes regarding the exercise of jurisdiction must be submitted to the settlement procedures specified in Article XI (essentially consensual) unless in the meantime relevant recommendations by the Consultative Parties under Article IX.1(e) have been accepted.

Management Activities Considered to be Within the Scope of the Antarctic Treaty

While it is possible to regard the Consultative Parties' powers of recommendation conferred by Article IX as being limited, in the words of that article, to "measures in furtherance of the principles and objectives of the Treaty," and therefore to measures for maintenance of peace and the promotion of international cooperation in scientific investigation on subjects such as those listed in sub-paragraph 1 of that article, there has been a gradual assumption of a broader competence extending into aspects of the management of the living and non-living resources of the Antarctic continent and the Southern Ocean.

Sub-paragraph 1(f) of Article IX contemplates recommendation by the Consultative Parties of measures regarding "preservation and conservation of living resources in Antarctica", and in 1964 they adopted, as interim guidelines, "Agreed Measures for the Conservation of Antarctic Fauna and Flora." With the stated desire to "promote and achieve the objectives of protection, scientific study, and rational use of [Antarctic] fauna and flora", the Agreed Measures establish the Antarctic Treaty area (*i.e.*, the area south of 60° South latitude) including all ice shelves as a "Special Conservation Area" wherein the killing, wounding, capturing, or molesting of any "native mammal or native bird" or harmful interference with them is prohibited by the participating governments, except under a permit issued by one of them subject to stated conditions. Areas of "outstanding scientific interest" may be designated "Specially Protected Areas" and accorded additional protection in order to preserve their unique natural ecological system. Other provisions prohibit the introduction into the

area of non-indigenous species, parasites and diseases, and require the exchange of information among participating governments.

In 1972 the Antarctic Treaty Parties adopted the Convention for the Conservation of Antarctic Seals. With the stated desire to "promote and achieve the objectives of protection, scientific study and rational use of Antarctic seals", the Antarctic Treaty Parties provide -- this time in the form of an international agreement open for signature and ratification by them and open to accession "by any State which may be invited to accede . . . with the consent of the Contracting Parties -- for the prohibition of the killing or capture of specified species of seals except under a system of permits to be established by each one of them. The Convention calls for the adoption of detailed measures regarding, for example, catch limitations of various kinds and equipment specifications. Most importantly, the Convention requires the establishment of "an effective system of control, including inspection, over the implementation of this Convention," as well as a Commission to undertake such functions as the Parties deem necessary.

The Antarctic Treaty Parties' management objectives in regard to the Southern Ocean have thus far been most elaborately stated in the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) adopted by them in 1980. The preamble recalls the objectives of safeguarding the environment, protection of ecosystems, increasing knowledge of the Antarctic's marine living resources, and the urgent need for conservation of those resources and international co-operation for that purpose. The preamble further declares recognition of

> the prime responsibilities of the Antarctic Treaty Consultative Parties for the protection and preservation of the Antarctic environment and, in particular, their responsibilities under Article IX, paragraph 1(f) of the Antarctic Treaty in respect of the preservation and conservation of living resources in Antarctica. . . .

Article II of the Convention, while establishing "principles of conservation," declares that the objective "conservation" includes, for the purposes of the Convention, the meaning "rational use." The Convention establishes a Commission for the Conservation of Antarctic Marine Living Resources charged with giving effect to "the objective and principles set out in Article II", and a Scientific Committee for the Conservation of Antarctic Living Marine Resources as a consultative body to the Commission. The Commission is given legal personality, and charged with a wide range of regulatory responsibilities including the adoption and implementation of conservation measures and a system of observation and inspection. Conservation measures are to include catch limitations of various kinds and equipment specifications, and the designation of special areas for protection and scientific study.

This series of international instruments culminating in CCAMLR represents a steady development of a legal framework for the establishment and pursuit of a full range of management objectives regarding the resources of the Southern Ocean as among participating states. Although the Antarctic Treaty makes no mention of mineral resources in connection with conservation, or in any other context, the Treaty Parties have, since 1972, been engaged in negotiations for the establishment of a regime for the "conservation," and therefore the "rational use," of the Antarctic's minerals, which would include their commercial exploitation provided technological developments make such an enterprise

financially attractive while meeting necessary environmental protection standards. Disillusionment at the outcome of the negotiation of a seabed minerals regime at the Conference on the Law of the Sea, adverse trends in oil and metal prices, and other global economic factors may have, in the meantime, slowed the development of an Antarctic minerals regime which the Treaty Parties, at their IXth Consultative Meeting in 1981, decided "should be concluded as a matter of urgency."

The legal framework created by the various instruments and practices that make up the "Antarctic Treaty System" bind the Treaty Parties within that system. Assertions of national jurisdiction over Antarctic territory and adjacent zones of the Southern Ocean -- always possible as between claimant states and states not parties to the Treaty -- could hardly be made among Treaty partners. Non-claimant Treaty Parties, however, sensitive to the sentiments underlying sovereignty claims, would wish to avoid having the issue of such claims raised at all for fear of damaging irreparably the balance of interests brought about by the Treaty in 1959. This has led to what has been called the "bi-focal approach," whereby legal artifice enables the unanimous adoption of texts that can be read as supporting claims of sovereignty or as being neutral on the matter.

For participants in the Antarctic Treaty system, as among themselves, the Southern Ocean would contain no areas over which a single state could claim to exercise exclusive national jurisdiction with the exception of the marine areas surounding certain islands specifically excluded. Within the geographical limits specified by the system -- in general the area south of 60^{o} South latitude -- the legal basis of resource-related activities would, in addition to the Treaty, include the relevant portions of the 1982 UN Convention of the Law of the Sea, the 1958 Geneva Conventions on the Law of the Sea, the 1946 International Convention of the Regulation of Whaling, regional arrangements including those concluded under the auspices of FAO and other Specialized Agencies, and the 1982 Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Sea-Bed, depending on whether a particular Antarctic Treaty Party had become a party to one or more of them.

An Antarctic Treaty Party which has signed or become a party to the 1982 UN Convention on the Law of the Sea would, however, need to consider the hierarchical ordering of obligations established by Article 311 of that Convention and, in a more general way, the rules to apply upon the conclusion among the same parties of a later treaty relating to the same subject matter, such as those reflected in Article 59 of the Vienna Convention on the Law of Treaties.

It is often argued that the Antarctic Treaty and related instruments are merely examples of regional arrangements consistent with the purposes and principles of the United Nations, which receive specific endorsement from Chapter VIII of the Charter; or again, that they give effect to the duty of states to cooperate in taking necessary measures for the conservation and management of living resources of the sea, a duty recognized by general international law and, in the words of the Secretary-General's Report (1984), "recently confirmed in the 1982 United Nations Convention on the Law of the Sea." The Report continues:

> 216. The various measures taken by the Consultative Parties for the conservation of Antarctic living resources have evidently aimed at fulfilling this goal.

The duty of states to cooperate in matters concerning conservation of the living resources of the sea and in other marine environmental contexts is, indeed, confirmed repeatedly in the Convention on the Law of the Sea, as is the endorsement of regional arrangements where appropriate. There can also be little doubt as to the effectiveness and value of the conservation objectives and implementing framework established by the treaties negotiated within the Antarctic Treaty system, most recently by CCAMLR.

These treaties, which establish valuable management objectives and set up machinery by which they might be effectively pursued, nevertheless contain, in the view of many states not parties to the Antarctic Treaty, other provisions that are not consistent with modern international law, and in respect of which they appear to have fundamental reservations.

States Not Parties to the Antarctic Treaty

For states outside the Antarctic Treaty system and not influenced by the innovative interpretations of its scope evolving within it, the 1959 Treaty remains one which deals essentially with the maintenance of peace and the promotion of international cooperation in scientific investigation. The Treaty served admirably in the past to bring into balance the individual interests of several states. A single party to the Treaty might have more than one concern. Thus a state may have (1) an interest in scientific research, and look upon the Antarctic as an unique laboratory. The search for knowledge may, however, also be an expression, of (2) an interest in discovering new and independent sources of minerals required for industrial use, or of (3) an interest in developing new technologies associated with mineral extraction. A State may have (4) an interest in a study of the environment, which may or may not be related to its mining and processing interests. Other States with (5) global military interests may find a detailed knowledge of the terrain and conditions of the Antarctic essential to their overall strategies. There are, in addition, some seven "claimant" States with (6) interests in seeking recognition of their claims to sovereignty over parts of the Antarctic and their resources and, in the case of claimant states located relatively close to the Antarctic, with (7) national security interests as well.

Since 1959, inaccessibility of the continent, a lack of interest in it on the part of states not parties to the Treaty, and the careful exercise of discretion and diplomacy by the Treaty Parties contributed to the maintenance of the Treaty's internal balance for over two decades. Claimant states, in return for not having their sovereignty claims actively disputed by the few states which might have found overriding strategic reasons for doing so and possessed moreover the military and technological capacity to ignore those claims with impunity, were content to place their claims in suspense as far as those states were concerned. On the other hand, for states with strategic interests and possibly industrial interests in the area and its resources, it was convenient to have sovereignty claims suspended so as to have the freedom of the continent, at the same time underwriting the balance achieved, and making common cause with the claimants in relation to non-members, whose occasional interference could invite awkward questions about their own activities, no less than the legitimacy of territorial claims. The Treaty "system," given direction by its Consultative Parties, and with its evolving fabric of recommendations, obligations and understandings, perhaps more than the

legal content of the Treaty itself, seemed the surest guarantee that that balance could be maintained. New members and, in particular, new Consultative Parties joining with the knowledge of the Treaty's internal balance and finding it useful would be unlikely to challenge it.

While the value of the Antarctic Treaty as a means of pursuing the objectives of maintaining peace and promoting international cooperation in scientific investigation is clear to states outside the system, and the Treaty's workings might have been slow to arouse their interest, much less their concern, expansion of the Treaty's scope through interpretation to provide a legal basis for its members to establish and pursue objectives relating to the management of the living and non-living resources of the Antarctic and the Southern Ocean has raised questions regarding the compatibility of aspects of the Treaty system with certain principles believed by many states to be fundamental. For a very large number of some 120 countries outside the Antarctic Treaty system, those fundamental principles are restated in the Declaration on the New International Economic Order and the Charter of Economic Rights and Duties of States adopted by the United Nations in 1974.

The two principles of central importance are (1) the sovereign equality of states, and (2) the unqualified right of all states to full and effective participation in resolving world economic problems in the common interest of all countries. These principles are most succinctly expressed in Article 10 of the Charter of Economic Rights and Duties of States:

> *Article 10*
> All States are juridically equal, and as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems. . .

Thus, each state regardless of size or other attribute is recognized as having only one vote of a value equal with that of every other state, decisions being made by a simple or qualified majority of participating states. This principle seems inevitably to cause its adherents to lean away from acceptance of forms of decision-making which would give preponderant effect to the vote of a particular state (or group of states) on such grounds as that it had some special interest in or expertise concerning an issue, or had made a greater financial or other contribution, or was first in the field. While systems of weighted voting could be incorporated in the Bretton Woods agreements, and the power of veto could be claimed by the permanent members of the Security Council in the political climate prevailing immediately following the Second World War, such devices have generally been rejected when proposed during more recent negotiations of general international agreements.

The Antarctic Treaty of 1959, and all the instruments created within the Treaty system, conferring as they do certain special powers and responsibilities on the Consultative Parties, appear to that extent to give effect to a principle widely regarded as unacceptable. The status of a Consultative Party, which under the Treaty system would exercise evolving powers to establish and pursue objectives for the management, including exploitation, of natural resources, and thus bring about economic consequences for states generally, may only be

achieved through (1) an historical association with the Treaty, by having participated in the International Geophysical Year; and (2) an interest in Antarctica demonstrated by conduct of substantial scientific activity here. The one requirement by definition excludes all but a handful of states, and those are already Parties; the other requirement is outside the technological and financial capacities of most states.

Trends in the negotiation of general multilateral treaties over the last quarter of a century make it unlikely that the grant of special decision-making powers based on financial and technological capacity -- provided for in the Antarctic Treaty -- would be accepted by the overwhelming majority of states. Negotiations regarding other areas of economic and strategic importance such as outer space, the moon and celestial bodies, as well as the seabed beyond national jurisdiction, have led to treaties providing for decision-making on a one-state-one-vote basis. The Outer Space Treaty creates no "steering committee", nor is a state required to qualify for membership by, say, placing a satellite in orbit or a man on the moon; nor is the demonstrated capacity to carry out deep seabed mining required for membership of the Council of the International Sea-Bed Authority, or confer special voting rights on a member. On the contrary, while a variety of economic considerations (and not merely financial capacity) are relevant in the election of some members of the Council, half the membership is elected on the basis of geography alone.

These considerations of principle make it difficult for a very large number of states to accept the Antarctic Treaty system as the basis for the establishment and pursuit of management objectives in the Antarctic and the Southern Ocean, despite the system's many merits: at its center is an organ constituted on the basis of qualifications to which many of them could never aspire or could not do so in the foreseeable future but which could take decisions affecting the economic interests of those states. Similarly, it would be difficult for them to accept a system of management based on recognition of claims to sovereignty and national jurisdiction over portions of the Southern Ocean. For those states not parties to the Antarctic Treaty which become parties to the UN Convention on the Law of the Sea, the waters of the Southern Ocean, being in their entirety beyond any state's national jurisdiction, would have their character of high seas and be subject to the freedoms and accompanying obligations derived from Article 87 of the Convention. Similarly, for them, the entirety of the submarine landmass of the Southern Ocean would be the common heritage of mankind and subject to the regime set out in Part XI of the Convention and its related annexes.[7]

Accordingly, in establishing management objectives for the Southern Ocean, these states are likely to explore possibilities for the equitable distribution of benefits from these resources, and to emphasize environmental concerns, including a restrictive approach to the management of mineral resources, and profit-sharing obligations to be associated with any allocation of exclusive rights to exploit resources. Any administrative or supervisory machinery for the elaboration of measures designed to achieve these objectives, and to secure compliance with them, would need to be based on universal participation and one-state-one-vote decision making, with appropriate safeguards for minority interests including consensus-oriented procedures.

Search for a Generally Acceptable Basis for Dealing with the Resources of the Southern Ocean

Recognizing the value and efficacy of certain aspects of the Antarctic Treaty system, but desiring to create a comprehensive and generally acceptable regime for the Antarctic and the Southern Ocean and their resources, a group of countries led by Malaysia has brought the subject before the United Nations at three successive sessions. Resolution 40/156, adopted by the General Assembly at its fortieth session in 1985, would seem to indicate both that there is now substantial community interest in Antarctica and that some two-thirds of the membership believe that current arrangements are not an adequate expression of that interest. While Part B of the resolution, adopted by some ninety-two votes in favor to fourteen against, with thirty-six countries (including all the Antarctic Treaty Parties) not participating in the vote, affirms that "any exploitation of the resources of Antarctica should ensure ... non-appropriation and conservation of its resources and the international management and equitable sharing of the benefits of such exploitation" (operative Paragraph 1), it stops short of pre-judging the conceptual framework within which action might be taken to achieve these objectives. During the debate some countries did state categorically their preference for declaring the Antarctic and its adjacent marine areas to be the common heritage of mankind subject to the kind of regime elaborated in Part XI of the UN Convention on the Law of the Sea. Malaysia, on the other hand, seemed to contemplate for the present a new phase of Antarctic activity in which the United Nations would have a role in a system of management characterized by "accountability, involvement, and equity" -- which may be interpreted to mean accountability of the managers, involvement of all those who wish to participate without preconditions of any kind, and the sharing of benefits on the basis of equity. Such a system would seem consistent with the essentials of decision-making on world economic issues to which the developing countries have hitherto given their unqualified support.

While those governments which favor the development of a new comprehensive regime for Antarctica have expressed a preference for application of the "common heritage" concept (now relatively familiar after nearly twenty years of discussion within the United Nations) implying endorsement of strongly community-oriented management objectives, other proposals contemplate different types of regimes, such as (1) declaration of Antarctica to be a "world park" under United Nations auspices (International Union for the Conservation of Nature, 1972; and "Greenpeace"); (2) according Antarctica the status of a condominium, or an area over which the Consultative Parties would exercise sovereignty jointly (Hambro, 1974; Rose, 1976); and (3) establishment by the Consultative Parties of a "Joint Antarctic Resource Jurisdiction" (Alexander, 1978). Of these examples, the first favors a global regime with strictly environmental and scientific objectives. The other two would seem to perpetuate the role of the Consultative Parties in a way which might not be acceptable to states not parties to the Treaty.

On the other hand, recent writers have urged solutions based on a reconciliation of interests as between the Antarctic Treaty Parties and the rest of the international community. As one of them observes:

> There are two principles in conflict regarding Antarctica. One is that a universalist regime for Antarctica, while desirable in theory, would be practically disastrous and

politically impossible. The other is that exclusive rights in Antarctica cannot justifiably be claimed by any nation or group of nations. The objective must be to achieve a reasonable trade-off between responsible trusteeship by the few and equitable sharing among many.[8]

Given the essential political will, such trade-offs may well be achieved. Another recent writer has suggested approaches reconciling at least two sets of interests: those of claimant and non-claimant Treaty Parties. One approach is through a scheme of "tempered sovereignty for claimant States" based on the regime applicable to the Svalbard archipelago: the claimants' sovereign rights would be recognized in return for their conceding certain agreed limitations on the exercise of those rights. The other approach would have "jurisdictional ambiguity" reign in Antarctica: Antarctic activities which do not prejudice conflicting positions on the issue of sovereignty would be carried out in accordance with legal arrangements so worded as to blur that issue. However, the writer concedes that these approaches, while they might find a sympathetic response among some Treaty Parties, are unlikely to form the basis of a bridge to positions taken up by the majority of non-party States.[9]

A viable regime for Antarctica that could offer a sound basis for the establishment and pursuit of a comprehensive range of management objectives would seem to lie in the direction of reconciling the interests of all three groups of states referred to: claimants, Treaty Party non-claimants, and non-parties to the Treaty. Such a regime might be founded on an Antarctic Treaty re-structured along the following lines:

(1) The original objectives of the Antarctic Treaty, *viz.*, the maintenance of peace and the promotion of international cooperation in scientific investigation, as well as all supporting undertakings, including prohibition of measures of a military nature, and of nuclear explosions and the disposal of radioactive waste, the maintenance of freedom of scientific research, the suspension/non-recognition of territorial claims for the duration of the Treaty, and procedures for becoming a Party to the Treaty should be retained. Other objectives concerning resource management may be added so as frankly to acknowledge the Treaty's new scope and avoid the need for strained interpretations of the present text or recourse to "implied powers."

(2) The concept and role of the "Consultative Parties" could be maintained, but changes might be made in its composition and procedures. The original (1959) Consultative Parties would have permanent membership, while other Consultative Parties would achieve or retain that status in accordance with Article IX, Paragraph 2 of the Treaty. However, other states would be elected Consultative Parties for a specified period so as to maintain a numerical balance between this group and the other two groups.[10] The only qualification for election to Consultative Party status would be membership of the Antarctic Treaty.

(3) Decisions would be made by the Consultative Parties on a one-state-one-vote basis, although devices for safeguarding minority interests, such as qualified majorities, would apply in issues of a sensitive nature. For exceptionally delicate questions, which

should be specified in the Treaty, "consensus" rather than "unanimity" might be required.

While re-structuring of the Antarctic Treaty is likely to be a complex and politically difficult endeavour, incorporation of changes along these lines would go a long way toward taking into account the concerns of the three main groups of states. With these as constitutional guidelines, and bearing in mind constantly the need to reconcile individual interests with group interests on a practical rather than ideological basis in order to achieve the common overall objective of securing the greatest good for the greatest number, that endeavour may have a chance of success.

NOTES

* The opinions expressed are those of the author and do not necessarily reflect the views of any government or institution.

1. See, for example, Barbara Mitchell, *The Management of the Southern Ocean* (London: International Institute for Environment and Development (IIED), 1980); and *Frozen Stakes: the Future of Antarctic Minerals* (London: IIED, 1983); Rainer Lagoni, "Antarctica's Mineral Resources in International Law", *Zeitschrift fur Auslandisches Offentliches Recht und Völkerrecht* 39 (1979): 1 *et seq.*, and studies cited therein.
2. Mahnoush H. Arsanjani, *International Regulation of International Resources: a Study of Law and Policy* (Charlottesville: University Press of Virginia, 1981, pp. 37-8, quoting M. McDougal and others, *Studies in World Order* 16 (1960): 233-4.
3. Robert Repetto, *World Enough and Time: Successful Strategies for Resource Management* (New Haven: Yale University Press, 1986), pp. 1516.
4. Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922/1954), p. 47.
5. The extent to which the Antarctic Treaty Parties may be regarded as having fulfilled the promise of the Treaty's provisions on making "observations and results" freely available and on the "establishment of co-operative working relations" with international organizations in general and the Specialized Agencies in particular, has been a matter of some discussion: see F.M. Auburn, *Antarctic Law and Politics* (London: C. Hurst & Co., 1982), pages 115 *et seq.* For amore positive view, see successive Reports of the UN Secretary-General on the "Questions of Antarctica" since 1984, e.g., UN Doc. A/39/583 dated 31 October 1984.
6. Establishment of a scientific station and the dispatch of a scientific expedition are, of course, only examples of activity sufficient to demonstrate that the scientific research being conducted "there" is "substantial." It would, in theory, be open to aspirants to consultative status to demonstrate "substantial" scientific research activity in other ways, provided the activity was carried out in Antarctica.
7. In particular, Annexes III and IV.

8. Phillip W. Quigg, *A Pole Apart* (New York: McGraw-Hill Book Co., 1983, pp. 207-8.
9. Barbara Mitchell, *Frozen Stakes*, pages 105 *et seq.*
10. Compare, for example, Article 86 of the United Nations Charter on the composition of the Trusteeship Council; the UN Convention on the Law of the Sea, Article 161.1 on the composition of the Council of the International Sea-Bed Authority; and Article VI(A).2(a) of the Statute of the International Atomic Energy Agency on the composition of the Board of Governors of the Agency.

AUTHORITY TO MANAGE FISHERIES AND MINERAL RESOURCES OF THE SOUTHERN OCEAN

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I have dealt before with this issue, also under the auspices of the University of Miami. The book then published in 1978 contains, through several authorities, an interesting discussion on the question well before regimes on Antarctic resources were so advanced as in the present.

My comment is supposed to deal with the perspective of "claimant states" as regards authority to manage resources of the Southern Ocean, that is, within the area of the Antarctic Treaty. Let me state, at the outset, that there is a common view -- not two or more opinions -- of the Consultative Parties and generally of members of the Treaty on the subject. This is well reflected in:

a) The Convention on the Conservation of Marine Living Resources in Antarctica, which has been in force for quite a time;
b) Recommendation XI-1, of the Buenos Aires Consultative Meeting of 1981, which is the agreed frame for negotiations currently under way for the preparation of a Minerals Regime; and
c) Reports of the XIIth and XIIIth Consultative Meetings, that refer to both items.

Such a view, in a nutshell, is that the Antarctic Treaty and its System are the forum to prepare regimes for Antarctic resources; that such regimes should be open to all states interested, on the model of the Treaty itself; and that they should be closely linked to the main instrument, within the Antarctic Treaty System.

Authority for such an exercise is given by the existence of a Treaty that has governed the area for a quarter of a century, which has developed into a system of legal investments and practice. The Treaty, open in nature and consistent with the Charter of the United Nations, has created a highly successful reality of innovation and cooperation. It has insured peace and non-military use, free science, protection of the environment, and the knowledge, development, and integration of the world of Antarctica, for the benefit of mankind. In synthesis, there is a legal regime for Antarctica, applying south of 60° South latitude, and a political system of cooperation among all interested states which is an effective subsystem within the larger international system. It is from this legal regime and political system of cooperation that specific regimes on resources were bound to originate.

The Antarctic Treaty and its system have enjoyed practical recognition by the broader international community, manifested in tacit acquiescence in their practical operation; in the attitude of Specialized Agencies and other organs of the United Nations which have cooperated with the Consultative Parties; in clear references to the achievements of the Treaty in the UN Secretary General's annual reports; and concretely in FAO, both in its Conference and Fisheries Committees. This recognition has surely taken into account the remarkable achievement of the only zone of peace, ecological preservation, open science, and universal cooperation existing in the world scene. It must have

borne in mind the exploration of this wild continent, its communication with the rest of the world, and the able administration of such a difficult environment as performed at great cost by the active members of the Treaty. It cannot have ignored the delicate balance existing in a complex and effective legal and political system of cooperation, which has been and currently is made possible through a number of compromises and acts of flexibility and self-restraint among interested and active parties.

Antarctica bears little resemblance to the so-called "common spaces," such as the sea bed beyond national jurisdiction or outer space, because:

a) there is in place a legal and political regime one quarter of a century old;
b) activity of man here has been displayed for centuries; and
c) longstanding claims of sovereignty are in existence.

Therefore, it cannot be treated as a legal and political vacuum, ignoring the Law of Treaties and the difficult realities of promotion of peace and world cooperation.

Through the Antarctic forum a number of agreed measures relating to science, environment, communications, tourism, and, generally, the administration of Antarctica, have been adopted. Conventions on conservation of Seals and Marine Living Resources are in place, and the latter is currently functioning with general approval. A regime on mineral resources is being negotiated since 1982, coupled with a moratorium, under a general mandate contained in Recommendation XI-1, which is public, as also is the fact, place, and moment of negotiations. During this time, the operation of the Treaty has been reviewed, to adapt it both to its internal growth and maturity and to the interest manifested by others. These developments, plus the increasing membership of the Treaty and other instruments related thereto, are advancing the Antarctic Treaty System towards its completion.

In this context, it appears not only convenient but necessary that regimes on resources be developed in close relationship with the other realities, norms, and practices which govern Antarctica. Any other solution could have brought chaos to the larger regime and could have endangered some or all of the big achievements of the Treaty. The same forum and actors are probably irreplaceable. It is also wise to have developed regimes before extended interest or, in the case of minerals, activity, are present. A better regime can emerge through this anticipation.

The issues of sovereignty or the struggle for it have been frozen by the Antarctic Treaty and its development in time, but not the claims themselves. Article IV, one of the cornerstones of the negotiation and the system, protects both the rights of the claimant states and the position of non-claimants. Since 1961, claimants and non-claimants have successfully worked together through a number of challenges and changes, with very few problems.

It must be clear, though, that those of us who exercised and claimed sovereign rights -- as, in the case of Chile, based on its obvious proximity, legal title, longstanding presence and activity -- have not abated the claim but have agreed to cooperate with other interested parties in the fulfillment of the objectives of the Treaty. Through this mutual cooperation it has been possible to preserve the unique natural and political condition of Antarctica and more recently,

to search for solutions to the challenge presented by the interest manifested in its resources.

The fact remains that most of Antarctica is under claimed sovereignty and that such claims have been, and are, consistent with international law. It must also be borne in mind that claims, through the established principle of "appurtenance," comprise the corresponding maritime spaces. It is worthy to record that the claims, as such, have been recognized in that condition by the thirty-two signatories of the Treaty who represent the states which have manifested interest in Antarctica, a wide variety of regions, political systems, and power, and a majority of the human race. The Antarctic Treaty prohibits new claims or the extension of existing ones, as is well known. Therefore, there is a solid reality of claimed sovereignty in Antarctica.

Together with that fact stands the existence of a joint jurisdiction of all Consultative Parties as regards the whole area of the Treaty for the fulfillment of its objectives, as manifested in the impressive common work achieved without institutions in these twenty-five years of successful cooperation.

Claimants and non-claimants have agreed on an "internal accommodation" within the existing regime of living resources. Under the parameters of Recommendation XI-1 they are negotiating a regime for mineral resources which must be closely linked to the Antarctic Treaty, open to other states, with full protection of the Antarctic and related ecosystems, and bearing in mind the interest of all mankind. It must also apply the principles of Article IV and develop a solution which is satisfactory and without prejudice to claimant and non-claimant.

The current strength of the Antarctic Treaty and its system makes it both unnecessary and unwise for the claimant states -- or *etats possessoires*, as the French more appropriately say -- to pursue the claim to its logical conclusion. A state with sovereign rights can well agree on a satisfactory regime or regimes with participation of interested countries and open in nature, without prejudicing such rights and thus contributing to the welfare of Antarctica and the world at large.

To complete a very general "perspective" of a claimant state and Consultative Party -- which is highly personal, of course, because I have no mandate to speak on their behalf -- a word should be said on the current item on Antarctica before the UN.

There is, no doubt, a legitimate interest of the international community in Antarctica. Such an interest lies in the heart of the negotiation and approval of the Antarctic Treaty, open to all and which gives expression to the principles and purposes of the Charter of the United Nations. This is present as well in all the instruments which conform to the Antarctic Treaty system, where participation is subject to the dual criteria of interest and activity. Such participation of states has grown in quantity and intensity in recent years and information has been disseminated in a way corresponding to increasing demand.

Though the appropriate forum for dealing with Antarctic questions is clearly, in my view, the Antarctic Treaty system, past discussion at the United Nations and the study prepared by the Secretary General may have contributed to a better knowledge of the continent and its realities. It is desirable, nevertheless, that the legitimate interest which has been manifested is not transformed into a challenge to the magnificent achievement represented by the Antarctic Treaty and its work, which has been characterized with justice as one of the major successes of international cooperation in modern times.

AUTHORITY TO MANAGE FISHERIES AND MINERAL RESOURCES OF THE SOUTHERN OCEAN: THE PERSPECTIVE OF NON-CLAIMANT PARTIES TO THE ANTARCTIC TREATY

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I have been asked to address the perspective of non-claimant parties to the Antarctic Treaty with regard to their authority to manage fisheries and mineral resources of the Southern Ocean. Non-claimants, of course, are those parties to the Antarctic Treaty that neither claim nor recognize sovereignty in Antarctica. As there are now twenty-five diverse non-claimant parties to the Antarctic Treaty, my task is not easy. I do not speak for the U.S. Government, let alone the other twenty-four non-claimant governments. Moreover, the non-claimants have never precisely articulated a considered view on their authority to manage offshore Antarctic resources. Unlike the claimants, they do not have a claimed territorial basis on which to rely. The non-claimant point of view thus must be inferred from the actions taken under the Antarctic Treaty in the past twenty-five years. Finally, I would note there are probably a number of ways in which non-claimant and claimant views converge. A prime example of this convergence is that, regardless of perspective, both non-claimants and claimants agree that the Antarctic Treaty parties do have authority to manage Antarctic offshore resources.

A good starting point is to identify who the non-claimant parties are. First, there are the eleven Consultative Parties. These include the five original signatory parties who participated in the 1959 Washington conference which adopted the Antarctic Treaty: Belgium, Japan, South Africa, the Soviet Union, and the United States. The other six are Poland, the Federal Republic of Germany, Brazil, India, the People's Republic of China, and Uruguay, who acceded to the Antarctic Treaty after its entry into force in 1961 and became Consultative Parties by meeting the activities criteria set out in Article IX of the Treaty. The twenty-five are rounded out by the fourteen Non-consultative Parties, who like the six new Consultative Parties, acceded to the Antarctic Treaty after its entry into force. They include Bulgaria, Czechoslovakia, Cuba, Denmark, Finland, the German Democratic Republic, Hungary, Italy, the Netherlands, Papua New Guinea, Peru, Romania, Spain, and Sweden.[1] Of these, at least three: Italy, Spain and Sweden -- have indicated an intention to seek consultative status in the future.

It is readily apparent that the non-claimants constitute a rather varied geopolitical grouping. It may also be noted that both in terms of total numbers and in terms of new Consultative Parties, the non-claimant group will continue to grow.[2] They encompass East-West, North-South, the non-aligned, fishing and non-fishing states, mineral exporters, mineral importers, and various stages of economic development. The non-claimants hold three of the five permanent seats on the UN Security Council, account for the great majority of the world's population, and include the two superpowers. Of important significance is that these two superpowers, the United States and the USSR, unlike

the other non-claimants, maintain a legal basis for a claim to sovereignty in Antarctica which is preserved by the Treaty.

It is also important to note that three of the non-claimants -- Peru, the United States, and the Federal Republic of Germany -- have neither signed nor adhered to the 1982 UN Convention on the Law of the Sea; the latter two due to objections to the Convention's deep seabed mining provisions. While all other non-claimants have signed the 1982 Convention, only Cuba has ratified it. Finally, six of the non-claimants -- Belgium, the Federal Republic of Germany, Italy, Japan, the Netherlands and the United States -- joined in concluding in 1984 the Provisional Understanding Regarding Deep Seabed Mining.

Before turning to the perspective of the non-claimants as regards the management of Antarctic resources, it is useful to briefly cite relevant portions of the Antarctic Treaty as well as actions taken thereunder. The Antarctic Treaty does not specifically address resource exploitation. At the time of negotiation of the Treaty, this issue was considered too remote to address. The Treaty's silence as to exploitation of Antarctic resources basically left the matter unresolved and for the parties to address as required in the future.

Paragraphs 1 and 4 of the Preamble to the Antarctic Treaty express two fundamental principles: 1) "that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord" and 2) it articulates the conviction "that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations." These principles have guided all actions taken under the Antarctic Treaty, including those relating to resource management.

Article I, Paragraph 1 of the Treaty sets forth the primary legal obligation that "Antarctica shall be used for peaceful purposes only." If one asked the non-claimants, they would generally take the view that exploitation of Antarctic resources is a peaceful use of Antarctica and therefore not prohibited by the Treaty and relevant recommendations.

Article IV of the Treaty establishes the basic accommodation on sovereignty and provides that:

1. Nothing contained in the present Treaty shall be interpreted as:
   (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
   (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
   (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other state's rights of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

This agreement to disagree on sovereignty is at the center of all action taken within the framework of the Antarctic Treaty and is parti-

cularly important with respect to the management of Antarctic resources.

Article VI of the Antarctic Treaty, which establishes its area of application, is particularly relevant to the topic at hand because it brings waters of the Southern Ocean under the Treaty framework. It provides that the Antarctic Treaty "shall apply to the area south of 60° South latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights or the exercise of rights of any State under international law with regard to the high seas within that area."

This article makes clear that there is a continuity between the continent and its adjacent offshore areas. However, since the entry into force of the Antarctic Treaty, Article VI has been a conundrum for its parties. At issue is the extent of high seas in the area and the effect and extent of the no-prejudice language. Also, there has been a significant evolution in international law of the sea since the adoption of the Antarctic Treaty in 1959 which has an impact on interpretation of Article VI by the parties. At one time, the parties were generally of the view that the practical effect of Article VI was to exclude the "high seas," whatever they were, from application of the Treaty and measures adopted pursuant to it. Suffice it to say, the non-claimants and claimants have significant differences over the status of offshore Antarctic areas just as they do on land.

The question of jurisdiction is also of direct relevance to the management of Antarctic resources. Other than providing that observers engaged in inspections under the Treaty and scientific personnel who have been exchanged are subject only to the jurisdiction of a party of which they are nationals, jurisdiction is left unresolved.[3] The Treaty does, however, provide for consultation over disputes over jurisdiction in Antarctica and lists the exercise of jurisdiction as one of the subjects of consideration under the consultative mechanism established under Article IX of the Treaty.[4]

Article IX of the Antarctic Treaty sets forth the mechanism through which it might be said "flesh has been added to the bones of the Antarctic Treaty." It calls for regular meetings for the purpose of considering and recommending measures in furtherance of the principles and objectives of the Treaty. Pursuant to this consultative mechanism there has been established a unique and creative legal regime commonly referred to as the Antarctic Treaty system. It is in this Article that the only reference in the Treaty to resources appears. Specifically, Article IX calls for recommendations on measures regarding "preservation and conservation of living resources in Antarctica."[5] This provision has provided an important basis for identifying protection of the Antarctic environment (which is not explicitly spelled out in the Treaty) as one of the important objectives of the Treaty and a responsibility of the parties. Protection of the environment and preservation and conservation of its living resources logically require the appropriate management of Antarctic resources by the Treaty parties.

Article X of the Antarctic Treaty also requires mention. It provides that "[e]ach of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty." As an international political matter, this Article reflects a commitment by the parties to maintaining the leading role of the Antarctic Treaty system

for the management of Antarctic affairs, including exploitation of Antarctic resources.[6]

The provisions I have cited are the basic underpinnings on which the Treaty parties have proceeded to manage the resources of Antarctica. Through the Article IX consultative mechanism, the parties have demonstrated that the Treaty system is capable of meeting and addressing new issues such as the exploitation of potentially valuable resources. In addressing the management of Antarctic resources, the parties are guided by the need to ensure that Antarctica not become the scene or object of international discord and thus that exploitation of such resources not upset the fundamental accommodations on sovereignty in Article IV of the Treaty. They have been equally guided by their special responsibility as the states active in Antarctica to preserve and conserve its living resources and to protect, in general, the Antarctic environment. It is without question that their success in maintaining peace in Antarctica and preservation of its environment through the wise management of its natural resources is in the interest of the world community and furthers the objectives of the UN Charter.

Antarctic living resources have been a topic of discussion under the Antarctic Treaty throughout its history. The first significant concrete action relating to Antarctic living resources was the adoption in 1964 at the Third Antarctic Treaty Consultative Meeting of the Agreed Measures for the Conservation of Antarctic Fauna and Flora. The purpose of the Agreed Measures is to provide protection for all native species in Antarctica through restrictions on the taking of species except in accordance with a government permit which can only be issued for limited purposes.[7] The Agreed Measures also express in the Preamble the consideration that the Antarctic Treaty area is a "Special Conservation Area," and set aside certain areas for special protection called "Specially Protected Areas (SPAs)."[8] They apply to the same area as the Antarctic Treaty and contain the same high seas clause as in the Treaty, thus leaving their precise scope unclear.[9] Article VII Paragraph 3 of the Agreed Measures does, however, specifically provide that "[e]ach Participating Government shall take all reasonable steps towards the alleviation of pollution of the waters adjacent to the Coast and ice shelves." Which waters were intended and their juridical nature was left unstated. I would note that SPA's have been adopted that incorporate marine elements.[10]

The 1972 Convention on the Conservation of Antarctic Seals, which was preceded by a number of recommendations dating back to the 1960s, was the first effort within the Antarctic Treaty framework at managing the economic exploitation of Antarctic resources. It was also the first time that a measure was concluded outside of the Antarctic Treaty itself. The Convention was designed to anticipate and regulate pelagic sealing prior to actual commercial harvesting which has never materialized. It was concluded as a separate convention instead of a recommendation in the interest of enabling other states to participate and because of perceived limitations imposed by Article VI of the Antarctic Treaty that precluded pelagic sealing from being regulated pursuant to an Article IX recommendation.[11] Nonetheless, development of the Convention evolved through the Article IX framework. The Seals Convention is linked to the Antarctic Treaty, contains a reference in the Preamble to the Agreed Measures, applies to the same geographic area as the Antarctic Treaty (the seas south of 60^0 South latitude) and affirms the provisions of Article IV of the Antarctic Treaty.[12]

The adoption in 1980 of the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), which entered into force in 1982, represents another significant addition to the Antarctic Treaty system and demonstrates the continuing ability of the system to address offshore resource issues. Like the Seals Convention, CCAMLR was preceded by a number of recommendations which date back to the 1970s and was developed within the Article IX framework.

Negotiation of CCAMLR, which applies to all marine living resources including birds, was stimulated by the potential commercial harvesting of krill and a belief in the need to establish an agreed legal mechanism before significant harvesting took place (CCAMLR, although applying to whales and seals, leaves direct regulation of their harvesting to the International Convention for the Regulation of Whaling and the Seals Convention.)[13] As with the Seals Convention, it was considered appropriate to conclude CCAMLR as a separate convention in order to provide for the participation of other states.[14] Recognizing the ecological interdependence of Antarctic marine living resources, the Convention applies a conservation standard looking at the Antarctic ecosystem as a whole and its jurisdiction extends north of 60° South latitude in order to encompass the Antarctic Convergence.[15]

CCAMLR is even more clearly linked to the Antarctic Treaty than the Seals Convention, incorporating by reference not only the obligations of Articles IV and VI of the Treaty, but Articles I and V as well.[16] In addition, pursuant to Article III of CCAMLR, the parties thereto are obligated not to act contrary to the "principles and purposes of the Antarctic Treaty."[17] Article IV, Paragraph 2 of CCAMLR basically reiterates Article IV of the Antarctic Treaty with the addition of a reference to coastal state jurisdiction. The inclusion of waters north of 60° South latitude around undisputed land territory in the Convention area enables non-claimants to interpret the provision to relate to those waters while the claimants can regard it as referring to their claimed maritime jurisdictions south of 60° South latitude. Finally, I would note that CCAMLR established a Commission with legal personality which enjoys cooperative relations with a number of international bodies including the FAO, IOC, IWC and IUCN.[18]

Antarctic minerals, which Tucker Scully will talk about later more extensively, have been dealt with by the Treaty parties in detail since the Ninth Consultative Meeting in 1977. As with other resources issues, the parties have proceeded with the perspective of reaching an agreed legal regime prior to commercial activities going forward. A number of recommendations have been adopted representing the recognition that the Antarctic Treaty system best provides the framework for addressing this resource issue in order to preserve the peace and protect the environment. Recommendation XI-1, adopted at the 1981 Eleventh Antarctic Treaty Consultative Meeting, called for negotiation of a minerals regime. It set forth a number of important elements, noting in the Preamble the unity between the continent of Antarctica and its adjacent offshore areas,[19] that the interest of all mankind in Antarctica should not be prejudiced,[20] that the position of non-claimants and claimants not be prejudiced,[21] that the regime apply to the Antarctic continent and its "adjacent offshore areas but without encroachment on the deep seabed,"[22] that the Antarctic Treaty must be maintained in its entirety[23] and that protection of the Antarctic environment be a basic consideration.[24] The form of any regime is still to be decided but it is intended that it be open to other states.[25] I would emphasize that

pursuant to recommendation IX-1 adopted at the Ninth Consultative meeting in 1977, the parties have agreed to form a "voluntary restraint" on mineral resource exploitation pending timely conclusion of a regime.[26] While, as Tucker Scully will note, hard work remains, I am confident that the Antarctic Treaty system will be up to the challenge and successfully address this resource management issue as it has others.

Antarctic ice could be considered another Antarctic resource, but to date the parties have not yet seen the need to consider the issue seriously and I shall not discuss it further. Should it appear commercially feasible in the future to exploit Antarctic ice, the Antarctic Treaty system will address it as well.

Finally, measures that have been taken within the Article IX framework for the protection of the Antarctic environment deserve mention and have a direct bearing on the management of Antarctic resources. As I noted previously, protection of the Antarctic environment is not specifically mentioned in the Treaty but is a responsibility the parties have assumed in order to preserve and conserve living resources and to preserve the use of Antarctica for scientific and other purposes. Accordingly, Recommendation VII-4, adopted at the Seventh Antarctic Treaty Consultative Meeting in 1970, states that the Antarctic Treaty Consultative Parties "should assume responsibility for the protection of the environmentally wise use of the Treaty area."[27] Recommendation IX-5, adopted at the Ninth Consultative Meeting, expanded on Recommendation VII4. It declares that the "Consultative Parties recognize their prime responsibility for protection of the Antarctic environment" and "[t]hat they will continue to monitor the Antarctic environment and exercise their responsibility for informing the world community of any significant changes in the Antarctic Treaty Area caused by man's activities."[28]

I have gone through this somewhat lengthy summary in order to demonstrate that for over twenty years, the Antarctic Treaty system has been capable of adjusting and responding to new issues such as the management of offshore resources. There is not a blank slate when considering the management of fisheries and minerals resources for the Southern Ocean. Thus, the starting point for any discussion on this issue is the Antarctic Treaty. In this regard, the Treaty parties have both the freedom and the right to manage the resources of the Southern Ocean. No competent competing legal forum exists. No existing rules nor the 1982 UN Convention on the Law of the Sea purport to remove that right. Pursuant to the Treaty, its parties have obligated themselves to preserve the peace in Antarctica and its environment. Because of the differing legal positions on Antarctica, the only way to meet those obligations is for the parties to work together. Limitations self-imposed by such cooperation are freely assumed political and legal accommodations which in no way call into question the right of the Treaty parties to act.

Without denigrating the contributions of global instruments such as the International Convention for the Regulation of Whaling, the IMO and its treaties, WMO and the FAO, the Antarctica Treaty parties have created an impressive juridical system governing Antarctica that represents the most detailed source of international law thereon that exists. The parties have brought stability and peace to the region. They have protected the environment and they have created a system open to others who have real and concrete interests in Antarctica. These are the interests of mankind. The Treaty parties, and more specifically,

the Consultative Parties, being the ones long active and demonstrably interested in Antarctica and taking responsibility for protecting its environment, rightly regard the Treaty system as providing the competent and most appropriate forum for addressing matters such as management of Antarctic resources. According them the leading role in Antarctic affairs based on their experience and contributions to date should be viewed no differently than the status given to the most interested states in such international bodies as the IAEA, IMO and ICAO.

In practice, the Antarctic Treaty parties have come to exercise a collective or cooperative administration of Antarctic affairs which includes offshore resources and which takes account of sovereignty but need not be based on it. The Antarctic Treaty has even been argued by some to meet all criteria for a regional arrangement pursuant to Article 52 of the UN Charter.[29] It can be asserted that the Antarctic Treaty system's competence has been recognized by the international community despite recent initiatives in the UN to call it into question.[30] Thus it is eminently reasonable for the parties to take the view that, though responsive to the interests of the international community, they are free to assert the responsibility to manage and conserve the fisheries and mineral resources of the Southern Ocean. They have earned that right by accepting its responsibilities and effectively fulfilling their duties. They have filled a vacuum in international resource management that would exist absent the Antarctic Treaty system, a system resting on the very firm foundations of the principles of the UN Charter. Moreover, the resource management regimes they have and are creating are open to all, including the conduct of activities thereunder.

I have belabored these points because they are central to the perspective of the non-claimants. The non-claimants do not recognize the claims to land territory nor the concomitant assertions of maritime jurisdiction off Antarctica. For the non-claimants, Antarctica and its offshore areas, which are akin to the high seas, cannot be managed through a system which finds its juridical basis in sovereignty. Instead the non-claimant seeks a different juridical basis.

In the remainder of my paper I shall address how the non-claimants view: 1) management of fisheries and 2) management of offshore minerals.

With respect to fisheries and minerals resources, the parties have intended to create institutions. The non-claimants can view the creation of these institutions, the rules prescribed by them, and the obligations contained in the agreements constituting them, as freely assumed limitations on high seas freedoms in the Southern Ocean that persons subject to their jurisdiction based on nationality might otherwise exercise.

There is no reason why the non-claimants cannot view the resource managed by CCAMLR as high seas fisheries resources whose regulation in CCAMLR is in furtherance of customary international law as reflected in Article 118 of the 1982 Convention on the Law of the Sea. From this perspective, they have cooperated with other states with respect to the conservation and management of living resources in the high seas of the Southern Ocean. While admittedly not all Antarctic Treaty parties are fishing states, they have created what amounts to a regional fisheries organization, as called for by Article 118 of the 1982 Convention, which is open to all interested states. Moreover, they have met the obligation reflected in Article 117 of the 1982 Convention of coopera-

ting with other states in taking measures for their respective nationals for the conservation of living resources of high seas. In addition, CCAMLR and the obligations it creates meet the conservation standards reflected in Article 119 of the 1982 Convention. Finally, it may be noted that CCAMLR and its provisions on participation are not substantially different from those of a number of existing fisheries agreements.[31]

Management of offshore Antarctic minerals presents a slightly different situation. It involves non-renewable resources and a potentially competing international regime. For the purposes of this paper and for argument's sake, I shall assume that the competing regime is Part XI of the 1982 Convention, that the Convention enters into force, is widely accepted, and the ISA is established and becomes operational. The ISA is to be constituted to manage the resources of the "Area." This "Area" is defined to include "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"[32] and is described, along with its resources, as the "common heritage" of mankind.[33]

If sovereignty is not recognized in Antarctica, some may argue that the continent and its seabed, or at least the unclaimed area, are the common heritage of mankind, part of the Area and subject to the management of the ISA, despite the fact that Antarctica was not a part of the negotiation of the 1982 Convention.[34] It is clear, however, that the non-claimants do not accept the continent of Antarctica and its offshore areas to be part of the common heritage of mankind or to be managed by any future ISA. This is true whether one is speaking of a non-claimant who has not signed the 1982 Convention or one who has signed it.

To address the question I need to assume for the moment that, despite the negotiating history of the 1982 Convention as regards Antarctica, common heritage, Part XI, and the ISA have some relevance, at least politically, now and in the foreseeable future to the question of management of the mineral resources of the Southern Ocean. The Antarctic Treaty parties recognized this possibility in adopting Recommendation XI-1 by indicating that the minerals regime should not encroach upon the deep seabed.

It is clear, however, from the plain reading of the 1982 Convention that the Antarctic continent cannot be considered part of the "Area" to be managed by the ISA. Antarctica the continent is not the seabed and ocean floor and subsoil thereof. Moreover, since there is no consensus that the continent or its adjacent offshore areas (to the limits of what a coastal state could claim if Antarctica had coastal states) are beyond the limits of national jurisdiction, the offshore areas cannot be part of the "Area." This is true for the unclaimed area as well since two non-claimants maintain a basis to a claim that could be prejudiced by any assertion of jurisdiction by a future ISA. While the non-claimants do not recognize the claimants' claims to the continental shelf off Antarctica, they could not accept any application or interpretation of Part XI that would apply it to the unclaimed area without prejudicing either their position of non-recognition of claims or undermining Article IV of the Antarctic Treaty. Without adopting the position of the claimants, the non-claimants can take the view that Antarctica, both the continent and its adjacent offshore areas, simply must be treated as a special case outside the purview of Part XI and the ISA, and that the paramount interest of the international community should be maintenance of the legal order created by the Antarctic

Treaty system. In this regard, I would add that it is essential to the integrity of this order that the continuity of the continent and its offshore areas be maintained.

In spite of considerable doubts as to whether there will ever be a viable ISA, the Antarctic Treaty parties have not foreclosed its role in the Southern Ocean. As I have noted, Recommendation XI-1 recognizes that there is deep seabed south of 60° South latitude and are not asserting Antarctic Treaty minerals jurisdiction thereover. I shall not dwell on how the limits of the minerals regime should be defined nor on arguments that could be advanced that would extend it all the way to 60° South latitude. (For example, non-claimants who do not intend to become party to the 1982 Convention might argue that they do not recognize that Part XI and the ISA have any legal relevance and it is up to the Treaty parties to govern mineral resource exploitation in the entire Treaty area.) Assuming, however, that if the ISA does become operational, it would seem that most non-claimants (as well as claimants) would agree that some coordination with the Antarctic Treaty system would be required. At a minimum, this would be to deal with the unlikely event of mining in areas south of 60° South latitude not covered by a minerals regime.

In light of the foregoing, the non-claimants rightfully see the Treaty parties as responsible for managing Antarctic mineral resources. All of the previous grounds I have mentioned for their management of Antarctic affairs, including its resources, apply. It is they who are likely to engage in mineral resource exploitation, are the most scientifically interested in the region, and are technically the best equipped to protect the Antarctic environment. Successful conclusion of a minerals regime will maintain the peace, be open to others, and protect the Antarctic environment. It would not be going too far, in my view, for such a regime to be equated with an agreement for protection of the marine environment as envisioned in Article 197 of the 1982 Convention.

In the final analysis, while the non-claimants have clear legal grounds on which to justify their management of fisheries and mineral resources of the Southern Ocean, they probably see the issue more in international political terms. From their perspective, Antarctic resources have been, are, and will continue to be managed by the Antarctic Treaty parties because they are committed as a matter of foreign policy to broader interests furthered by the maintenance of the Treaty, including preserving bases of claims, and perceive no viable alternative to the Treaty system. Whatever commentators choose to call the existing situation -- collective jurisdiction, co-administration, or even *de facto* condominium (which I do not believe any Antarctic Treaty party is willing to admit) does not matter, nor will it resolve the differences over sovereignty or objections coming from those who wish to change the system. What counts is the record of the parties in peacefully balancing the competing positions on sovereignty while at the same time promoting internationally accessible resource management regimes with concomitant protection of the Antarctic environment. Judged on that basis, the non-claimants can rightly conclude that the Antarctic Treaty parties are fully justified in playing a special role in the management of Antarctica, including its offshore resources, and take pride in the role that they have already played.

NOTES

* The views presented are those of the author and do not necessarily reflect those of the Department of State or the United States Government.

1. Papua New Guinea acceded to the Treaty after its independence from Australia.
2. In this regard, Austria and Thailand have communicated with the United States as depository for the Treaty, about possible accession. Canada has also been looked on as a likely country to accede in the future. In 1985, the Republic of Korea (which is already a party to the Convention for the Conservation of Antarctic Marine Living Resources) requested to accede to the Antarctic Treaty, followed in 1986 by the Democratic People's Republic of Korea. As non-UN members, they present a case of first impression under the Treaty as Article XIII requires the assent of all Consultative Parties for non-UN members to accede. As of the time this paper was written, the process of determining such assent had not yet been completed.
3. Article VIII, 1.
4. Article VIII, 2 and IX, 1.(e).
5. Article IX, 1.(f).
6. Its substance has been carried over to Article XXII of the Convention for the Conservation of Antarctic Marine Living resources (p. 14) and the working draft of the minerals regime (p. 16).
7. See Articles VI and VII.
8. Preamble, paragraph 7 and Article VIII, 1.
9. Article I, 1. and 2.
10. See report of the Thirteenth Antarctic Treaty Consultative meeting, Recommendation XIII-10.
11. Canada was invited to the London diplomatic conference adopting the Convention, but did not attend. Article 12 of the Seals Convention requires the assent of all Contracting Parties to the accession of additional states. Because of Article VI of the Antarctic Treaty, it was considered that the Agreed Measures did not provide the framework for regulating pelagic sealing.
12. See Preamble and Article 1(1).
13. See Article VI of CCAMLR.
14. Article XXIX,1 provides that it is open to accession by any state interested in research or harvesting activities relating to marine living resources to which the Convention applies.
15. See Articles II and I,1.
16. See Articles IV,1. and III.
17. See also the sixth Preambular paragraph which refers to the "prime responsibility" of the Consultative Parties for protection of the Antarctic environment.
18. See Articles VII, VIII and XXIII.
19. Paragraph 5.
20. Paragraph 5.(d).
21. Paragraphs 5.(c) and 6.
22. Paragraph 7.(iv).
23. Paragraph 5(b).
24. Paragraph 5(c).
25. Paragraph 7(ii).

26. Paragraph 8.
27. Preamble, paragraph 4.
28. See paragraphs 1 and 4. Recommendation VIII-13, adopted at the Eighth Consultative meeting in 1975, is also worth mentioning. In paragraph 1.(a), it is recognized that in considering Antarctic Treaty measures for the wise use and protection of the Antarctic environment, there is a responsibility for ensuring that the interests of all mankind shall be ensured.
29. See Hayton, Robert P. "The Antarctic Settlement of 1959" AJIL, 349, 366 (1960).
30. Some have gone so far as to call the Antarctic Treaty an objective regime. See Boczek, Boleslaw A. "The Soviet Union and the Antarctic Regime," 78 AJIL 843, 856 (1984) quoting 3 *Kur Mezhdunhrodnovo Praua* Chapter 9, *Instituty I Ostrali Soure Mennovo Mezhdunarod novo Prau* (1967) at 402.
31. See for example Article IV of the 1978 Protocol Amending the International Convention for the High Seas Fisheries of the North Atlantic Ocean, Article 17,3. of the 1982 Convention for the Conservation of Salmon in the North Atlantic Ocean and Article V(3) of the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission.
32. Article 1,1.(1).
33. Article 136.
34. For example, Hamilton Shirley Amerasinghe of Sri Lanka and then President of UNCLOS III said in 1975 that the question of Antarctica is in no way linked with the issue before the conference on the law of the sea and that the question should not delay agreement on a convention. UN DOC. A/PV 2380 at 16 1975.

PERSPECTIVE OF NON-PARTIES TO THE ANTARCTIC TREATY

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Antarctica has been described as the seventh and last undeveloped continent on earth. It is said to be bigger than China, the United States, and Mexico. It is known to be rich in resources -- both living and non-living. The living resources include various species of fish and shrimp-like creatures called krill -- a potential food source with high quality protein. Various mineral deposits which exist on other continents are also known to occur in Antarctica. Among these are iron, coal, copper, molybdenum, nickel, chromium and cobalt. There is also evidence of the presence of petroleum and other hydrocarbons together with natural gas on the continent; while oil and natural gas may exist offshore on the continental shelf as well.

Prior to 1959, Antarctica had become a source of competing territorial claims and disputes with the potential of escalating into serious military conflicts. It was with a view to obviating such conflicts among other objectives that the Antarctic Treaty was negotiated in 1959 before coming into effect in 1961.

The Treaty had as its main objectives:

1) the use of Antarctica for exclusively peaceful purposes;
2) the freezing of all territorial claims or potential claims;
3) the facilitation of scientific research;
4) the promotion of international scientific cooperation.

Since it came into force, the Treaty has gone a long way in meeting those objectives. It has largely been instrumental in defusing territorial conflicts which were about to explode at a time when states keenly competed to establish their sovereignty over the continent, while at the same time, it froze at least for the time being the urge to appropriate part of the continent which could have led to the escalation of new claims. Furthermore, freedom of scientific investigation and research has continued unimpeded while scientific exchanges and information have also continued.

Judged against this background, the Antarctic Treaty can be said to have played an important and constructive role in the maintenance of international peace in that part of the globe. For the past twenty-five years, no military conflict regarding the continent *per se* has broken out.[1] The maintenance of peace in the area has been cited as one of the outstanding merits of the Treaty and why it should not be renegotiated. However, to acknowledge this successful role of the Treaty is not to say that the territorial disputes regarding Antarctica or that the question of overlapping claims with potential for future conflicts have been resolved once and for all. Nor has it been determined whether the existing regime enshrined in the Treaty will remain in perpetuity to foreclose the possibility of future disputes. To raise these questions is not to be pessimistic but to acknowledge the fact that territorial and boundary disputes (overlapping claims) have a habit of lying dormant over a long period of time only to explode when they are least expected to do so. Hence, the fact that the territorial disputes and claims are only frozen but not resolved, given the fact that the area

contains rich deposits of mineral resources that are likely to become exploitable with development in science and technology, coupled with the strategic importance of the continent, it can at least be argued that all the ingredients for a potential dispute do exist in the future.

Article 4 of the Treaty which is so pivotal in this connection reads as follows:

1. Nothing contained in the present Treaty shall be interpreted as:
   (a) a renunciation by any Contracting Party of previously asserted rights or claims to territorial sovereignty in Antarctica;
   (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
   (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica nor create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Analyzing this important article of the Treaty leads to the irrefutable conclusion that territorial and overlapping claims and attempts to appropriate the continent remain outstanding and have not been resolved finally. On the other hand, all states, whether parties to the Treaty or not, have an interest in the maintenance of international peace in relation to Antarctica; and the fact that the issues of asserted rights or claims to territorial sovereignty have not been finally resolved makes it necessary that these issues must be seriously addressed at a time when the competing interests are not too pressing and inflamed. It is now timely and propitious to do so, so that when the review of the Treaty comes around in 1991, a legal vacuum will not exist to be exploited. The call to renegotiate or review the Treaty has to be taken on its merits, namely, to find an amicable solution to the existing problems surrounding the continent, and the community of states should be seen as having an interest in using the continent exclusively for peaceful purposes.

Talking about the interests of the community of states according to the Gondwanaland theory, the continent of Antarctica, it is said, once had a common landmass of five continents, namely, Africa, Antarctica, Australia, India, and South America. Over the centuries, a number of countries have based themselves on various criteria such as discovery, geographical contiguity, historic title, *anti-possidetis* and the sector principle to lay claim to Antarctica.

In some cases, claims have been made to the same territory, while in others such claims overlap. Moreover, most of the members of the international community have not recognized those claims. Therefore,

given the geographical circumstance of Antarctica as an area adjacent to all continents, and the fact that it is uninhabited and that most states have or are now developing a keen interest in it, and in the light of the objectives of the Treaty itself that it should be used exclusively for peaceful purposes and to promote scientific research and knowledge, it has been proposed that the continent be declared a common heritage of mankind. This will exclude any attempt to appropriate it or parts of it. Such a formula would also and for all time resolve the existing territorial and potential disputes. The declaration of Antarctica as the common heritage of mankind would ensure that the continent is used exclusively for peaceful purposes which will go a long way in meeting one of the main objectives of the Treaty itself.

Apart from the important question of maintaining the continent as a peaceful area and not open to militarization, there is that other equally important aspect of the continent to which reference was made earlier, namely, that Antarctica remains the last reservoir of resources, both living and non-living. Antarctica, as pointed out earlier, is known to contain a great variety of metal minerals -- copper, gold, lead, molybdenum, tin, zinc, etc. -- associated with ore deposits on other continents. The coal deposits are also said to be extensive. Its living resources include the shrimp-like krill, various species of fish, seals, and whales.

The continent is almost wholly overlaid by a continental ice sheet, containing approximately 7,000,000 cubic miles of ice representing about 90 percent of the world's ice. This tremendous volume of potential water can be used to make the more arid areas of the world arable.

With these vast resources which Antarctica contains and which could conceivably become economically exploitable with development in science and technology (after all, it has been said that scientific knowledge about Antarctica in the last twenty years has increased more than in the preceding millenia), it is understandable that the poor and economically underdeveloped countries with their increasing population and scarce natural resources should have manifested an interest in the region with a view to sharing in the exploitation of those resources.

For understandable reasons, the Antarctic Treaty made no provision for the exploitation of the mineral resources of the continent. With the increasing knowledge that those resources would become exploitable sometime in the future, the parties to the Treaty have been elaborating various mechanisms to exploit the mineral resources and to fish and harvest the living resources of the sea areas adjacent to the continent. Unfortunately, those regimes have not taken into account the interests of the less endowed members of the international community, to ensure that they too will benefit from the resources of the area whenever they become exploitable. When it is recalled that the Treaty itself calls for the peaceful uses of the continent and that its development should further the purposes and principles embodied in the United Nations Charter, one of which is the promotion of international economic cooperation and development, not only is the keen interest of the developing countries to benefit from the resources of the region understandable, but perhaps even necessary to overcome underdevelopment. The various minerals regimes that are being drawn up should at least have taken into account the interests of those countries as well.

It is with a view to be able to participate in the sharing of the potential resources of Antarctica that a number of developing countries have called for the continent to be declared a common heritage of

mankind. Such a proposition, viewed positively, is not only in line with the principles and purposes of the Charter of the United Nations but also in line with the principal objectives set out in the Antarctic Treaty itself, which objectives remain valid even though the Treaty itself is no longer sufficient to regulate the changing conditions of the continent.

Various suggestions have been advanced as to the type of regime that should be installed should the common heritage concept be applied to Antarctica. One such possible regime is that set up by the 1982 United Nations Convention on the Law of the Sea pertaining to the seabed area beyond the limits of national jurisdiction. According to Article 136 of the Convention, "the Area (*i.e.*, the seabed and ocean floor beyond the limits of national jurisdiction) and its resources are the common heritage of mankind." Article 137 sets out the legal status of the area and its resources as follows:

1. No state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any state or person, national or juridical, appropriate any part thereof. No claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized.
2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals derived from the Area, however, may only be alienated in accordance with this part and the rules and regulations adopted thereunder.
3. No state or person, natural or juridical, shall claim, acquire or exercise rights with respect to the minerals of the Area except in accordance with the provisions of this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

Article 140 stipulates that "activities in the Area shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states, whether coastal or landlocked, and taking into particular consideration the interests and needs of developing states and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other General Assembly resolutions. The article then goes on to state that "the Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area...."

Thus, declaring Antarctica the common heritage of mankind will not only be in accordance with the principles and objectives of the United Nations Charter but will also meet the primary objectives of the Antarctic Treaty itself and further enhance its role and develop it to the extent it needs to be developed.

Declaring Antarctica a common heritage of mankind would mean that no state or states could claim it or any portion of it while at the same time access will be available for the development of its resources. Instead of the rival claims that we now have over the continent, an international authority can be set to oversee and manage the utilization of the resources of the continent for the benefit of all countries. But not only would the authority oversee the exploitation and management of the resources, it would also be its responsibility to

ensure that the environment of Antarctica is protected from pollution and other threats that could impair its physical character by taking appropriate conservation and environmental measures and preserving its eco-climatic system which is also important for the rest of the world. The Antarctic Treaty authority could also act as the repository of scientific research and investigation of the continent and also as a great clearing house for the exchange of scientific knowledge and information.

Finally, declaring Antarctica a common heritage of mankind will ensure its peaceful uses at all times and would also ensure that it is conveyed to future generations unpolluted and without its being physically destroyed.

To sum up, the Antarctic Treaty was primarily designed and elaborated to avert the territorial conflicts which were breaking out around the continent and to promote scientific investigation and research in the region. It can rightly be claimed that, even though the Treaty has not finally resolved competing territorial and overlapping claims, for the past twenty-five years, no military conflict has broken out on the continent. However, it is also a fact that neither Article 4 of the Treaty nor any other article of the Treaty has finally resolved the outstanding territorial claims and overlapping claims. There is thus cause for genuine concern given the fact that the continent is not innocent when it comes to military conflicts. It is therefore timely to start reviewing and renegotiating the Treaty with a view to resolving those conflicts once and for all and to ensure that Antarctica remains peaceful for all time.

Furthermore, Antarctica is now recognized as the last reservoir of natural resources both living and non-living. With development in science and technology, it is becoming increasingly possible to explore and exploit the resources of the region. Today, the international community is divided between the have and have-not nations. A substantial number of have-not countries are practically without resources and their viability as sovereign states is increasingly being thrown into doubt. It will therefore be just and equitable that the resources of the region do not only benefit the technologically advanced states but that some of the benefits of those resources be used to overcome poverty and underdevelopment throughout the world.

To achieve the foregoing objectives, it will seem most prudent and practical to declare Antarctica the common heritage of mankind, not subject to appropriation or acquisition by any one state or group of states, but to be used exclusively for peaceful purposes. To achieve this aim, an international authority should be set up to oversee the development and management of the continent, to conserve its resources and protect its environment both for the present generation and future generations. Declaring Antarctica the common heritage of mankind will eliminate all territorial disputes, ensure that it is used extensively for peaceful purposes, promote international economic development and preserve the region in the interest of all mankind.

The need to formulate a new legal order for Antarctica is apparent. Appropriation of Antarctica by a group of states would put the exploitation of its resources only at the disposal of those states with the necessary technology and which are already well endowed, to the disadvantage of the poorer regions of the world. Moreover, the present Treaty will not settle the question of ownership of Antarctica and the uncertainty surrounding it will remain. The call to declare it a common heritage of mankind is realistic and should be viewed with objectivity.

NOTES

1. Although see Theutenberg, B. J., *The Evolution of the Law of the Sea* (Dublin, 1984) pp. 72-3 where it is suggested that part of the explanation of the 1983 war in the South Atlantic had its roots in Antarctica.
2. Auburn, F. M., *Antarctic Law and Politics* (London, 1982.)

THE ANTARCTIC MINERAL RESOURCE NEGOTIATIONS: A REPORT

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Background

At the Eleventh Antarctic Treaty Consultative Meeting (ATCM XI) held in Buenos Aires in July, 1981, the Antarctic Treaty Consultative Parties[1] (ATCPs) agreed (in Recommendation XI-1) to initiate negotiations on a regime for Antarctic mineral resources. These negotiations opened in Wellington, New Zealand in June, 1982 and have continued in sessions which have averaged two weeks in length through the most recent -- the eighth -- held in Hobart, Tasmania, Australia, 14-25 April 1986. As these negotiations enter what may be their final stage, it is worth examining the nature of the regime which is emerging from them and the issues which must be resolved for its successful conclusion.

The agreement to initiate negotiations reflected in Recommendation XI-1 had been preceded by a decade of consideration of the issue within the Antarctic Treaty consultative mechanism. The Antarctic Treaty itself does not deal with issues of resource development in the Antarctic. Thus, the juridical accommodation contained in the Treaty between states claiming territorial sovereignty in Antarctica and those neither recognizing nor asserting such claims does not extend to resource activities. The system of consultative meetings provided for in the Treaty, however, has evolved into an effective mechanism for dealing with new issues and for managing new activities in Antarctica. Therefore, it was within this consultative mechanism that the issue of mineral resources was first raised in informal discussions at ATCM VI (Tokyo, 1970).

The subject "Antarctic Resources -- The Question of Mineral Exploration and Exploitation" was included as an item on the agenda of ATCM VII (Wellington, 1972) and remained an item for regular discussion at succeeding ATCMs. Discussion at ATCM VII and ATCM VIII (Oslo, 1975) centered upon determining whether an agreed international approach to possible mineral resource activities in Antarctica was required. In undertaking this examination, the ATCPs emphasized the need to ensure that possible mineral resource activities did not become the source of discord or conflict -- counter to the principles and purposes of the Antarctic Treaty -- and underlined the potential risks of such activities to the Antarctic environment. At ATCM VIII, the ATCPs called for detailed study of the environmental implications of possible mineral resource activities, including a request to the Scientific Committee on Antarctic Research (SCAR) to examine the matter. Also at ATCM VIII, the ATCPs "urged states and persons to refrain from actions of commercial exploration and exploitation while, acting as Consultative Parties, they seek timely agreed solutions to the problems raised by the possible presence of valuable resources in the Antarctic Treaty area."

In June, 1976, the ATCPs held a special preparatory meeting on mineral resources in Paris. The Paris meeting laid the groundwork for consideration of the issue at ATCM IX in London. In Recommendation IX-1 on mineral resources adopted in London, the ATCPs, for the first time, endorsed the need for a regime for Antarctic mineral resources and

began the process of defining the purposes of the regime and the principles upon which its development should be based. Recommendation IX-1 also reaffirmed the commitment of the ATCPs to see that commercial mineral resource activities not take place while working toward an acceptable regime. Specifically, the ATCPs urge their nationals and other states to refrain from all exploration and exploitation of Antarctic mineral resources while making progress towards the timely adoption of an agreed regime concerning Antarctic mineral resource activities. They will thus endeavor to ensure that, pending the timely adoption of agreed solutions pertaining to exploration and exploitation of mineral resources, no activity shall be conducted to explore or exploit such resources.

At the same time, at ATCM IX, the ATCPs directed more specific attention to the issue of Antarctic marine living resources than to that of mineral resources. They called for the negotiation of an agreement to provide the conservation of Antarctic marine living resources -- an initiative which resulted in the conclusion, in 1980, of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR). This decision reflected ATCP commitment to assuring necessary protection of the productive ecosystems found in Antarctic waters in the face of concrete interest in the harvesting of fish and krill populations.

The priority accorded to the negotiation of an agreement on living resources, however, did not prevent continued work on the development of an agreed basis for a future regime on Antarctic mineral resources. At ATCM X (Washington, 1979), the ATCPs continued to elaborate principles and objectives which should be reflected in a possible regime. By the conclusion of ATCM X, a wide measure of agreement had been achieved on such principles and objectives. This, combined with the conclusion of CCAMLR, opened the way for more concentrated attention to the mineral resource issue at ATCM XI (Buenos Aires, 1981).

Recommendation XI-1

Recommendation XI-1 adopted in Buenos Aires calls for the conclusion of a regime for Antarctic mineral resources "as a matter of urgency" and for convening a special consultative meeting in order to elaborate the regime and take the necessary steps to determine its form and how it would be adopted. The recommendation articulates the following five principles upon which the regime should be based:

(a) the Consultative Parties should continue to play an active and responsible role in dealing with the question of Antarctic mineral resources.
(b) the Antarctic Treaty must be maintained in its entirety;
(c) protection of the unique Antarctic environment and of its dependent ecosystems should be a basic consideration;
(d) the Consultative Parties, in dealing with the question of mineral resources in Antarctica, should not prejudice the interests of all mankind in Antarctica;
(e) the provisions of Article IV of the Antarctic Treaty should not be affected by the regime. It should ensure that the principles embodied in Article IV are safeguarded in application to the area covered by the Antarctic Treaty.

It also outlines seven aspects of possible mineral resources activities with which the regime should deal.

The regime should, *inter alia*:

(i) Include means for

(a) assessing the possible impact of mineral resource activities on the Antarctic environment in order to provide for informed decision-making;
(b) determining whether mineral resource activities will be acceptable;
(c) governing the ecological, technological, political, legal and economic aspects of those activities in cases where they would be determined acceptable, including:
-- the establishment, as an important part of the regime of rules relating to the protection of the Antarctic environment; and
-- the requirement that mineral resource activity undertaken pursuant to the regime be undertaken in compliance with such rules.

(ii) Include procedures for adherence by States other than the Consultative Parties, either through the Antarctic Treaty or otherwise, which would:

(a) ensure that the adhering State is bound by the basic provisions of the Antarctic Treaty, in particular Articles I, IV, V, and VI, and by the relevant Recommendations adopted by the Consultative Parties; and
(b) make entities of that State eligible to participate in mineral resource activities under the regime.

(iii) Include provisions for co-operative arrangements between the regime and other relevant international organizations.
(iv) Apply to all mineral resource activities taking place on the Antarctic Continent and its adjacent offshore areas but without the encroachment on the deep seabed. The precise limits of the area of application would be determined in the elaboration of the regime.
(v) Include provisions to ensure that the special responsibilities of the Consultative Parties in respect of the environment in the Antarctic Treaty Area are protected, taking into account responsibilities which may be exercised in the area by other international organizations.
(vi) Cover commercial exploration (activities related to minerals involving, in general, retention of proprietary data and/or nonscientific exploratory drilling) and exploitation (commercial development and production).
(vii) Promote the conduct of research necessary to make environmental and resource management decisions which would be required.

The adoption of Recommendation XI-1, then, represented a decision of the ATCPs to initiate negotiation of a regime for Antarctic mineral resources. The decision reflected a shared definition of the issues requiring resolution and of elements necessary to resolve them -- a definition which had emerged through examination of the subject within

the regular consultative mechanism. It also reflected a shared understanding that the point had been reached to establish a special negotiating forum -- a special consultative meeting -- for the detailed work of elaborating the regime and determining its form. Emergence of the consensus for negotiation of the regime -- through an accretionary process -- is characteristic of the manner in which the Antarctic Treaty system operates to respond to new issues or new activities. The emergence of this consensus also illustrates the emphasis, within the operation of the Treaty system, upon constructing agreed approaches to issues prior to their becoming major or pressing problems.

In this regard, the decision to initiate negotiation of a regime did not rest upon evidence that commercially valuable mineral resource deposits exist in Antarctica. While a good deal of geological research has been undertaken on and around the Antarctic continent and while it is clear that there are occurrences of quite a number of minerals, including hydrocarbons, it is not known whether such minerals exist in concentration or quality sufficient to warrant an effort to extract them in the foreseeable future or, in fact, ever. Minerals there are; whether there are mineral resources is, as yet, an unanswered question. At the same time, one of the important elements in the decision to negotiate a regime is the belief that it is important to have in place an agreed system for dealing with possible mineral resource activities in Antarctica before it is known whether such resources exist.

This judgment has been supplemented by recognition of the fact that the initial phase of mineral resource exploration -- prospecting -- can take place now. Further, prospecting, unlike later stages leading to and comprising development, is feasible from both the technological and environmental perspective and there has been some degree of interest in undertaking such activities. Since an agreed legal basis for the conduct of prospecting does not exist, there is also a "here-and-now" problem with respect to possible Antarctic mineral resource activities with which the ATCPs feel they must deal.

The Negotiations

With the adoption of Recommendation XI-1, the ATCPs also accepted the invitation of the Government of New Zealand to host the opening session of the Special Consultative Meeting on Antarctic Mineral Resources in Wellington in June, 1982.

There have been seven additional sessions -- in Wellington (January, 1983), in Bonn (July, 1983), in Washington (January, 1984), in Tokyo (May/June, 1984), in Rio de Janeiro (February/March, 1985), in Paris (September/October, 1985) and in Hobart, Tasmania (April, 1986). Following the January, 1983 session in Wellington, the Chairman of the negotiations, Ambassador Chris Beeby of New Zealand, circulated an informal personal report to which he attached a text setting forth suggested formulations on most, but not all, of the components to be incorporated in the regime. The Beeby text -- as it was known -- created a focal point for the negotiations and was accorded detailed discussion at the two sessions which followed in Bonn and Washington.

In early 1984, prior to the Tokyo session, Beeby circulated a revised text designed to reflect the trend of the discussions and to fill in a number of sections which were left open in his first offering. The revised Beeby text continues to serve as a focal point in the negotiations. It is not my intent to attempt a summary or analysis of the second Beeby text. For one thing the text, though technically a private conference document, has found its way into the public domain.

For another, there have been significant developments in the negotiations since the text appeared which it obviously does not reflect. What I will attempt is an examination of the nature of the regime that is emerging from these negotiations and the issues which must be resolved for its successful conclusion. At this point, I should stress that this examination represents no one's official views, neither those of the U.S. Government nor those of the Antarctic Treaty Parties, as a group. Rather, it reflects my personal observations as one close to the negotiations.

Before addressing the specific components of the emerging regime for Antarctic mineral resources, several comments of a general character relating to the nature of the regime are in order. First, the term "regime" as used here may be defined as an agreed international system for making decisions about possible mineral resource activities; specifically decisions about whether such activities, if interest in them arises, would be acceptable and, if determined to be acceptable, decisions about how such activities should be governed.

Second, as was noted earlier, it is not known whether minerals exist in commercially attractive deposits in Antarctica. Not only would there have to be rich deposits to attract commercial interest, but also significant technological innovation and development would be required to render exploration and development activities in Antarctica feasible. Therefore, it is not possible to identify which minerals, if any, may become the object of specific attention, nor the general areas in which they might be located.

For these reasons, the regime must offer the means for judging the acceptability of and, if necessary, regulating a wide range of possible activities -- from hydrocarbon to hard rock mineral exploration and development -- and in a wide range of possible environments -- both onshore and offshore. In consequence, the regime must of necessity be of a framework character. It will not, indeed cannot, set forth detailed regulations -- a detailed mining code -- for governing mineral resource exploration and development in Antarctica. Rather, the regime will be essentially a simple instrument which will establish an agreed legal basis for considering possible Antarctic mineral resource activities. It will set forth the necessary legal obligations and provide for the establishment of the necessary machinery to do so. Such machinery would constitute the collective mechanism, first, for assessing and judging possible future mineral resource exploration and development and second, if such activities were determined to be acceptable, for elaborating the detailed regulations, appropriate to the nature of those activities and the areas in which they might take place, to ensure that they would be undertaken in acceptable fashion.

More specifically, the regime will need to:

- -- establish the basic legal obligations of the parties with respect to possible Antarctic mineral resource activities;
- -- identify the stages of possible Antarctic mineral resource activities;
- -- identify the decisions required in order to judge the acceptability of possible activities at each stage;
- -- prescribe the standards and criteria against which such decisions must be made;
- -- provide for the establishment, as and when necessary, of the machinery -- the institutions -- through which the parties to the regime will consider and take decisions about possible

mineral resource activities and prescribe the detailed terms and conditions for such activities as may be permitted; and
-- elaborate the composition, functions, relationships, and decision-making procedures of those institutions.

To summarize, the instrument will establish the general obligations and standards applicable to the consideration of possible mineral resource exploration and development in Antarctica and will provide for the establishment of the machinery to translate these obligations and standards into detailed and binding regulations governing such activities should they become technically feasible and be judged environmentally acceptable.

With these general points in mind, the emerging regime for Antarctic mineral resources incorporates provisions which may be grouped into the following categories:

-- Scope of the Regime
-- General Obligations and Principles
-- Institutions
-- Stages of Activity

Scope of the Regime

Area: As provided for in Recommendation XI-1, the regime will apply to Antarctic mineral resource activities taking place on the continent and other land areas south of 60° South latitude, including ice shelves, as well as their adjacent offshore areas, but without encroachment on the deep seabed. In practical terms, the adjacent offshore areas would be those areas of seabed and subsoil within 200 nautical miles of the coast of Antarctica and beyond that distance where the physical continental margin so extends. The regime would also apply to related support activities anywhere within the area of the Antarctic Treaty.

An issue which remains to be determined in this regard is whether to include in the instrument a detailed depiction of the area of the regime by specific coordinates or by map. There is a growing view that the specific depiction of the area should be undertaken, in the future, and only as and when necessary.

Activities Covered:

The regime will apply to mineral resource activities defined in three stages: prospecting, exploration and development.

Prospecting is defined to mean activities aimed at locating areas of mineral resource potential, including geological, geochemical, and geophysical techniques and field observations but would exclude any significant dredging, excavation, or drilling. Prospecting could not create any legal rights to resources.

It should be noted that prospecting, as defined, involves the use of methods and techniques which are already employed in scientific research activities. The basic distinction between scientific research and prospecting, therefore, lies not in the nature of the activity but in the intent of the entity carrying out the activity.

Exploration is defined to mean activities aimed at identifying and evaluating specific mineral resource occurrences or deposits and would include drilling, dredging, and excavation.

Development is defined to mean activities, following exploration, involving or associated with commercial production of mineral resources

and would include pilot projects and related support activities, such as transportation or storage.

Operators:

Antarctic mineral resource activities, as permitted, could be carried out by entities, sponsored by any party to the regime, including a state party to the regime or its agency or instrumentality, a national or juridical person of a party to the regime, and a joint venture of any of the above entities.

Participation in the Regime:

There is growing view that being a party to the Antarctic Treaty should be a condition precedent for accession to the Antarctic mineral resource regime. As noted later, there would be additional criteria for participation in certain of the institutions of the regime.

General Provisions

Basic Obligation:

The parties to the regime would agree that no Antarctic mineral resource activities could be undertaken except in accordance with the provisions of the regime and measures adopted pursuant to it. As will be discussed further in a later section, prospecting sponsored by a party to the regime could take place without the prior authorization of the institutions of the regime provided that it conformed with the standards and principles of the regime and any regulations generally applicable to prospecting. Exploration and development, however, would be prohibited unless specifically authorized by the institutions of the regime and subject to the specific terms and conditions established by those institutions.

The Environmental Standard:

The regime incorporates a number of standards which would be applied to the consideration of possible mineral resource activities and would constitute the criteria upon which decisions about possible mineral resource activities would be based. The most basic of these standards relates to the protection of the Antarctic environment, and has three elements:

- -- No mineral resources activity would take place until there is available information sufficient to assess its possible impacts;
- -- No mineral resource activity would take place until it is judged, based on assessment of its impacts, that such activity would not have significant adverse impacts upon Antarctic ecosystems, including atmospheric, terrestrial, and oceanic environments; upon populations of living resources, including in particular endangered or depleted species, upon ecosystems dependent upon or related to Antarctic ecosystems, or upon regional or world climate or weather patterns; and that it would not degrade or risk degradation of areas of biological, scientific, historic, or aesthetic significance.
- -- No mineral resource activity would take place until the technology and procedures exist to ensure that the impacts identified above could be prevented and to ensure safe operations, including the capability to respond effectively to accidents and to monitor the impacts of the activity in question.

In the application of this standard, the cumulative impacts of possible Antarctic mineral resource activities would have to be taken into account.

Other Uses:

There would be additional obligations to ensure that Antarctic mineral resource activities do not undercut other legitimate uses of Antarctica, primarily scientific research activities. The formulation of these obligations remains the subject of debate as there remain divergences of view as to whether certain activities (such as scientific research) should be accorded a priority over others and, if so, how much.

Protected Areas:

There appears to be general agreement that mineral resource activities would be prohibited in areas set aside as Specifically Protected Areas or Sites of Special Scientific Interest under the Antarctic Treaty, or designated as protected by the commission established by the regime for historic, ecological, environmental, scientific, or other reasons. There remain differing perspectives on how to deal with areas set aside for protection under the Convention on the Conservation of Antarctic Seals and the Convention on the Conservation of Marine Living Resources.

Links with the Antarctic Treaty System:

The regime would be defined as a part of the Antarctic Treaty System. (Assuming that its parties are parties to the Antarctic Treaty, they would all be bound by the basic obligations of the Treaty). Further, there would be an obligation to ensure that institutions established pursuant to the minerals regime consult and cooperate with the other components of the Antarctic Treaty System to prevent interference with the achievement of their objectives and to ensure consistency among their activities.

Non-prejudice to Article IV of the Antarctic Treaty:

The regime will include an article drawn from CCAMLR, which essentially extends in a formal sense the principles and obligations of Article IV of the Antarctic Treaty to the operation of the mineral resource regime and any activities that were authorized pursuant to it.

Compliance:

Parties to the regime would undertake obligations to ensure compliance with its provisions and with any measures or regulations elaborated pursuant to it. The issue of compliance raises difficulties because of differences among those involved in the negotiations over the legal status of Antarctica. One approach to this issue -- the one employed in CCAMLR -- is a "bifocal" one which obligates each party to take all necessary steps "within its competence" to ensure compliance. In this regard, the primary responsibility for ensuring compliance would rest with the state sponsoring the activity in question. In addition, the regime would provide that no exploration and development activity could go forward unless satisfactory arrangements for inspection and monitoring had been developed.

Inspection:

There is general agreement that the regime should make provision for effective inspection of Antarctic mineral resource activities. This would include, first, extension of the Antarctic Treaty inspection rights to cover mineral resource installations and second, institution of an inspection system specific to mineral resource exploration and development. On the latter point, as noted above, no exploration or development activities could proceed until satisfactory arrangements for their inspection had been developed. There remains discussion of whether provision to each party of additional rights of inspection for mineral resource purposes would be desirable.

Liability and Compensation:

It is accepted that the regime should incorporate basic principles relating to liability and compensation. In this area, there are issues to be resolved relating to state liability, standards of liability, and definition of damage. It is also clear that the principles included in the regime will require further elaboration by the institutions after its conclusion. There is also agreement that application of specific standards of liability and means to assure prompt and adequate compensation in the event of damage must be agreed prior to permitting exploration and/or development.

Dispute Settlement:

An important component of the regime's legal provisions would be those relating to the settlement of disputes. Significant work remains in articulating dispute settlement procedures, some of which may require work after conclusion of the regime. Such procedures will need to reflect the nature of the regime as an agreement among states, and they will rest upon the presumption that states would be the parties to which they would apply. There are differences as to whether the procedures should be compulsory in nature, though there is strong support for this result. In this regard, there appears to be a growing preference for compulsory arbitration as the method to be applied if parties to a dispute are unable to resolve it through means of their choice.

International Participation:

There is widespread agreement that the regime would include provisions calling upon the commission to establish incentives for international participation, including such participation by developing countries, in Antarctic mineral resource activities. Such incentives would not constitute mandatory requirements for joint activities but would need to be elaborated by the Commission before applications for exploration and development rights could be considered in any general area. The formulation of this provision and the decision-making procedures by which it would be implemented by the commission is one of the key outstanding issues in the negotiations.

Institutions

There is general agreement that the regime should provide for the establishment of a central institution -- the Commission -- as well as regulatory committees -- limited membership bodies with specific responsibilities for considering mineral resource activities in general areas identified by the Commission. In addition, there would be a scientific, technical and environmental advisory body to provide expert

advice and assessments to these institutions. The Commission would be empowered to establish a secretariat as and when necessary.

The Commission:

The Commission would exercise general competence with respect to possible mineral resource activities in Antarctica. It would have the capacity to develop measures relating to such activities on an Antarctic-wide basis. In addition, one of its key functions would be to consider requests from parties to identify general areas of Antarctica for possible exploration and development activities. The Commission would adopt the budget and provide for the disposition of revenues that might accrue from the conduct of any exploration and development activities. The regime would spell out an illustrative list of its competences.

Membership in the Commission would consist of the original signatories of the regime (likely to be the ATCPs) plus parties which later acceded to the regime, meeting an activities criterion relating to Antarctic mineral resources. The regime would also make provision for the Commission to invite international organizations (inter-governmental and non-governmental) to attend its meetings. The Commission would be charged with keeping a public record of the actions of the regime.

The question of decision-making procedures in the Commission, particularly with respect to the identification of areas, is one of the key outstanding issues in the negotiations.

Regulatory Committees:

One of the innovative aspects of the emerging regime is its provision for regulatory committees. A regulatory committee would be established for each general area identified for possible exploration and development activities by the Commission. The committee would be charged with completing elaboration of the requirements to which all mineral resource exploration and development activities in the area of its responsibility must conform. These requirements would have to reflect the basic obligations of the regime, any measures or guidelines adopted by the Commission, and would be subject to Commission review.

Following the establishment of these requirements, the regulatory committee would be responsible for receiving, considering, and judging applications for specific exploration and development activities at specific sites within the area of its responsibility. The committee would play a continuing role in oversight of activities undertaken pursuant to an approved application and, if necessary, would judge whether an operator could proceed from the exploration to the development phase.

Regulatory committees would normally consist of ten members (parties to the regime). These would include the parties (if any) with territorial claims to all or part of the area for which the committees were responsible and would include other parties which had demonstrated concrete interest in the area (largely through the provision of information necessary for the Commission identification of the area). There is a widespread view that the U.S. and USSR should be members of each regulatory committee and that each committee should include adequate representation of developing countries. Parties to the regime not selected as members of a regulatory committee could attend its meetings as observers as could invited international organizations.

The rationale for the regulatory concept is twofold. First, it would provide, for each general area identified, an institution designed to develop necessary detailed resource management knowledge and experi-

ence with respect to that area in a way that a body as large as the Commission would be hard put to do. Second, it would offer a forum within which those most directly interested in a particular area could negotiate the necessary accommodations relating to possible activities in that area.

The composition of, selection mechanism for, and decision-making procedures in regulatory committees are key outstanding issues in the negotiations.

Scientific, Technical and Environmental Advisory Committee:

The regime calls for establishment of an advisory body to provide expert advice to the Commission and regulatory committees on the scientific, technical, and environmental aspects of any matters under consideration. The advisory committee would not be a decision-making body, but the Commission and regulatory committees, before taking any major decisions, would be required to take full account of the views of the advisory committee. (The committee, in turn, would be required to convey a full report of each of its meetings, incorporating all views expressed.)

Advisory committee membership would be open to any party to the regime, again with provision for observer participation by international organizations.

The regime would include an illustrative list of its functions, many of which relate to the transmission of advice and assessments to the Commission and regulatory committees on the matters with which they must deal. In addition, the advisory committee would have a number of ongoing functions with respect to the collection, archiving, and dissemination of scientific, technical, and environmental data and information relating to Antarctic mineral resources.

Stages of Activity

The emerging regime would establish the process through which possible future mineral resource activities would be considered, including the points at which decisions would be required. This process is best viewed from the perspective of the stages of authority.

Prospecting:

Prospecting sponsored by a party to the regime would be permitted without prior authorization, provided that it accorded with the general standards and principles of the regime and any measures generally applicable to the prospecting activities. Among the latter would be measures adopted under Article IX of the Antarctic Treaty for the protection of the Antarctic environment and general measures, which could be adopted by the Commission at any time, to regulate prospecting activities.

Parties to the regime would be required to notify the Commission of each instance of prospecting they sponsor, providing information on the location, timing and nature of the activity; an assessment of its possible environmental impacts; assurance of the competence of the prospector; and commitment to ensure compliance with the provisions of the regime. Additional provisions are being elaborated which will permit accelerated Commission consideration of prospecting, notified or underway, which parties believe could be inconsistent with the provisions of the regime.

As noted earlier, prospecting could not generate any rights to resources. Prospecting data, unlike data resulting from scientific

research activities governed by the Antarctic Treaty, could be retained as proprietary. A significant issue remains as to whether the regime should include a specific limit to the length of time that a prospector could retain prospecting data as proprietary. Resolution of the issue will require balancing the interest of the scientific community which supports early release of such data, much of which could be of scientific value, with the legitimate concerns of potential operators to ensure necessary protection for information of commercial significance generated by prospecting. There seems to be agreement that a party sponsoring a prospector should be obligated to ensure the release of such data if not, or when no longer, of commercial significance. The issue of a time limit, however, remains.

Identification of Areas:

Any party to the regime could propose that the Commission identify a general area for possible exploration and development of a particular mineral resource or resources. The identification of such an area would constitute a general decision that exploration and later development could be acceptable there. However, it would not represent a decision to permit exploration and development activities. Rather, it would trigger the process, centered in the regulatory committee, of elaborating the requirement for exploration/development activities in the area concerned.

The decision with respect to identification of an area would rest with the Commission, on the advice of the scientific, technical and environmental advisory committee. In considering a proposal to identify an area, the Commission would apply two sets of criteria -- first, of course, the consistency of the proposal with the basic provisions of the regime, including in particular the three-fold environmental standard; and second, the need to ensure that any area identified constituted a coherent unit from the resource management point of view (particularly in its physical, geological, and environmental conditions and features). The application of these criteria could result not only in an up-or-down decision on a proposal to identify an area; it could also result in a decision to identify an area either smaller or larger than that proposed and in the elaboration of conditions to guide regulatory committee establishment of area-specific requirements for exploration and development.

Exploration/Development - Pre-Application Phase:

Should the Commission decide to identify an area in respect of a particular mineral resource or resources, a regulatory committee would be established to elaborate the requirements to which exploration and development must conform. These requirements again would be designed to give effect to the basic provisions of the regime, in particular the three-fold environmental standard, as well as any general measures adopted by the Commission, and to be consistent with any conditions elaborated by the Commission in deciding to identify the area.

The regulatory committee, with the advice of the scientific, technical, and environmental advisory committee, would be responsible for establishing the requirements for exploration and development with sufficient specificity so as to provide a potential operator with a clear picture of the prerequisites for undertaking commercial activity in the area concerned and, thus, with a basis for determining whether to apply for the right to undertake exploration and development at a

specific site or in a specific bloc within the area. The requirements would include:

-- definition of specific blocs for which exploration and development rights would be sought;
-- measures for the protection of the environment and safeguarding of other uses of Antarctica;
-- technical and safety measures;
-- data collection and reporting obligations;
-- requirements for regular monitoring;
-- provisions for inspection;
-- the duration for which exploration/development rights would be granted;
-- conditions under which rights could be suspended, modified or terminated;
-- resource conservation practices, including unitization;
-- diligence requirements;
-- procedures for removal of structures, installations and equipment;
-- relinquishment;
-- financial obligations of an operator;
-- provisions to establish liability and ensure the financial responsibility of operators, including bonding and/or insurance;
-- obligations to maintain capability to respond to accidents, including contingency plans.

It should be noted that there are several issues which remain to be resolved with respect to the requirements for exploration and development in an identified area. Some of the requirements, primarily those which might apply to any area identified, might best be undertaken by the Commission; others, those which would be area-specific, might best be undertaken by the regulatory committee. There are differing perspectives as to the relationship between the commission and the regulatory committee in this regard. One promising approach appears to be to recognize that the Commission can act, pursuant to its general competence, to establish such requirements as it chooses when identifying an area, but to charge the regulatory committee with responsibility for completing the necessary requirements.

In addition, there are differing approaches to the degree of specificity with which the regulatory committee should establish these requirements. Some advocate very general requirements, leaving as much as possible to negotiation after applications are received, on a case-by-case basis. Others, believing that this approach could lead to discrimination and inconsistent regulations, call for the requirements to be as concrete as possible to permit the most objective decisions on specific applications.

Applications for exploration and development rights could not be lodged until the regulatory committee had established the aggregate of requirements (noted above) to which such exploration and development must conform. Once established, those requirements would be subject to review by the Commission to ensure consistency with its original decision to identify the area.

Exploration/Development -- Post Application Phase:

Applications for exploration and development rights by operators sponsored by parties to the regime could be lodged during a fixed period

following the establishment of the area-specific requirements (and any Commission review). Consideration of such applications and oversight of any exploration and later development activities that might be approved would constitute the second phase of regulatory committee activities.

The regulatory committee, with the advice of the scientific, technical, and environmental advisory committee, would be responsible for determining whether to approve or disapprove applications for exploration/development rights in the area concerned. Each application would have to provide detailed information on the financial and technical qualifications of the operator and a detailed description of the proposed activities, including demonstration of their conformity with all of the requirements established for the area concerned. The regulatory committee would be obligated to satisfy itself of the financial and technical competence of the operator and that the proposed activities satisfied all requirements established for the area before approving an application. An approved application would take the form of a management scheme which would convey to the operator an exclusive right to exploration and a presumptive right to development at a specific site or in a specific bloc and would set forth the detailed terms and conditions (deriving from the area-specific requirements) which the operator must observe in order to maintain such rights.

It should be noted that there remains an issue of how to deal with competing applications. There appears to be agreement that maximum incentives should be established to encourage competing applicants to resolve any such competition themselves. However, consideration continues as to what procedure would be invoked if competing applicants failed to resolve the issue.

The regulatory committee would play a continuing role, subject to overall Commission authority, in ensuring that the activities of approved operators conformed to the provisions of the relevant management scheme.

As noted earlier, applicants for a specific site or a specific bloc in an identified area would apply for both exploration and development rights. An approved management scheme would convey an exclusive right to exploration and a presumptive right to development. Any operator who wished to proceed from the exploration to the development phase (that is, to initiate commercial production) would be required to notify the regulatory committee and provide detailed information on its proposed program of development (to the extent that such information had not been available in the initial application).

The regulatory committee, again on the advice of the scientific, technical, and environmental advisory body, would be responsible for considering the notification and supporting information from the operator. The operator would be permitted to proceed to the development stage unless there were modifications in the proposed development activities, described in the original application, or new information relating to hazards to the environment posed by the proposal. In either event, the regulatory committee would be required to revise the management scheme to ensure that the development activity conformed with the basic provisions of the regime, including, in particular, the basic environmental standard.

The regulatory committee would play a continuing role with respect to monitoring and oversight of any approved development activities.

Remaining Issues

In identifying the features of the emerging regime I have sought to flag issues which remain to be resolved. It should be noted that in the informal style of negotiation, characteristic of the Antarctic Treaty system, there are no formal texts and no formally agreed provisions. None of that which has been described, therefore, can be said to be agreed. Agreement on specific points requires agreement on all points. At the same time, this outline of the emerging regime is, in my view, a reasonable representation of what will be the nature of the regime if the satisfactory solution can be found to what are described as the key issues.

At the last several rounds in the negotiations, there has evolved detailed informal discussion aimed at finding a package solution to these key issues. They relate to the role of parties to the regime which are not ATCPs; decision-making in the Commission, particularly with respect to the identification of areas; decision-making in the regulatory committees, as well as the composition and function of such committees; and international participation in possible Antarctic mineral resource exploration and development.

The role of parties to the regime which are not consultative parties (the non-consultative parties or NCPs) has emerged as one of the key issues. (To be precise, the issue relates to the role of parties to the regime not members of the commission -- as original signatories or by meeting the necessary activities criterion). This issue was given particular impetus by involvement in the negotiations of the NCPs (of whom there are now fourteen[2]). Beginning with the Rio de Janeiro session in early 1985, the NCPs have attended the negotiations as observers.

It is a basic tenet of the regime that any party to the regime would be entitled to undertake mineral resource activities permitted pursuant to the regime and to participate in discussions relating to any application for exploration and development by operators it sponsored. There is also agreement that all parties to the regime would be members of the scientific, technical, and environmental advisory committee. However, there are differences in approach to the question of the role of NCPs in the Commission. NCP representatives have supported a voice in at least some Commission decisions. The majority of ATCPs have taken the view that it is of basic importance to maintain the activities criterion for membership and that observer status offers the opportunity for those parties not involved in activities related to mineral resources to make their views felt. A suggestion which offers promise for resolving this question is to provide for convening a special meeting of all parties to consider any proposal to identify an area and to provide recommendations and advice to the Commission -- which would, in taking its decision, have to take full account of such advice and recommendations.

The issue of the role of NCPs is linked to the broader and more basic issues of decision-making in the institutions of the regime. Decision-making represents the primary means through which the necessary accommodations among the parties to the regime will be made in its implementation and operation. Procedures will need to be elaborated which will provide a reasonable balance for each party between its interest in assuring positive decisions on actions it considers desirable and being able to prevent undesirable actions. Such procedures must provide a means through which the various interest groups believe that they can pursue and protect their interests, as claimant or non-claimant countries, as socialist or free market states, and/or as developing or developed countries.

Against this background, there are differing perspectives with respect to specific decision-making procedures. There is strong support for basing the decision-making procedures of the mineral resource regime upon the consensus principles. The Antarctic Treaty System operates on the basis of consensus and, indeed, the minerals regime is being negotiated by consensus. On the other hand, there is significant concern that application of consensus to a decision-making process in which the major activities regulated are prohibited unless authorized by collective agreement could lead to a situation in which a single state could prevent all such activities. Those sharing this concern argue for decisions by qualified majority.

While the issue of decision-making is by no means resolved, there has been considerable progress in narrowing the divergences. What is emerging is a composite approach which involves identifying the essential steps in the regulatory process and applying differing decision-making requirements for those steps, as well as apportioning those decisions between Commission and regulatory committee -- bodies with differing compositions.

The decisions on the key steps in the process can be identified as:

-- the identification of an area;
-- conditions associated with the identification of an area;
-- specific requirements for exploration and development in an identified area;
-- approval or disapproval of specific applications for exploration and development;
-- international participation.

Decisions relating to the identification of the area, conditions associated with identification of an area, and international participation would rest with the Commission. While it appears acceptable that the Commission would normally take decisions by qualified majority, there is disagreement as to whether these three issues should require consensus or a qualified majority. Decisions relating to specific requirements for exploration and development in an identified area and approval of disapproval of applications for exploration and development in that area would rest with the appropriate regulatory committee. Here also there is a divergence between supporters of consensus and of qualified majority procedures. There is, however, exploration of a solution which would involve regulatory committee decisions being taken by a qualified majority, contingent, however, upon agreement on how committee membership would be determined and committee procedures for considering applications.

The concept of the regulatory committee, from one perspective, is designed to respond to the need for an efficient and expert body to oversee potential activities for particular resources or types of resources in general areas which should be treated as units for resource management purposes. However, it is also designed to provide a forum in which those with most direct interest in (whether as a claimant or as a sponsor of proposed activities) and information about the area concerned would take decisions about specific exploration and development activities and the requirements therefor. The committees could be composed in such fashion that qualified majority decision-making procedures would prevent both claimant and non-claimant from being outvoted as a group. At the same time, if such procedures were accepted, regulatory committee composition would become a basic issue. Not unexpectedly, therefore,

differences remain over the selection criteria and selection mechanisms necessary to ensure that regulatory committees, when constituted, would reflect a balance among the most directly interested parties in the area concerned.

For similar reasons, great importance has been placed upon the procedures by which regulatory committees develop or consider specific authorizations for exploration and development activities with claimant states, in particular suggesting additional means by which their interests can be accommodated in this process.

The other of the key issues is that of international participation in mineral resources activities. This question relates to whether the mineral resources regime should create opportunities for participation in the conduct of resource exploration and development by interested parties to the regime, particularly developing countries. The emergence of this issue, to some extent, reflects the changing composition of ATCPs with a significant number of developing countries now among that group. These countries, along with a number of other ATCPs, seek assurance of concrete involvement in mineral resource exploration and development should these ever prove feasible and acceptable.

On the other hand, there is considerable resistance to the establishment of mandatory obligations for international participation -- mandatory joint ventures or consortia, for example. Any such provisions, it is felt, would create artificial disincentives for such mineral resource activities and otherwise distort the basis upon which decisions about them should be made.

Clearly, international participation is an ideologically sensitive issue. However, there appears to be growing support for dealing with it through elaboration of a general principle endorsing international participation, coupled with a requirement that the commission, in some way, take action to establish incentives, but not mandatory requirements, for such participation. This approach, of course, is closely bound up with what sort of decision-making procedures would be followed in the Commission.

Concluding Notes

This paper attempts a report -- from a personal and thus subjective perspective -- on the ongoing Antarctic mineral resource negotiations. It does not include a prediction as to whether the negotiations will be successfully concluded. What it does include is a prediction of the type of regime which will emerge if satisfactory solutions can be found to the key outstanding issues.

I would end with two comments on these issues. First, the key issues are closely inter-linked. A solution to them will involve a package approach whose acceptability for any participant in the negotiations would be judged against the overall balance it contains. Second, there is an opportunity to conclude a rational regime in the near future. This opportunity in part results from the fact that there is a perhaps brief respite from the perception and reality of mineral resource scarcity which existed through the 1970s. There is no immediate pressure for development of such resources as may exist on Antarctica. It is for this reason that I characterized the negotiations as entering what may be their final stage.

The outcome of the negotiations, I believe, does not turn upon the ability of the negotiators to find creative solutions to the key outstanding issues. Those, too, I believe, are emerging. It turns more on whether policymakers in the participating nations are prepared to seize

the opportunity -- to make what will be hard choices on an eventual compromise package -- without the pressure of imminent decisions on commercial activity.

NOTES

1. At that time: Argentina, Belgium, Chile, France, Federal Republic of Germany, Japan, New Zealand, Norway, Poland, South Africa, U.K., U.S. and USSR. There are now eighteen ATCPs -- the above fourteen plus Brazil, China, India, and Uruguay.
2. Bulgaria, China, Cuba, Czechoslovakia, Denmark, Finland, German Democratic Republic, Italy, Netherlands, Peru, Papua New Guinea, Romania, Spain, Sweden.

COMMENTARY

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Dear Colleagues,

The proper way of carrying out my role would be to comment upon the ideas and arguments expressed in the papers submitted to this panel. In view of the number of papers, the plenitude of ideas they contain, and the short time at my disposal, I shall limit myself to some personal remarks concerning the present legal status of the Southern Ocean -- not the entire Antarctica -- and some suggestions concerning the manner in which the remaining problems of this status should be resolved. However, in these comments I shall deal indirectly with many of the positions taken by the authors of the papers.

The present legal status of the Southern Ocean is determined by two sets of rules: a) the Antarctic Treaty, and b) the general international law of the sea. Notwithstanding the merits of the Antarctic Treaty system in regulating activities of states in Antarctica since 1961, it remains *res inter alios acta* for states non-party to it. It is adhered to by only one fifth of the members of the United Nations, and it is not envisaged as establishing a definite regime for Antarctica.[1] The characterization of this system as an "objective regime" cannot contribute to its application *erga omnes*.[2] However, it is plausible to assert that some of its basic principles have already passed into customary international law.

The application of the general norms of the law of the sea to the Southern Ocean derives from the restricted scope of the Antarctic Treaty *ratione personae* as well as *ratione materiae*, and particularly from its Article 6 which says that:

> The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present treaty shall prejudice or in any way affect the rights, or the exercise of rights, of any State under international law with regard to the high seas within that area."

As, according to scientists, the boundary between the Southern Ocean and the three major world oceans is determined by the Subtropical Convergence,[3] it appears from Article 6 of the Antarctic Treaty that in the northern part of the Southern Ocean -- between 40° and 60° South Latitude -- only general law of the sea, and not the Antarctic Treaty provisions, should be applied. However, the application of the 1980 Convention on the Conservation of Antarctic Marine Living Resources has been extended even to some parts of this area, namely up to the Antarctic Convergence. Moreover, the signatories of this Convention extended the application of many of the principles and provisions of the Antarctic Treaty itself to the whole area of application of the Convention.

As this northern part of the Southern Ocean includes land territory of some states, all international regimes governing sea and seabed are represented. This means that coastal states are entitled to manage the natural resources of their coastal areas of the sea under their

sovereignty or sovereign rights, and that these rights of the coastal states can be limited only by their consent.

Although Article 6 of the Antarctic Treaty is drafted in a somewhat ambiguous manner, it is obvious that south of 60° South latitude the high seas regime, subject to the principles of the Antarctic Treaty, applies. In respect of the living resources, the 1980 Conservation Convention is an important addition to the applicable general rules.

As far as the seabed of this second, middle part of the Southern Ocean is concerned, in my view, the situation is clear. The principles of the 1970 Sea-Bed Declaration and the international seabed regime elaborated at UNCLOS III -- when the LOS Convention enters into force -- are to be applied as they are in the northern part of the Ocean. This is a consequence of the unanimous recognition of the UN General Assembly and the 1970 Declaration "that the existing legal regime of the high seas does not provide substantive rules for regulating the exploration of the area and the exploitation of its resources."[4] UNCLOS III did not establish the international seabed regime for any particular geographic area, nor did it exclude any region from its application: it has been established for the whole seabed beyond the limits of national jurisdiction. States elaborating the Draft Articles on the Antarctic Mineral Resources have arrived *nolens-volens* at the same conclusion when they said that the envisaged regime for mineral resources on Antarctica will be "without encroachment on the deep seabed."[5]

While the content of the legal regime of this part of the Southern Ocean does not present serious problems, the territorial scope of its application is the crux of the present confusion concerning Antarctica. On the basis of their claims on the Antarctic continent, the claimant states demand their territorial seas, exclusive economic zones, and continental shelves. The non-claimant states do not recognize the validity of the territorial claims on Antarctica and consequently they consider all the waters adjacent to the Antarctic continent as high seas.

In respect to the requests of the claimant states, I would like to stress the following: the regimes of the seas adjacent to the coasts have been developed on different physical and legal realities than those existing on Antarctica. The sinking of the Antarctic landmass attributable to the weight of the ice, the existence of ice shelves and underlying waters, the expansion of the Antarctic continent in winter due to the thick and compact pack ice, are only some of the natural characteristics of the Antarctic coast which distinguish the relationship of the Antarctic continental landmass with its adjacent waters from all other coasts.[6] The existing international rules on internal waters, the territorial sea, the EEZ, and the continental shelf have been conceived for waters adjacent to coasts not possessing such specific properties caused by the presence of ice. Moreover, all the rules on coastal sea zones are formulated on the basis of the existence of one coastal state. On Antarctica the situation is quite different. No undisputed sovereignty exists in relation to any part of the coast; in different parts of the continent the coast is claimed by one, two, or even three states. There is also an unclaimed part of the coast.

The settlement of the territorial claims, contested in some cases even among the claimant states, and not recognized by the great majority of other states, cannot be a smaller problem in the future than it was in the past and is today. But, even if the international community

decided to resolve the overlapping territorial claims and recognized the right of the coastal states to all the sea zones, as in other parts of the world, the problem of the regime of the sea adjacent to the unclaimed parts of the coast would remain unsolved.

The extension of the present regime of the high seas up to the coast also would not, in my opinion, be a satisfactory solution. Although it is true that the existing regimes at sea adjacent to the coasts are based on the sovereignty on land, not all the rules forming these regimes have their *raison d'etre* only in the existence of coastal sovereignty. There are some interests, activities, and relations, non-existent on the open sea, that have to be regulated in the coastal waters independently of the existence of coastal sovereignty: for example, the prevention of land-based pollution, the prevention of infringement of sanitary regulations applied on land, the protection of coastal species, the regulation of discharging or embarking, etc.

Hence, my position concerning the sea adjacent to the Antarctic continent could be summarized as follows: *the high seas regime, adapted to the specific features of the Antarctic coastal waters, should be extended up to the Antarctic coast.* Many of the results achieved within the framework of the Antarctic Treaty system could be very useful in this respect.

As far as the seabed of this area of the Southern Ocean closest to the Antarctic continent is concerned, different solutions are suggested: sovereignty of individual states, joint sovereignty of all claimant states (*condominium*), joint jurisdiction of the Consultative Parties, as well as different solutions involving all states.[7]

As the international seabed regime -- contained in the LOS Convention -- is conceived for the exploration and exploitation of the resources of the deep sea-bed, *it could not be automatically applied* to the coastal sea-bed areas of Antarctica even if the international community disposed of the sovereignty claims. However, in my view, it is just the approach taken in relation to the natural resources of the international seabed area that *should be adopted* also in relation to the entire sea-bed off Antarctica.

Such an international regime, compared with all other suggested solutions contains many advantages:

* it could assure the exploitation of the natural resources for the benefit of the entire international community, including an equitable sharing of the benefits derived from such exploitation as required by the UN General Assembly;[8]
* it could contribute to the development of the new international economic order: the UNCLOS international sea-bed regime is considered to be one of the first concrete contributions towards attaining this goal;
* being based on the principle of the sovereign equality of states, it would be acceptable to the vast majority of states and it could provide a lasting solution;
* being founded on the concept of the common heritage of mankind, and under the supervision of the United Nations, this system would, for the great majority of states, be the acceptable solution for the definite regime of Antarctica itself.

May I be permitted, Mr. Chairman, to conclude my remarks with a quotation. Somewhere I found the following statement: "Responsibility to manage activities in Antarctica was more a burden than a privilege."

Apparently convinced of the truth of this assertion, the whole international community is ready to share this burden with those having this responsibility today.

NOTES

1. See: M.C.W. Pinto, "The International Community and Antarctica", 33 *University of Miami Law Review* 482 (1978).
2. B. Vukas, *Relativno djelovanje medjunarodnih ugovra*, Zagreb, 1975. pp. 145-147.
3. See: H. J. de Blij, "A Regional Geography of Antarctica and the Southern Ocean", 33 *University of Miami Law Review* 400 (1978).
4. Third preambular paragraph of the 1970 Sea-Bed Declaration.
5. Article IV, para. 1 of the Draft Articles of 29 March 1984.
6. See: De Blij, *op. cit.*, pp. 305, 310, 311; M. Giuliano, T. Scovazzi, T. Treves, *Diritto internazionale*, vol. II, 2nd ed., Milano, 1982, p. 352.
7. See e.g.: F.C.Alexander Jr., "A Recommended Approach to the Antarctic Resource Problem", 33 *University of Miami Law Review* 408 (1978).
8. Resolution 40/156 of 16 December 1985.

COMMENTARY

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As a non-lawyer, I have a limited tolerance for discussion of legal bases to manage resources, particularly in the context of Antarctica, when the solutions that have been accomplished to date, and it would seem to me the solutions of the future, are going to be political accommodations and not based on technical interpretations of law. I was pleased to hear both Ambassador Zegers and even Scott Hajost of the Legal Office say that it's a political accommodation we're looking to in the future. I concur with those on this panel who've mentioned that the Antarctic Treaty system has evolved in a very pragmatic and flexible way to deal with new issues as they arise in Antarctica, to respond to questions and problems raised. I think it's worth trying to summarize quickly what kinds of responses have taken place in that system in the last three or four years as there's been increasing interest in Antartica, the issues there, and the activities of the Antarctic Treaty system.

Those in the international community who are not party to the Antarctic Treaty system and not involved in it have raised the point that there is a lack of available information on the treaty system itself and on the activities that take place in Antarctica. In the last three years, the response of the system has been to make available a much wider range of information on what's going on in Antarctica and on the meetings themselves. Documents from the early consultative meetings are being declassified. The treaty system is opening up to allow non-consultative states, which do not have decision-making status in Antarctica, to participate in consultative meetings. In 1983 they were invited to take part in the consultative meetings which take place every two years and in 1984 to take part in the mineral regime negotiations which Tucker has already told you about.

There's also been a recent growth in efforts to consider new or improved means of environmental protection, an issue that is of great concern to the environmental organizations I work with in Washington. They've looked at application of environmental impact assessment procedures, improving waste disposal procedures in Antarctica, and the development of protected areas concepts, both in scope and in numbers, as applied in Antarctica. These are ongoing subjects before the consultative meetings that I'm sure will be considered in the future.

Having supported the system, I'd hate to see those who take part in these Antarctic decision-making meetings become too complacent. I think there are a number of areas where the operation of the system should be improved. I would stress that it's the operation, not the fundamental structure, that should be altered. I'm going to discuss improvements in three subject areas: environmental protection and conservation, international participation, and compliance with the treaty system.

Ambassadors Pinto and Koroma noted the importance to the international community of protection of the Antarctic environment and conservation of resources there. Scott Hajost mentioned that the basis for the measures that evolved under the Antarctic Treaty system to protect the environment is Article 9 of the Antarctic Treaty, which refers to conservation of marine living resources. A number of speakers both on

this panel and in the literature talk about how the Antarctic Treaty system has addressed conservation issues before they arise -- conservation of seals, marine living resources, and now minerals. The Antarctic Treaty mechanism also early on in 1964 declared Antarctica a special conservation area in the agreed measures adopted in 1964, as Scott and others have noted in their papers.

My question is whether the Antarctic Treaty system is going to remain in the forefront in environmental protection and conservation policies. In that context I would note that the 1980 Convention on the Conservation of Antarctic Marine Living Resources when adopted incorporated a unique, forwardlooking ecosystem-wide standard for conservation policies not only compatible with the LOS Convention but one which further developed incipient concepts for fisheries management in that Convention. Yet CCAMLR is currently having some difficulty in agreeing on conservation measures for marine living resources, based on the claim that there is not sufficient information made available by States Parties on historic and current efforts to fish in the area.

Second, under the Antarctic Treaty itself, environmental impact assessment procedures are under ongoing consideration. Article 240 of the Law of the Sea Convention addresses marine scientific research and mentions that environmental protection provisions elsewhere in the treaty should be applied to marine research projects. The LOS Convention probably goes a bit further in obligating states to undertake environmental impact assessment of their scientific research projects than does the Antarctic Treaty and the recommendations adopted under it. There's also been some reluctance, some wariness, I would say, within the Antarctic Treaty mechanism to take on those obligations with regard to mining.

In other international mechanisms such as the UNEP, a series of principles applying to environmental impact assessment refer to the obligation to consult with other potentially affected states. In the Antarctic Treaty mechanism a number of the environmental groups have encouraged the dissemination of impact assessments to the other states in the system for comment prior to any final determination to go ahead with an activity. The policy has not yet been adopted.

With respect to the ability of the Antartic Treaty system to anticipate in a more comprehensive fashion information and policy requirements for Antarctic conservation, there has been an initial effort to look at information needed for effective environmental management, to develop policies which would stimulate collection of that needed information, and to coordinate scientific research within the Antarctic treaty system. But the anticipated growth in scientific research, logistics, prospecting for mineral resources, tourism, settlements, and fishing will require improvements in coordinated policy development. The Antarctic Treaty system does not at the moment have a very effective mechanism for doing so. And the system may be falling behind other international fora in applying the concepts of land-use planning and protected areas.

On the other issue of international participation, I sympathize with the view expressed by Ambassadors Pinto and Koroma on the need to promote wider international participation in Antarctic events, and I'd like to address the substance but not necessarily the structure of what they're looking at. Among the benefits of the greatest good to the greatest number over the longest term that might accrue to the international community from Antarctica are the results of scientific research, and the consultative parties have recently made more information avail-

able on scientific research. Ambassador Djalal yesterday asked if in the context of the Law of the Sea Convention states were actually explaining how scientific research would be of benefit to them and offering participation in that kind of research. Within the Antarctic Treaty system states could go further to respond to the interest of other states in Antarctic science and to bring them on board in cooperative research projects that are now carried out by parties to the treaty.

Another benefit to the international community is environmental protection, which I will not go into any more.

A third is in the area of decision making. Many of the states in the international community have expressed a desire to take part in Antarctic decision making. Participation by the non-consultative states as observers has effectively brought them into decision making. Technically they are not decision makers, but they sit in a forum where decisions are taken by consensus and they can freely express their views on any subject before the meeting.

Chris Pinto didn't actually specify his proposals, but he mentioned that one modification to the system would be to elect as consultative parties states that are acceding members to the treaty. If criteria for states to qualify to make decisions in the Antarctic Treaty system could be expanded to include limited scientific research efforts, perhaps this form of participation in scientific research could qualify states for decision-making.

I would also like to stress the role of international organization observers in decision-making. Scott mentioned how they play a role in the marine living resources convention and Tucker mentioned that they are being considered for observer status in the different institutions of the minerals regime. Representation through these international organization observers of the wider spectrum of members of the international community is another way to express interest in and influence policy within the Antarctic Treaty system.

Another form of benefit to the international community from the Antarctic Treaty system is addressed in the Law of the Sea Convention: actual revenue or resources. In the Antarctic minerals negotiation, the delegation from Chile proposed that some of the revenue from Antartic mineral resource activities, if and when they ever do occur, be used for the wider benefit of the international community in environmental research or scientific research of some form.

Finally, the last mode of participation in the Antarctic Treaty system is participation in actual activities. Tucker has mentioned that there would be some incentives for joint participation in minerals activities. I would also refer back to what I just said about expanding the opportunities for participation in science under the Antarctic Treaty system.

Turning then to the third issue, compliance, many writers have referred to the inspection procedures in the Antarctic Treaty in 1959 as being in the forefront of international verification or inspection procedures for any international agreement. I think it was true then; I wonder whether it's true now. I was particularly struck by Colin Keating's remarks on verification in the South Pacific Nuclear-Free Zone Agreement. He mentioned that that treaty calls for regular reporting requirements, would allow the Secretariat to initiate consultations on matters arising under the Nuclear-Free Zone Agreement, and would provide for a consultative committee to consider complaints triggered by one state if there is felt to be a problem with compliance or verification. The institute I work for, IIED, has for a long time been trying to

promote more detailed reporting requirements by States Parties to the Antarctic Treaty system on how they are complying with Antarctic measures both legislatively and in practice. I would definitely support Colin in the application of his concept of increased reporting requirements within the Antarctic Treaty system. Tucker mentioned that in relation to minerals prospecting they are considering an accelerated procedure for examining activities that may not be consistent with measures governing prospecting. Similar procedures might be considered more widely within the Antarctic Treaty system, so that a question about compliance with any aspect of the system can be automatically investigated and action taken on it.

Many of you may have heard of "the French airstrip incident." The French built an airstrip that raised questions in the environmental community as to whether it was an environmentally sound operation and whether it actually violated some of the Antarctic Treaty measures. There was no investigative procedure to which the questions could automatically be referred to avoid having to scurry around on various bilateral diplomatic consultations to find out. In that area of compliance I think the Antarctic Treaty system may have a little way to go to catch up with wider international practice.

My final comment is a plea to look for pragmatic solutions based on political compromise to improve the operation of the system, to address the questions that have been raised by the wider international community on how to increase participation, how to improve the benefits to them from that system. Calls to resolve the claims or the status of the unclaimed area, or wishful thinking that the claims will go away will not solve any problems. Nor is there going to be, on the other hand, a fight between the claimants and non-claimants. Two of our speakers have concurred on the value of the Antarctic Treaty system. So I think it's far more worthwhile to look at accommodations, at how the system can evolve in a manner that takes account of the questions raised about it.

Eduardo Ferrero Costa: We have sixteen minutes to answer questions or to receive brief comments from the audience. Professor Oxman.

Bernard Oxman: Mr. Scully noted that special regulatory bodies, which would include directly interested governments, would be formed to deal with mining activity in particular areas of Antarctica. I have no quarrel with these principles, but Mr. Scully went further. He said that a government that claimed an area automatically would sit on such a body. Now let me reassure Ambassador Zegers that I believe the result is correct, but I think the reasoning that Mr. Scully gave is dangerous. The claimant government should sit on the regulatory body because it has demonstrated a historic interest in the area, not because it has made the claim. The claim is and must remain a contested legal manifestation of what is uncontested, and that is the historical interest of the claimant state. I don't regard this as a nitpick. If we are to preserve the Antarctic Treaty system for the future, then Lee Kimball is correct that we must recognize that one of the ever-present threats to that system is nationalistic pressures on the governments of some claimant states. We must deal with those pressures as a political reality, but we must also be careful not to take legal steps that would increase those pressures in the future. I fear that Mr. Scully's articulation of the role of claimant states will make it harder for the governments of some claimant states in the future to maintain the record of restraint and cooperation that they have shown in the past.

Fernando Zegers: I would like to respond to Bernard Oxman, with whom I've shared so many years in the Law of the Sea Conference. The reference to claimants is perfectly objective, because claims are a legal fact and their recognition as such does not necessarily mean recognition of sovereignty and, anyhow, it exists in the Antarctic Treaty itself. Besides, after negotiation of the regime of mineral resources there's little left to complete the Antarctic Treaty system. So I believe that references now contemplated are the very least needed to make an agreement possible.

Tucker Scully: Just a brief comment on Bernie's point. I don't think the question of the presence of relevant claimant states, to use current parlance, on a regulatory committee in and of itself poses the difficulty that he raises. The question is the selection criteria which will end in that result. It's been my view that the reason the Antarctic Treaty system as a whole operates and has operated effectively is that it does relate decision making to concrete interest. I think that in a selection mechanism for a regulatory committee that would result in claimant state membership, the same criterion would have to be applied.

Alan Hutchison: I have a question directed to the two representatives from the U.S. State Department. We got a very excellent description of the environmental protection laws for any future mining or resources development in Antarctica, yet Ms. Kimball mentioned the case of the building of the French airstrip, which many environmentalists claim will seriously damage, I believe, either an Emperor or a King penguin rookery. Are there any provisions to require environmental impact statements or to apply the same type of strict environmental controls you're going to have on mining, on the present activities of the treaty members?

Eduardo Ferrero Costa: I know Tucker or Lee would like to answer, or Scott. I would like to say first that persons on the panel are invited and come here on a personal basis and not as representatives of any government.

Scott Hajost: I'll try to address that question. I appreciate Lee's comments on the issue of environmental impact assessment. It has been a subject of considerable discussion at the Twelfth Consultative meeting and at the Thirteenth Consultative meeting that was recently concluded. The Antarctic Treaty system from the early Consultative Meetings has dealt with the assessment of environmental impacts. While there may not be a specific set of procedures in place pursuant to an agreed recommendation that in essence is the equivalent of the U.S. National Environmental Policy Act or the Executive Order 12114 Environmental Effects Abroad of Major Federal Actions, a variety of Treaty measures address assessment of impacts on the environment and indeed SCAR has recommended to the parties a number of steps for consideration of environmental impact assessment. We anticipate that more detailed procedures for environmental impact assessment, consultation, and exchange of documents will continue to be discussed at Consultative meetings. There is already an informal practice among some of the Contracting Parties to exchange environmental review documents; we, for instance, have provided ours. [Note: the Fourteenth Antarctic Treaty Consultative Meeting adopted a Recommendation on environmental impact procedures. (Rio 5-16 October 1987)]

You asked a question about the minerals regime. It will contain detailed environmental obligations and assessments of environmental impacts by the institutions and by the States Parties concerned. So there will be a full consideration of environmental impacts.

Alan Hutchison: Are these provisions that were applied by the French when they made the application to build the airstrip?

Scott Hajost: I would say the French think so.

Colin Keating: I would like to comment on what Ambassador Koroma said, and I request his comments in return. He was advancing an interesting and fascinating new principle of international law: where there is dispute or lack of consensus about sovereignty, the area in question and its resources should be internationalized. I would suggest that if that principle were applied generally, very large areas of the African continent would be under international administration. Take an example in my part of the world, the South China Sea. It's a very large area, about as large as Antarctica, with the same kinds of resource potential, where there's an area of disputed sovereignty involving five or six countries, including the Philippines, Vietnam, Malaysia, and China. If it were proposed that the United Nations should declare that area the common heritage of mankind, what would the response of the countries involved be? I think it would be identical to the response of the countries that claim sovereignty in Antarctica, and I think that the principle that's being advanced is not one which is generally accept able. I would be grateful for Ambassador Koroma's reply.

Abdul Koroma: I was certainly not attempting to proffer a new thesis of international law on the resolution of territorial conflicts. We know

that the Charter of the United Nations is geared to the prevention of conflict. Antarctica is a whole continent, and parties have competing claims, and now the international community has declared a general interest in it. I thought the best way to encompass both the conflicting claims and states that have not made any claims to the territory would be to internationalize it. This, as you will agree, is not a new solution; we have had cases of condominiums or internationalized territories in the past. It was in that respect that I advanced such a proposition. It's not that every territorial boundary dispute should necessarily be internationalized.

Eduardo Ferrero Costa: The last question.

Geoffrey Dabb: I was amused by Ambassador Pinto's delightfully cynical aphorism, "If it can't be fixed, it ain't broke," but I know that he's not a cynical person, so he probably didn't really mean it that way. Slightly reformulated, it is very close to an obvious wisdom in international affairs, "If it can't be fixed, it can't be fixed."

Eduardo Ferrero Costa: I would like to thank the seven members of the panel for their comprehensive and interesting presentations and comments.

PART VI:
VIOLENCE AT SEA

INTRODUCTION

Jon Van Dyke
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Nobody needs an introduction to this morning's topic, violence at sea, because we have been reading about it all too frequently. There has been an effort at the international level to deal with the problem of terrorism. This effort has not resulted in the drafting of a comprehensive document, but it has dealt with separate aspects of the problem more successfully. In the first half of this morning's session, we will look specifically at the problem of piracy and try to determine whether the legal definitions of piracy can be tightened or applied more appropriately to modern problems. Then we will move from piracy to other aspects of violence at sea, such as the bombing of the *Rainbow Warrior* in New Zealand, the mining of harbors in Nicaragua, and the attacks near Libya.

Our first speaker, Captain Thomas Robinson, has graciously agreed to deliver a paper, prepared by RADM. J. W. Kime and Mr. Daniel Sheehan, which looks at the scope of the problem. Captain Robinson is a graduate of the Coast Guard Academy and also has a Master of Science degree from the University of Michigan. He has served aboard Coast Guard cutters in the North Atlantic patrol and has most recently been marine safety officer in Kentucky. He will return to Washington, D.C. shortly, where he will assume the duties of Chief of Port Safety and Security responsible for Coast Guard enforcement and safety programs in U.S. ports, harbors, and coastal areas. He served as alternate U.S. delegate to the Marine Environment Protection Committee and as an advisor on counter-terrorism issues to the U.S. delegate to the Maritime Safety Committee of the International Maritime Organization.

Our second speaker is Burdick H. Brittin, who will address in more detail the legal parameters of the definition of piracy and how it might be modified. Burt received a Bachelor's degree from Union College, a J.D. from George Washington University Law School, and did further graduate work at the Wharton School at the University of Pennsylvania and the National War College in Washington, D.C. He joined the Navy and made his first contact with violance at sea at Pearl Harbor on December 7, 1941, He served on naval vessels during and after the war and was later stationed at the Pentagon, working his way up to be the Director of the International Legal Division of the Navy. In 1964, he left the Navy, joined the Foreign Service, and spent the next ten years working on law of the sea activities, including resolution of disputes concerning uses of the seas and preparation for and participation in the Third UN Conference on the Law of the Sea. He is now on the Board of Directors for the Council of Ocean Law and is active in many ocean-related activities. His fine textbook, *International Law for Seagoing Officers*, is now in its fifth edition and has been translated into six languages.

Our first commentator, Captain William L. Schachte, has had a long and distinguished naval career. He first served as a line officer and was stationed in Puerto Rico. In 1968 he volunteered for Vietnam duty and saw his tour of violence at sea operating out of Cam Ranh Bay. On leave from the Navy, he attended law school at the University of South Carolina and returned as a trial counsel in the Navy Legal Services

Office. He was Assistant Force Judge Advocate on the staff of the Commander of the Naval Surface Force at the U.S. Atlantic Fleet and again took leave to obtain a Masters of Law degree in international law with highest honors at George Washington University. Since then he served as the head of the law of the sea branch of the Navy Judge Advocate General's International Law Division and as staff assistant in the office of the Department of Defense representative for the law of the sea. In this capacity, he served as a member of the U.S. delegation for the final sessions of the UNCLOS III negotiations. He became Special Assistant for Ocean Policy Affairs after the end of the UNCLOS negotiations and was the Department of Defense Inter-Agency Coordinator on the President's Navigation and Overflight Program. He also was the DOD coordinator on other law of the sea issues involving coastal zone management and deep water ports. Six days ago, he reported for duty as the Deputy Assistant Judge Advocate General for International Law.

Our second commentator is Dr. Budislav Vukas. Professor Vukas made helpful comments yesterday morning on the Antarctica panel and we have asked him to perform double duty and to offer comments on the subjects that are addressed this morning. Dr. Vukas is Professor of International Law at the Faculty of Law, University of Zagreb, in Yugoslavia. He has been a member of the Yugoslav delegation to the Third UN Conference on the Law of the Sea since 1974 and is currently a member of the Yugoslav delegation to the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea.

VIOLENCE AT SEA: SCOPE OF THE PROBLEM

Rear Admiral J. W. Kime, USCG
and
Mr. Daniel F. Sheehan
U.S. Coast Guard Office of Merchant Marine Safety

presented by

Captain Thomas H. Robinson

Introduction

What focuses our attention also focuses our efforts. The problem of piracy and other unlawful acts at sea is one which I thought had long since been relegated to novels and television docu-dramas. I had heard of the random case of piracy during my tenure as Chief of the Marine Safety Office in Baltimore. However, it was not until I was stationed here in Miami as the Chief of Operations that I became aware of the full extent of the continuing problem. Andy Warhol has stated that every individual will become famous for fifteen minutes during his lifetime because of the power of the press, in particular TV. I often think that the same situation exists for issues which often smoulder beneath an undefined level of our tolerance before we as a society, nation, or group of nations become intolerant and subsequently insistent on action to rectify the problem.

Perception Versus Reality

In the view of the authors, the perceived scope of the problem is substantially different than its reality. The recent emphasis on this issue is causing all concerned to assess their own perception concerning the frequency and severity of violence at sea. We are struck by the parallel between the focused concern that has evolved over the last two years with respect to violence at sea compared with the specific focus of the international community eight years earlier concerning pollution of the world's oceans. In the abstract and in the specific, events occurred which were significant enough to raise public awareness to the existence of a problem. In the instance of violence at sea it was initiated by horror stories concerning Vietnamese boat people, fed by a recurrence of actual pirate attacks on merchant ships, and reached its apex with the death of Leon Klinghoffer aboard the Italian cruise ship *Achille Lauro*. The names of the *Argo Merchant* and the *Sanseninia* are inextricably linked with marine pollution; so too will Leon Klinghoffer's be linked with a conscious effort to address the problem of maritime violence. Neither the ships nor the individual were the initiators but they are the symbol of the final intolerance of inaction.

Central to doing something about the issue of pollution prevention as well as acts of violence at sea is the ability to determine what the actual experience has been or what potential exists for solving the problem. During the international deliberations which preceded the development of the most recent pollution prevention conventions, the validity of statistical data was sharply scrutinized. Substantial portions of time were spent collecting, collating, and comparing and ultimately analyzing pollution incidents. In real terms there was a paucity of data. Deciding whether a pollution incident was caused by an

explosion or a collision with a subsequent explosion is similar to our current efforts in this area of piracy. Member governments of the International Maritime Organization (IMO) voiced their frustration during the pollution prevention proceedings by promulgating a conference resolution which requested that the Organization develop a data base for analysis of tanker casualties. A similar situation exists today with the issue we are discussing. Several attempts have been made to collect data and, until such time as there is a regime which develops specific criteria for collection and identifies specific sources of raw or refined data, a comprehensive picture of this problem will remain as elusive as the one the international community wrestled with several years ago.

We have been intrigued by the issue of the magnitude of the problem versus the reported number of incidents for a long time. In attempting to see what data were available we set the following conditions on our efforts. First, we would exclude incidents that occurred with recreational boats as well as incidents that occurred with belligerents in a declared or undeclared war. We would like to explain our reasoning. Before we started this collation we decided to examine why we were interested. Like pollution prevention it is more than an academic exercise. We are interested because violence at sea threatens our environment in its fullest sense. It threatens our citizens, it threatens the fabric of our way of life. Therefore, this exercise must have as its endpoint a series of measures available to states to deter this violence. If regimes are in place that address violence between citizens of that state it is an issue that is legitimately a sovereign one unless it extends to violence to citizens external to that state. Violence at sea to belligerents in a declared war is a consequence of war. Violence to non-belligerents on behalf of belligerents is to a degree constrained by the rules of war.

Not being experts in the finer points of international law concerning the distinction between piracy, terrorism, and other unlawful acts, we attempted to define what we were looking at in terms of relationships.

* The location of the act of violence relative to its flag state, the coastal state;
* The citizenship of the perpetrators, the crew, and the passengers;
* The relationship between the parties.

When attempting to rationalize these criteria into something that we could evaluate to address the magnitude of the problem, it became evident that work which we had been involved with in IMO had once again served as a focal point for international data collection. IMO, through Resolution A 545(13), requested its party nations to do several things. First, governments were urged to take all necessary measures to prevent and suppress acts of piracy and armed robbery from ships in or adjacent to their waters. The resolution also called on governments to report to the IMO all acts of piracy against ships flying their flag and to inform the Organization of action taken to implement the resolution. IMO has requested the information in a specific format.

* Type of ship and its gross tonnage;
* Date and time of the occurrence;
* Location of the incident;
* Details of the incident;

* Consequences for the crew, ship, cargo;
* Action taken by the master and the crew;
* Reporting state;
* Action taken by the coastal state.

While all incidents have clearly not been reported, the magnitude of the problem to commercial vessels in international trade can be examined. *Table 1* is a synopsis of the incidents by year and by coastal state. The reported incidents do not include attacks on Vietnamese refugees. It is my opinion that many member governments of IMO have taken positive action to deter this type of incident. The reasons are manifold. First, the reports are published in an official international report which names places, dates, locales, and action by the coastal state. Second, there is substantial pressure exerted by the membership of the Organization when one country asks another: "What have you done in accordance with IMO Resolution A 545(13) to suppress these acts of violence?" Many countries feel that their national honor has been called into question in the plenary sessions of IMO. This has been, in my view, a powerful tool. A similar situation exists when IMO publishes the list of flag-state ships which have been detained because of violations of their various convention responsibilities. No one wants to make the list.

Table 1: Piracy Reported to IMO

Area of Reported Piracy	1983	1984	1985
Bangladesh	2	1	
Belgium	1		
Brazil	2	1	3
Cameroon		2	
China			1
Ecuador	1		
Guinea		1	2
Guyana		1	
India		2	
Ivory Coast	1	9	3
Jamaica		1	1
Liberia		5	
Malaysia	1		
Maldives			
Nigeria	7	3	2
Panama		1	
Senegal	1	1	1
Sierra Leone	1	4	4
Straits of Malacca		1	1
Singapore	2	4	3
Tanzania			2
Zaire	3	2	
	22	39	23

The mystery is why more countries haven't submitted reports through the appropriate channels to IMO. At variance are the reported number of incidents described in Villar's new book entitled "Piracy Today: Robbery and Violence at Sea since 1980." Villar reports over 400 incidents, which is at variance with the totals listed in the IMO reports. While the reports from IMO begin in 1983 and go through 1985, their total is only in the 90s. Presuming a certain lag time involved in the reporting of such incidents and assuming for comparison purposes that the average reported incidents per year to IMO is 26, a total for five years would only be 130. We believe that companies are deterred from reporting specific incidents for a series of reasons. First, they may be concerned with potential increases in insurance premiums. Second, they may be concerned with potential retaliatory discrimination from the coastal state; and, third, they may feel that this is one of the potential risks of the sea and their experience is in fact an isolated incident.

Our experience in the regulatory programs of the Coast Guard tells us that the number of actual incidents is far greater than any of us think it is. We have conducted several verification exercises to determine actual versus reported maritime casualties, and depending on the criteria the variance was quite substantial. This leads to our view that until such time as we make specific detailed and formal recommendations to the appropriate international organizations we will not have a true picture of the problem. We are going to begin deliberations with our Department of State and other affected U.S. agencies to formalize a proposal to IMO on this issue. These recommendations will complement the efforts which are currently underway. There have been some changes to the current method of reporting of incidents at IMO. By way of an update at the most recent meeting of IMO's Maritime Safety Committee (MSC), the issue of violence at sea was discussed under two topic areas. "Measures to prevent unlawful acts against passengers and crews on board ships" and "piracy and armed robbery" were discussed as separate and distinct topics. On the former issue, which is directly attributed to the *Achille Lauro* affair, draft measures were circulated to governments with a view toward finalization at the next MSC meeting in September 1986. Piracy and armed robbery, which have been under consideration for several years, resulted in the following action by the Committee.

> The Committee decided that reports on piracy and armed robbery received by the Secretariat from the flag States should be forwarded to the port or coast States concerned which should be invited to comment and advise on the action it had taken in this regard. The Committee also invited Member Governments to report on cases where attacks were successfully repelled or thwarted and also any measures recommended to ships flying their flag.
>
> The Committee noted information provided by the Secretariat that a maritime expert had been stationed in Singapore with financial support from the Government of the United States and had advised that suppression of piracy in southeast Asian waters could best be achieved by assisting southeast Asian countries to enhance their maritime search and rescue capabilities and improve their maritime radiocommunications and surveillance capabilities in the areas where incidents of piracy and armed robbery had been reported. The Committee also noted that a subregional seminar on Maritime Search

and Rescue was expected to take place in Singapore in April 1986 (MSC 52/25/1).

Both of these actions are indicative of the willingness as well as responsiveness of IMO to address the continuing problem of violence at sea.

Conclusion

The problem of violence at sea is greater than indicated in current international mechanisms for reporting such incidents. Progress can be made on this problem but only after we have defined the scope of it. We think we are having a positive effect, but the only way the community of nations can know for sure is to institute a cross-checking mechanism which is subject to review, analysis, and verification.

THE TWO FACES OF PIRACY

Burdick H. Brittin
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A close and highly respected friend of mine, Cecil Olmstead, opened his comments on commercial navigation at the March 1986 Seminar of the Center for Oceans Law and Policy in Bermuda as follows: "The topic of commercial navigation on the oceans seems almost a non topic these days." My response to Cecil is two dimensional. The first, and most briefly, is the disruption of navigation in the Persian Gulf area as a direct result of hostilities between Iraq and Iran. The magnitude of that disruption is succinctly presented in the chart and tabulation of attacks distributed to you this morning.

The second dimension has to do with violence at sea other than the product of armed conflict; it is the central theme of this paper. The magnitude and scope of such violence has been most ably presented by Captain Tom Robinson, USCG.

Both of the above activities certainly have an abrupt impact on freedom of navigation. In prior conferences on violence at sea within the past year, I was struck by the repeated pleas to strengthen enforcement procedures and capabilities. Granting that major enforcement problems have to be met, the core question is the adequacy of the governing law that has to be enforced.

That governing law, in large measure, is the law of piracy. It is spelled out and adopted in the 1982 LOS Convention in Articles 100 through 107. They essentially reiterate the piracy provisions set forth in the 1958 Convention on the High Seas ratified by numerous countries including the U.S. Earlier, in 1956, the UN International Law Commission had formulated the same type of provisions. It follows that existing law is certainly the majority view of the world community. In none of the above fora did it produce strong or strident debate. In reality, from the 1940s up through the 1970s, piracy was relatively dormant; indeed, in 1957 and 1958, many delegates to the first LOS Conference were inclined to forget piracy on the basis that it was no longer a very real problem. Several were of the same opinion at the Third LOS Conference.

Historically, and particularly in the 18th and 19th centuries when piracy was of major concern to the world community, there was a second view of the international high seas crime of piracy. In brief, it sought to broaden the definition as set forth in Article 101 of the 1982 Convention which is relatively restrictive. This view, it was argued, should in its broadest application encompass any armed violence at sea which was not a lawful act of war. It is still, at this stage, a minority view.

It is my purpose here to raise some issues that suggest desirable changes to the present law of piracy to better meet the challenge of violence at sea. Two examples are pertinent.

The first case is that of the Portuguese cruise ship, *Santa Maria*, which took place in January-February 1961. When the ship sailed from Curacao, Netherlands West Indies, for Miami, some seventy passengers, secretly armed with machine guns and grenades, came aboard, along with the other passengers who had boarded at various points on the cruise. Forty vacationing Americans were on the passenger list. Admiral R. L.

Dennison, U.S.N., then Commander in Chief of the U.S. Atlantic Fleet, describes the unfolding incident as follows:

> The initial report was received at Atlantic Fleet Headquarters in Norfolk late on the afternoon of January 23rd from the United Kingdom's Senior Naval Officer, West Indies, who was at Santa Lucia where Captain Galvao, who had taken over the ship, had put ashore by boat several wounded members of the *Santa Maria*'s crew. The report advised that the cruise ship *Santa Maria*, registered under the Portuguese flag, had been forcibly taken over by a group of about 70 armed passengers. It appeared that piracy might have occurred. It was requested that the U.S. Atlantic Fleet arrange and coordinate a search for the ship in areas to the north of Trinidad. Instructions at this time to U.S. war ships were to board the vessel to determine if piracy in fact had occurred and, if so, to bring the ship to the nearest United States port, presumably, San Juan, using force as necessary.
>
> Expert legal opinions in the United States were unable to support a finding of piracy in international law. Therefore the need no longer existed to determine piracy by boarding and exercising force. Appropriate modifying orders were dispatched to the naval forces involved.

The second case is much more current. On October 7, 1985, armed men seized the Italian cruise ship *Achille Lauro* and held 420 persons hostage. The press labeled the act as piracy. As the facts emerged, it became clear that the seizure was carried out by four members of the Palestine Liberation Front, a group that had split off from the Palestine Liberation Organization (PLO) and then had splintered into several factions and engaged in various acts of terrorism. They had boarded the *Achille Lauro* in Italy as passengers with hidden firearms and false passports and seized the ship at sea after it departed from Alexandria, Egypt. The terrorists' essential demand was the release of fifty Palestinian prisoners held in Israel. While on board, they did not steal or rob; they did use force and intimidation on the passengers and crew and killed an elderly disabled American. They controlled the movements of the ship. In total, their acts were entirely lawless. They surrendered the ship to Egyptian authorities off Port Said after extensive negotiations and eventually ended up in Italian custody in Sicily.

Interrupting the narrative, let us look at Article 101 of the LOS Convention.

It is clear in the case reports from both the *Santa Maria* and the *Achille Lauro* that a second or pirate ship was not involved; yet the use of such a pirate ship is an essential ingredient for the act to be considered as piracy. In the *Santa Maria* case, the men involved came aboard peacefully while the ship was moored; that fact prompted the U.S. not to label the act as piracy. In the *Achille Lauro* case, the perpetrators boarded the ship as disguised passengers from a port in Italy.

The requirement for "another" ship, ostensibly the "pirate" ship, in my judgment, seems too limiting, for it makes a technical point of how the pirates arrived aboard the victim ship. It would appear that just how or where the "pirates" got aboard is of little consequence as long as their purpose was to take control by use or threat of violence.

The primary test of piracy is the act itself and not the mechanics of setting the stage for the act. The present requirement presents the arresting ship with the burden of trying to determine just how the boarding took place before acting to stop the violence or theft.

Some respected experts in international law sustain that view:

Oppenheim:

> The crew or passengers who, for the purpose of converting a vessel and her goods to their own use, force the master through intimidation to steer another course, commit piracy as well as those who murder the master and steer the vessel themselves.

Higgins and Colombos:

> Piracy is *any* armed violence at sea which is not a lawful act of war.

Let us return to the *Santa Maria* incident.

At the time of the takeover by Galvao, a crew member of the *Santa Maria* was killed and several were wounded. Although the passengers were guarded with drawn pistols, none were really molested nor was any personal property taken. Galvao, who led the group of "passengers" who took control of the *Santa Maria*, claimed that he and his men were part of the "Iberian Liberation Movement," a political movement aimed at overthrowing the existing governments of Portugal and Spain. The group was composed of Portuguese, Spaniards, and Latin Americans.

Who was Henrique Galvao? Fenwick, in a short comment on the case noted that, "He (Galvao) said he was an insurgent, that his purpose was to overthrow the tyrant of Portugal, that he was taking the first step in a revolt against the dictator; that the Portuguese colony of Angola was awaiting his arrival." Further reports give us a fuller picture of the man. The *Herald Tribune* characterized him as, "The master *pro tem* of the Portuguese liner *Santa Maria* is a hawk-faced revolutionary convicted three times for trying to overthrow Premier Salazar."

In the *Achille Lauro* case, the perpetrators' essential demand was the release of fifty Palestinian prisoners held in Israel. Their leader, not on board, was a man named Abbas who headed a splinter group of the PLO and believed that the only way to defeat Israel was through violence. They took control of the movements of the ship, killed an elderly disabled American, and intimidated the passengers and crew.

Again, let us look at the definition of piracy as in sub paragraph (a) of Article 101 -- the words "for private ends" are pertinent. After Galvao and his helpers killed and wounded members of the crew and steered the ship on courses of his choice, he was finally persuaded, by an international net of warships closing in, to enter the port of Recife, Brazil where he surrendered to local authorities. He did not plunder the ship nor its passengers -- although he certainly produced a high degree of anxiety in the crew and passengers. What was his motive? Was it "for private ends" or something else? "For private ends" is normally interpreted to mean that the act was for private material gain or personal hatred. If that is the situation in any given case, the act can be determined to be piracy.

The need for determining what the motive was for the act causes a major problem for those trying to suppress violence at sea.

In my view, it is most questionable to try to establish motive at the time of any given act of alleged piracy for, in the usual case, the external facts are all that are available. The subjective motivation behind the act can, most frequently, only be determined in retrospect long after the violent act itself. What the perpetrator might say at the time of the act is only a bit of evidence of his true purpose and should not be the governing factor in a final determination of whether piracy was committed or not. In essence, it is better in laying down a general principle to be content with the external character of the facts without entering too far into the often delicate question of motives. If such were the standard, reaction time by arresting units would be compressed to the benefit of persons and property. In both cases, the external facts all pointed to an act of piracy except for the technical matter of how the perpetrators got aboard.

Wheaton is one of a group of authorities who, over the years, has held to the position that "for private ends" is too narrow a test. He said, "Piracy is the offense of depredating on the high seas without being authorized by any sovereign state, or with commissions from different sovereigns at war with each other." In effect, he was proposing that the search for motive should be restructured in large measure.

But central to the *Santa Maria* case was the fact that Galvao proclaimed that he was an insurgent in revolt against the governments of Portugal and Spain. Did his claim of insurgency place Galvao outside the penalties accorded to acts of piracy and give him the specialized status of a belligerent with the rights that flow from that status?

In like context, implicit in the action involving the *Achille Lauro*, Abbas considered himself to be in conflict with Israel -- did that give him the specialized status of a belligerent with the rights that flow from that status?

Insurgents are persons who are engaged in a political struggle; classically, they are distinguished from people who are acting "for private ends."

Insurgency necessarily means fighting as in a revolution, but, in this case, Galvao had no base of operations nor was there any open fighting in Portugal or Spain to so constitute a revolution.

The status of insurgency is not one to be conceded to any and every citizen who believes that the government of his country is tyrannical and should be overthrown. It takes something more than that. A recognition of insurgency by third states or the acknowledged open fighting for control of an area by an organized group against a sovereign state could be the additional factors required.

For Abbas and his few rag tag followers, his actions were not prompted or recognized by the PLO which has a certain degree of legitimacy as a belligerent -- he had no territory under his control, no apparent organized military effort; endorsement from the world community was hard to find.

Fenwick takes the thought a step further:

> It matters not that there was no further violence beyond changing the course of the ship and leaving the passengers in suspense as to their fate; it matters not that Galvao's followers were not *hostes humani generis* as pirates are described; they killed and robbed on the high seas, under circumstances not justified by the law of insurgency.

If the acts of Galvao and Abbas do not meet the test of insurgency, can it be said that they disqualified themselves as pirates because their acts were not "committed for private ends"? It is difficult to sustain a private goal in these instances, for personal material gain or private hatred were not the objectives sought. Conversely, the acts had political propaganda value and served as a possible catalyst for heightening conflict. Consequently, the conclusion that must be drawn is that Galvao's and Abbas' ventures were for public ends -- stillborn, but nonetheless a public venture. Thus an anomaly is present; Galvao and Abbas were not insurgents nor did they pursue a "private end"; lacking that important qualification, they were not pirates under Article 101 of the Convention. If neither insurgents nor pirates, what were they?

I would submit that not being, under the law, pirates nor insurgents, the only other possible classification for Galvao and Abbas is something that is almost a weekly occurrence in the decade of the 80s -- terrorists. In today's vocabulary, Galvao and Abbas were terrorists. Unquestionably, the great majority of terrorist acts take place on land with few reported cases involving actions at sea (about sixty cases in this decade as reported by IMB), but as seen from comments by other speakers here, the threat is present for unprotected ships, oil rigs, and smaller craft at sea which are attractive targets. Pragmatically, it is difficult to distinguish the result of an act of piracy from that of an act of terrorism. At the time of the *Santa Maria* incident, some reporters felt strongly about the U.S. decision, *i.e.*, *The New York Times*, "The minutiae of definitions of piracy are absurdly irrelevant. The gang had behaved as gangsters and pirates and that was how the U.S. Navy, with its long tradition of defense of the freedom of the seas initially proposed to handle them."

It is submitted that in today's world climate, dramatic efforts by terrorists such as Galvao and Abbas will probably be repeated and will have to be dealt with. It is manifest that an effective response to terrorism at sea requires, in the final analysis, cooperation on an international scale. One possible course of action, although remote today, would be to seek amendment to Article 101 of the LOS Convention deleting (1) the requirement of a second or pirate ship and (2) substituting the phrase "without due authority" in place of "for private ends." Lacking that, the anomalous controversial status as presented in the described cases prompts me to suggest that where a like situation arises in the future, the world community should nonetheless react as though an act of piracy had taken place. We can't afford to conclude that because the violence described doesn't meet the strict criteria of piracy, the incident should be treated as anything less heinous.

Piracy in International Air Space

It is noted that Article 101 applies to aircraft as well as to ships. There are several common threads that are compounded in the air.

(1) Force or the threat of force shifted control of an airliner from the authorized pilot to another person(s) at grave danger to the passengers and plane;
(2) political motives in lieu of "private ends" appear to be the predominant goal being sought; there is no recognized belligerency or insurgency involved -- the vast majority of cases are carried out by terrorists;

(3) while under forced control, the airliners cross international boundaries and parts of the airspace above the high seas;
(4) only one aircraft is involved, *i.e.*, there is no second or "pirate" aircraft.

In viewing the common features of air incidents against the criteria for piracy (as laid down in Article 101) it is apparent that the test of an act committed for private ends and the requirement that "another" aircraft be involved are missing. It follows that the acts cannot be considered piratical under the legal constraints of Article 101.

In addition to the rationale set forth heretofore as to amending and therefore broadening the concepts of piracy, I would suggest that, in regard to aircraft, practical considerations make an amendment even more mandatory. Query, is it not much more difficult for an aircraft to physically commit an act of piracy against another aircraft or ship than to consummate the piracy in the sole aircraft itself? For those bent on piracy, the apparent choice is to board the chosen aircraft before it is airborne. Similarly, while piracy at sea is dangerous enough, the violent act in the air is manifestly of greater immediate danger to life and property; it would appear that, if anything, stricter rather than looser control is indicated. In regard to the criteria for "private ends," it is apparent that an airplane is a poor choice of property to abscond. While in the air the usurper can maintain control, but once he lands, his control problem becomes complex indeed. In fact, cases of seizing control of aircraft in the air "for private ends" are marked by their rarity. The usual motive by organized and unorganized terrorists is to create political impact; the seizing of an aircraft in flight is most dramatic and forceful and draws attention to the cause of the doer. When one tries to balance out the motive against the act itself, it is difficult to qualify the act as something less than privacy.

Thus, it is suggested that when such acts occur over or in their consummated state transit, the high seas, they should be considered acts of piracy. The amendments previously suggested in regard to Article 101 would accomplish that end.

I will now turn to some other elements in ocean law that impinge on the suppression and control of piracy. Clearly, the suggestions I will make are rather abrupt departures from regimes that have stood the test of time and state practice. Therefore, I do not make the suggestions with the belief that they might receive current international endorsement; rather, I view them as possibilities for thought should violence at sea continue to increase.

The doctrine of hot pursuit is an old and a most valuable tool for coastal states in the pursuit and apprehension of suspected criminals who have violated the law of the coastal state. Historically, it was limited to the pursuit of vessels that had committed illegal activities in territorial waters. In the 1958 Convention on the High Seas, the doctrine was expanded to include particular acts in the contiguous zone. The 1982 LOS Convention expanded it further to include particular illegal acts within the newly recognized 200 mile exclusive economic zone.

In contrast, there is no reverse regime for hot pursuit from the high seas, where an international illegal act such as piracy takes place, into the jurisdictional waters of a coastal state. An examination, then, is necessary of what impediments or constraints, if any,

exist to hinder hot pursuit into the EEZ, the continguous zone, and the territorial sea by a warship foreign to the coastal state.

By definition, while there are particularized jurisdictions of the coastal state in the EEZ and the contiguous zone the waters therein are high seas. Accordingly, a pirate ship may be chased into and captured by a foreign warship within these zones. In contrast, the singular characteristic of the territorial sea is that the coastal state exercises overall sovereignty within those waters and its national law, including policing, applies. Thus, even though the foreign warship is acting for the common good, it may not enter territorial waters in pursuit to seize a pirate ship.

The only authority who would permit that pursuit activity within the territorial sea is Lauterpacht. I quote, "If a pirate is chased on the open sea and flees into the territorial maritime belt, the pursuers may follow, attack and arrest the pirate there; but they must give him up to the authorities of the littoral state." Should that statement govern, reverse hot pursuit would be a needed reality.

By definition, piracy is an international crime on the high seas and is not recognized as such within the territorial sea of a coastal state where domestic law applies. The present worldwide problem of piracy clearly indicates that a great many piratical acts take place within the territorial sea. With the recognized twelve-mile breadth of the territorial sea it is pertinent to ask whether the enforcement capabilities of many coastal states can monitor and respond to the growing problem in that large area off their coast. If they can't (and it appears that some can't or won't), what changes in the law would facilitate supression of piracy in that jurisdictional zone?

One thought that emerges is that, when the twelve-mile limit was negotiated, no thought was given to the rights and duties pertaining to the high seas (such as suppression of piracy) in the waters that had been high seas when the three-mile limit was in effect.

Such was the case when straight baselines became legal, as in the Anglo-Norwegian fisheries adjudication. When such straight baselines created broader internal waters, it was established that innocent passage was to be continued and recognized in such internal waters. Currently, successful operations have been advanced within the territorial sea of the Bahamas and Colombia in the suppression of drug traffic by agreement with the countries concerned. The same principle could be utilized (particularly under an initiative by the U.S., which currently maintains the three-mile limit) in the fight against piracy in the area between three and twelve miles from the coast.

Collateral to the discussion above, international law requires that "all states shall cooperate to the fullest possible extent in the repression of piracy on the high seas." For the most part, acts of piracy are concentrated in particular regions of the world such as South East Asia, the Caribbean, and the Gulf of Guinea. It is observed that when there is a common regional problem concerning other uses of the seas, international law requires the contiguous states to seek agreement among themselves or through regional organizations to meet the problem. Such is the case for fisheries (Article 63 of the LOS Convention) or protecting an area of the oceans from pollution, which includes the development of joint or regional contingency plans for responding to pollution incidents (Article 199, LOS Convention). Would not the effort to suppress piracy be enhanced if the same kind of specific obligations were made applicable to piracy?

In summary, perhaps some of the suggestions presented can serve to better equip the world community to meet and contain this modern manifestation of violence on the oceans. There are clear encumbrances in proceeding in that direction at this time. Two such encumbrances are patent:

(1) It is not practical or politically desirable to attempt to amend any of the provisions of the 1982 LOS Convention.
(2) Like attempting to define aggression, an agreed upon definition of terrorism is elusive.

What lies ahead? What emerges here from our discussion might indicate the road the international community should pursue, for fundamentally we all know that in order for the oceans to best serve the community, we need them to be peaceful and not tainted by violence.

COMMENTARY

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As Captain Robinson, speaking for RADM Kime, has told us, in the last several years violence at sea has become an increasingly important problem for the international community. To underscore his point about difficulties in obtaining accurate information, I have some data which has just been obtained from the International Maritime Bureau (see *Figure 1*), for comparison purposes. Until the *Achille Lauro* incident, attention had been primarily focused on attacks aimed at Vietnamese refugees and against modern commercial vessels. There are three major centers of such activity: The Gulf of Thailand, the South China Sea area, especially around Singapore, and the west coast of Africa, particularly the port of Lagos, Nigeria.

In the Gulf of Thailand, pirates who traditionally preyed on local vessels have, since the mid-1970s, turned their attention toward the refugees flooding out of Vietnam. The refugee exodus has also served to transform some Thai fishermen into pirates. Reports of robbery, gang rapes, torture, disfigurement, and similar atrocities are common. Despite UN efforts to assist the Royal Thai Government, refugee boats in the Gulf are still being attacked.

Commercial crime at sea in the Far East is centered near Singapore where thieves are boarding large ocean-going craft in the Singapore Strait/Phillip Channel and stealing cash and personal valuables. These bandits, generally operating along the southern edge of the Strait, most frequently attack large tankers traveling east in the Phillip Channel. Most attacks appear to be occurring in Indonesian-claimed territorial waters. In spite of a marine patrol surveillance system agreed to by Singapore, Indonesia, and Malaysia, piratical activity has continued.

On the west coast of Africa, particularly in Lagos, Nigeria, thieves board ocean-going vessels in and around harbors and steal limited amounts of high-value cargo. Almost all reported attacks have taken place in territorial waters. Nigerian anti-piracy efforts have been ineffective and short lived, brought about only by the generally increasing incidence of attack and resultant international pressure on Nigeria since 1981. The projected down-turn in the Nigerian economy as a result of falling oil prices should lead to a decline in attacks as fewer ships call at Lagos and other ports.

In the western hemisphere, piracy is not viewed as a widespread problem. In recent years there have been numerous largely unconfirmed reports of yachtjacking by drug smugglers in the Caribbean. On the whole it seems that such activity is sporadic. Relatively few confirmed pirate raids on major commercial ships have been reported since 1980 in the western hemisphere. There is no evidence of a global pirate conspiracy. Pirates in the Gulf of Thailand include a small number of Thai fishermen, and seaborne "bandits" operate in the other two major areas.

Reports of piracy, however, have increased since 1980. There is no flag country which appears to be of higher interest to piracy than another. Interestingly, some nations with large merchant fleets, such as Greece, report almost no incidents of piracy. One reason for the lack of reported piracy may be the ship owners' conclusion that these

Figure 1: Violence at Sea

	'81	'82	'83	'84	'85
1. Incidents of Piracy					
West Africa	46	29	29	20	12
Far East	26	44	34	3	13
Other Areas	7	11	11	7	3
2. Attacks on Refugees (S.E. Asia)	'81	'82	'83	'84	'85
Thailand First Half	1043	372	183	168	127
Second Half	1048	116	24	12	--
Malaysis First Half	192	143	70	135	42
Second Half	214	86	101	45	--

3. Piracy Incidents in Gulf of Thailand (1985 only)

Thailand:	#Persons Arriving	2037
	#Boats Arriving	136
	#Boats Attacked	33
	%Boats Attacked	24
Malaysia:	#Persons Arriving	4308
	#Boats Arriving	116
	#Boats Attacked	37
	%Boats Attacked	32

Source: International Maritime Bureau, 3rd Report, July.

incidents are relatively rare and the impact of the theft may be less than the likely increase in insurance rates if the incidents were reported. Soviet merchant ships are not generally targeted because they have larger crews with weapons available, which increases the pirate's risk dramatically. The short-term outlook calls for a decline due to the decrease in refugee traffic in the Gulf of Thailand and the weakening of the Nigerian economy. Over the long run, however, violence at sea may increase because of numerous political, economic, and military factors. The most notable of these is the effect of domestic political and economic factors on the governments in the piracy regions.

Since the *Achille Lauro* incident, dealing with politically motivated attacks on shipping has been the focus of renewed attention because of the violence of the attack. The temptation, of course, in searching for legal solutions to all these crimes, is to apply the legal regime of piracy.

The idea of piracy in many ways represents the lowest common denominator, because it is nearly universally recognized and condemned as a "crime against nations." The universal abhorrence of violent crime done for private ends on the high seas, in a place far from the reach of most authority, has made "piracy" a politically acceptable shorthand by which to condemn all forms of violence at sea. It is such a striking

and derogatory label that nations have defined it in their domestic legislation to include all manner of seaborne criminal acts which fall well within the primary jurisdiction of the coastal state.

Terrorism, on the other hand, remains largely undefined in the international community. Its limits are shadowy. The "one man's terrorist, another's freedom fighter," syndrome makes world consensus on terrorist acts difficult to achieve. In fact, terrorism differs from piracy in that terrorists often profess to act for "public purposes" (for example, in opposition to "colonial, alien, or racist regimes"). This complicates attempts to label many such acts as "piracy." There are those who argue that splinter groups of the PLO, and the PLO itself, for that matter, have no "State" to which they may lay claim and therefore their actions are arguably for private ends. If that is so, then their terrorism at sea is universally actionable as piracy. The PLO itself is recognized, however, in many international fora as the official representative of the Palestinian people. It would be difficult to ignore such recognition in constructing a "private ends" argument for PLO terrorism.

This complexity is one which has always plagued the law of piracy and has contributed to the misalignment between domestic piracy laws and the international legal concept. It is particularly difficult to resolve because in each case of violent crime at sea for which political causes are alleged, the level of support for the political cause in the international community will be different. Some states will recognize the validity of the political movement behind the acts and some will not. The learned treatises on piracy without exception devote attention to the problems of insurgency and recognition in the determination of when acts of "piracy" have occurred. Many of these authorities conclude that some acts may be piratical when directed toward some states but not when directed toward others, depending on the recognition status of the perpetrators claiming to act for political ends. It is important to remember that these legal arguments fit into a world with real consequences. The consequence of the determination that an incident is not piracy narrows the pool of national authorities having a primary right to take enforcement action against the hijackers.

Mr. Brittin, highlighting how this ambiguity has created confusion and hampered use of the law, has suggested as a cure some fairly dramatic changes to the current definition of piracy embodied in Article 15 of the 1958 Convention on the High Seas and repeated in Article 101 of the 1982 Convention on the Law of the Sea. His proposed changes would simplify the necessary elements of the offense, so that the term would broaden to encompass many more varieties of violence at sea. In particular, he would abandon the "private ends" requirement and incorporate acts of passengers and crew of the victimized ship or aircraft. These proposals provide a timely opportunity to debate once again some of the old issues which have plagued the law of piracy.

Article 15 of the 1958 Geneva Convention on the High Seas resists characterizing the acts which form the piracy; it creates a circular concept, defining the crime in terms of "illegal acts of violence." It leaves open the question of what acts are included within its scope, or even whether its definition is exhaustive.

Must there be an attack from one ship to another? May piracy consist of a mutiny or uprising of passengers? The International Law Commission Report of 1956 which preceded Article 15 appeared to indicate that internal seizure could not constitute piracy. Scholarly experts, however, have taken both positions, as have courts. The United

States Supreme Court has held (*Harmony* v. *United States*, 2 How. 210 (1844)) that mutiny accompanied by murder is piracy. As recently as 1971, a court in Scotland (Court of Session of Scotland, *Cameron* v. *H.M. Advocate*), defined the crime of piracy to include the seizure of a vessel by its crew using violence or threats, when the vessel is subsequently converted to their private use.

In the scholarly debate concerning the *Santa Maria* case, both the question of the scope of Article 15 and the issue of the purpose and character of the seizure were debated. (Interestingly, in light of the *Achille Lauro* incident, the debate was occasioned by the initiatives, ultimately abandoned, of several countries to take action against the *Santa Maria* to save their nationals.) In 1970, the International Law Association adopted a resolution which reopened the question, defining piracy as unlawful seizure or taking control of a ship through violence, threat of violence, surprise, fraud, or other means. The rapporteur stated that if Article 15 meant that the attack had to be launched from another vessel, then it was too narrow. During the years of the Third United Nations Conference on the Law of the Sea, which reiterated the definition of Article 15, no meaningful debate occurred. However, international law recognizes well-defined concepts for acts which are perpetrated by the crew of a vessel, such as mutiny or barratry, and which are clearly within the jurisdiction of the flag state. Similarly, domestic laws are equipped to deal with criminal acts committed by civilian passengers. As Mr. Brittin points out, the difficulty with this approach is that states may fail to assert their jurisdiction forcefully when they are intimidated by terrorist acts or in sympathy with the causes allegedly justifying the criminal acts. Consideration of this issue leads directly to Mr. Brittin's other suggestion, that of removing the *mens rea* for piratical acts.

The problem in such cases, including the recent *Achille Lauro* incident, as well as the *Santa Maria*, is the treatment of acts which would normally be considered within the scope of belligerent activity but which are committed by unrecognized insurgents. The acts committed by such persons, when they target "neutrals," may be resisted but may or may not be successfully characterized as piracy. It is an extremely difficult issue and one that has been around at least since insurgents seized Spanish warships in Cartagena in the 19th Century. The Spanish government proclaimed them to be pirates, but the British and French governments instructed their naval commanders not to interfere so long as the lives and property of their nationals were not threatened. In fact, this same type of issue was debated on the way to the codification of Article 15 of the 1958 Convention, in relation to the Nyon Agreement of 1937. The Nyon Agreement was a result of the Spanish Civil War and consisted of an agreement by nine European countries to treat as "acts of piracy" attacks on neutral vessels by unidentified submarines involved in the Spanish Civil War. The thrust of the available discussion of the issue at the Conference was that adoption of the principles of the Nyon Agreement in the definition of piracy would raise insoluble issues of insurgency and recognition.

Mr. Brittin has suggested a dramatic change in the law of piracy embodied in the Convention to accommodate such problems. His suggestion is very timely. Obtaining consensus on such a change may, however, prove as time consuming and ultimately frustrating as other attempts to punish criminal acts under the heading of "piracy" without reference to the political justifications for the acts. There is probably a historic reason that the "private ends" requirement has been as pervasive as it

has. Nations have had to deal for centuries with competing claimants for government. Depending on the way in which an internal civil struggle developed, ships which appeared to be pirates might turn out to be legitimate commissioned vessels of a government. Because of the universal jurisdiction, there is a very real risk of major political consequences under such circumstances. I personally feel that a change with those kinds of potential consequences should be approached with caution. I am wondering if a different approach, utilizing available resources, might provide some assistance to states while the larger legal issues are being debated.

By far the greatest numbers of incidents which arise do not have the dramatic political aspects of the *Achille Lauro* case. Most are regional problems of robbery and violence previously mentioned. These problems may respond to somewhat different approaches than the single, dramatic terrorist incident which captures the attention of the world. Looking at the coin of violence at sea without looking at whether we are viewing one side which is directed at private ends or whether we are looking at the side which purports to support political objectives, it is apparent that we are looking at unlawful acts of violence at sea which constitute a menace to all maritime nations. Indeed, what we are discussing are acts that are clearly inimical to the safety of ships and the peace and good order of the maritime environment. From this background it appears compelling to argue that it is the obligation of all states to suppress these acts. The obligation of all states to suppress unlawful acts should become the basis for cooperative state activities. This approach seems to have the potential for mobilizing the power and the interest of many states and expanding the areas and persons subject to common rules against maritime acts of violence. However, because of the pressing nature of the problem, the better approach would seem to be one which uses existing mechanisms available for dealing with the diversity, rather than refining the legal niceties of international definition.

A useful and practical approach in dealing with the problem is simple self-help arrangements. Worldwide shipping is not centrally regulated in the way that international airline traffic tends to be. Shipping ports have not been the object of intensive government attention to security that commercial airports have been. Lessons can be learned from the aviation example.

Without taking steps which will result in overregulating the shipping industry, governments and ship owners can begin with measures of prevention, such as controlling access to vessels at sea or in port. In the meantime, internationally agreed measures which can quickly be adopted by member governments through the auspices of the International Maritime Organization (IMO) should be sought.

Governments and ship owners should ensure that all ships are aware of the geographical area in which there is a potential danger of encountering violence and develop a system of providing information instantly to ships when a violent act occurs at sea or in port. In this regard, the United States Defense Mapping Agency (DMA) provides a service which in essence is a subsystem of their Navigation Information Network, known as the Antishipping Activities Messages Subsystem (ASAM). This system provides a repository of reports of worldwide antishipping activities which are filed and can be accessed by the maritime community. This new system of centralized capabilities is designed to be a major step towards monitoring the escalating problem of maritime crimes against life and property which affect the safety of navigation.

This system provides for a central location to file the reports of attacks against shipping, and it also serves as a vehicle for providing warnings to the maritime community of risks in certain geographical areas by warning them that they should avoid or approach these areas with due caution. Avoiding questions of whether acts are piratical or classified as terrorism, and with new definitions of territorial limits, such as archipelagic waters, DMA elected to utilize the title "antishipping activities." There are three program inquiries which link the results in a data file as follows:

1. Data is sent in a manner that prompts the new user to in turn provide input needed to expand the data base.
2. To query by sub-regions. This program allows the user to obtain all ASAM messages from as many geographical regions as requested simply by loading the first two numbers of any Defense Mapping Chart.
3. Query by occurrence dates. This program allows the user to receive all ASAM messages for a requested time span.

(Parts of the system areas illustrated in *Figures 2* and *3*.)

Figure 2: Defense Mapping Agency's Geographic Locator

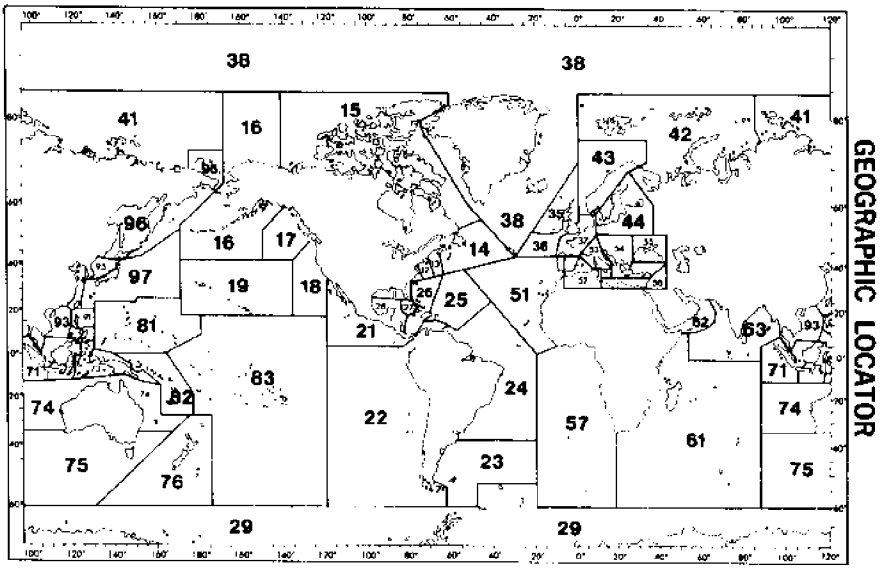


Figure 3: Anti-Shipping Activities Messages (ASAM)

Date of Occurence: 10/07/85 Reference Number: 85-0028
Geographical Subregion: 56
Geographical Location: 31/45.0/00 N 32/20.0/00 E
Aggressor: Pirates
Victim: Italian cruise ship *Achille Lauro*
Description: Palestinian guerillas seized the Italian cruise ship *Achille Lauro* at 2145 GMT 07 October while she was steaming about 50 km north of Port Said Egypt. Reports indicate the ship was carrying about 450 passengers and crew enroute from Alexandria to Port Said. The pirates call themselves the Palestine Liberation Front and the PLO have disavowed any affiliation claimed. Update entered to message on 10/10/85. One hostage killed on 10/09 by terrorists who later surrendered to Egyptian authorities. The *Achille Lauro* was freed.
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Date of Occurence: 5/16/78 Reference Number: 85-0002
Geographical Subregion: 92
Description: Sulu Sea. *Lloyds List* of 15 May reports a 5,000 ton ship outran two heavily armed boats during a nighttime attack in the Southern Sulu Sea on 4 May. Ship hit by hand grenades and rifle fire.
--//--

Date of Occurence: 10/25/85 Reference Number: 86-0004
Geographical Subregion: 71
Aggressor: Pirates
Victim: *M/T Marianna*
Description: Pirates attempted to board the Greek tanker *Marianna* in the Malacca Strait near the Island of Noord Natuna Eil on 25 Oct. 1985 at 0800 hrs and without warning opened fire on the vessel with automatic weapons. The Master immediately ordered full speed ahead (about 17 kts) and while turning the wheel hard to port and then to starboard was able to keep the attackers from boarding the vessel. A subsequent inspection revealed approximately 100 bullet holes. The location of Noord Natuna Eil is unknown by that name to DMAHTC. It may refer to Kepuluan Natuna Besar vicinity which is approx 4-00N 108-00E. Media reports the ship was Singapore and Borneo.
--//--

Date of Occurence: 04/10/81 Reference Number: 85-0001
Geographical Subregion: 22
Description: Colombia.
1. Mariners are advised to be alert to unusual abnormal or hostile activities by pirates (especially during darkened hours) in the approaches to and in Buenaventura Harbor/Anchorage.
2. Two U.S. flag vessels have recently been fired upon, resulting in personal injuries.
--//--

Date of Occurence: 8/22/85 Reference Number: 85-0022
Geographical Subregion: 51
Geographical Location: 88/30.0/00 N 13/14.0/00 W
Aggressor: Pirates
Victim: West German ship *Urundi*
Description: *Urundi* was attacked by pirates while dropping anchor in Freetown Harbor, Sierra Leone. The pirates who were armed with knives and axes, climbed on board the ship after approaching it on a motor boat, smashed in 6 containers, and stole some goods. The Captain of the *Urundi*, which was chartered by the West German company Woermann, took the attackers by surprise and they fled.
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Date of Occurence: 1/11/80 Reference Number: 85-0018
Geographical Subregion: 56
Geographical Location: 34/00.0/00 N 34/00.0/00 E
Aggressor: Unknown
Victim: Turkey
Description: *Instergeneral R. Gumuspala*, a Turkish flag general cargo vessel intercepted by corvettes and shot at with machine guns 24 miles west of Beirut.
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One thing that is clear in this undertaking by DMA is that the ASAM system is dependent upon cooperative efforts of everyone. The quality of information in the network will require continuing input by mariners. Even DMA admits that it is too early to predict the utility of this new service and it will take time to educate and alert the full range of potential users. This new service will be introduced to future maritime meetings where DMA can fully inform potential users of the system.

The self-help approach seems to be decidedly more achievable at this time than a political approach. It is obvious that because of political instabilities and regional animosities there are very few coordinated official endeavors which produce meaningful antiviolence activities. Often proposals to suppress acts of violence at sea get hung up on questions of who has the responsibility for the protection and who has the responsibility for the cost incident to that protection.

Using Singapore as an example, that country has assumed some responsibility for policing its coastal waters by installing upgraded radio equipment in the port to receive messages of attacks and to warn other ships. Yet the often lightning-fast methodology utilized by those committing the acts of violence reduces the value of reporting attacks, because by the time the information is received by the authorities and a response mounted, the attackers have disappeared. Newspaper reports indicate that Singapore has rejected calls for conduct of "antipirate patrols" in the area, particularly in the Phillip Channel, which is approximately 25 miles long and at its narrowest area is only 1400 yards wide. Ships must slow considerably to make passage. This is the biggest trouble spot and is dotted with islands. These news reports indicate that Singapore, in response to requests for antipirate patrols, has noted that the channel is outside its jurisdiction and that

responsibility for the area lies with the government of Indonesia. In our search for legal answers, we must not neglect such realities of the everyday world. The cost of coping with the problem must be an important consideration in proposed remedies. That is another reason why cooperation is an important ingredient for initial measures.

The need for cooperation has some particularly interesting practical aspects in light of current customary international law developments. As most states expand their territorial seas to twelve nautical miles and island nations assume control over large tracts of archipelagic waters, the problems of enforcement at sea are magnified. The financial and resource burdens on the coastal state are much greater than those required to police a narrow band of coastal waters, such as the territorial seas which were the extent of coastal state responsibility when the principles of sovereignty over the territorial seas were articulated. As pointed out by Mr. Brittin, traditional rules of piracy envisaged a three-nautical-mile territorial sea. Looking at the world today, in archipelagic waters, and where attacks disrupt shipping through international straits, traditional rules are inadequate. Many of the attacks on shipping do occur very quickly, from apparently land-based boats which commit the criminal acts and disappear before law enforcement units can arrive at the scene. In some straits vessels must slow down and thus become easy targets, and land refuges are close at hand to shelter the perpetrators after attacks.

The 1982 Convention provides some basis for cooperative measures to combat these problems. Article 43 provides,

> User States and States bordering a strait should by agreement cooperate:
>
> (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aids of international navigation...

Article 44 provides,

> States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge.

Although these provisions probably were primarily focused on topographical or meteorological hazards, they provide a clear, articulated basis for cooperative action among user states and coastal states. The user states need not be excluded from the solution of the problem. Under these circumstances the determination of the appropriate relationship between the strait state and the user states in today's law of the sea environment could be a slow and somewhat tedious process, but there is a clear basis for attempting cooperative measures.

In the case of the Strait of Malacca, there is considerable precedent for cooperative action to ensure safety of navigation: the under-keel clearance arrangement and cooperative efforts in the arena of traffic separation schemes, better charts, and other areas, mentioned by Ambassador Djalal. These measures carefully balance the needs of coastal states and user states. Similarly, there is precedent for handling the question of cost. Japan, for example, has assisted in the provision and maintenance of navigational aids. With expanded coastal

state responsibilities, funding to police the straits may have to be sought from cooperative resources.

Although the provisions of Article 43 are not applied to archipelagic waters by the 1982 Convention, rational promotion of the peaceful uses of the oceans would suggest that where the coastal state is unable for lack of resources to police archipelagic sea lanes in a successful fashion, a cooperative arrangement in which states benefitting from the uses of the sea lanes would assist in the funding of the enforcement action, where agreed, would provide necessary support. The reason, once again, is availability of assets. The law of piracy requires that pirates on the high seas be apprehended by a vessel of war or similar state vessel. In relatively remote areas of the world, the warship assets of user states, no matter how big their navies, may be few and far between, and dedication of such assets to the interdiction of pirates may be inefficient and conflict with other necessary uses of the ships. Cooperative development of a regional force for use in combatting violence at sea which occurs under the jurisdiction of a group of regional coastal states may be a better use of assets.

Lauterpacht and other authorities state that a doctrine of reverse hot pursuit can be utilized in the case of pirates -- they may be pursued into the territorial sea if they flee there while being pursued on the high seas. (Colombos cites the 19th Century British case *The Magellan Pirates*. O'Connell cites *Accessory Transit Co.* Lauterpacht makes the statement without citing particular cases.) This avenue might also provide a useful practical means of expanding the realistic options of victim states without dramatically altering the law. Such expanded rights of apprehension may be particularly appropriate in the case of archipelagic waters or territorial seas where the world at large has been proscribed from asserting freedoms of use of the ocean space which were possessed previously. One way of approaching such a right might be to confine it to situations in which the coastal state had shown itself to be unable or unwilling to deal with an existing problem off its coasts.

Customary international law has long recognized a right of self-help (a state's rescue of its own nationals) and of humanitarian intervention (rescue of another state's nationals) when there is an imminent threat to life and the state in whose territory it occurs is either unable or unwilling to prevent it. A state's use of force to rescue its nationals from terrorist acts can be a proper exercise of the right to self-defense under Article 51 of the United Nations Charter, particularly where the attack is against the state's representatives, but also where its nationals are seized and threatened by reason of their nationality. In the case of capturing pirates in the territorial sea, Lauterpacht and others also have suggested that it may be necessary to turn them over to the coastal state for prosecution. Most states, including the United States, also recognize a state's right to exercise jurisdiction, based on the territorial principle, over acts committed outside a state's territory but having a substantial effect within its territory. There are, however, other bases for assertion of jurisdiction, and jurisdiction over each case would need an analysis based on reasonableness.

When self-help and regional efforts are insufficient, the international community becomes involved. This is what has happened in the wake of the *Achille Lauro* incident and the U.S. government's resort to self-help.

At the present time, several international bodies have taken an interest in the problems raised by *Achille Lauro*. The Tokyo Economic Summit issued a statement condemning international terrorism on 5 May of this year. The statement urges the cooperation of other nations, and particularly such international fora as the United Nations, the International Civil Aviation Organization, and the International Maritime Organization, drawing on their particular areas of expertise. The governments agreed to intensify the exchange of information concerning the potential threat, sponsors of the threat, and ways to prevent threats from materializing. They further specified specific measures deemed open to any national government to deny to international terrorists the opportunity and the means to carry out their aims, as well as to identify and deter perpetrators. These measures were broad-based but included the following:

* Refusal to export arms to States sponsoring or supporting terrorism;
* Strict limits on the size of official bodies abroad of states which sponsor terrorism, to include even closure of offices;
* Denial of entry to persons who have been expelled from any cooperating state on suspicion of involvement in international terrorism or who have been convicted of such a terrorist offense;
* Improved extradition procedures in accordance with the due process requirements of the states involved;
* Stricter immigration and visa requirements and procedures in respect of nationals of States which sponsor or support terrorism; and
* The closest possible bilateral and multilateral cooperation between police and security organizations and other relevant authorities in the fight against terrorism.

This statement is particularly historic in light of the sympathy some of these states have demonstrated toward the reasons given for some terrorist acts (as evidenced once again two weeks ago in the sentences handed down to the perpetrators of the *Achille Lauro* hijacking). In that case, the judges were heavily influenced by defense arguments that the struggle for Palestinian self-determination caused the defendants to commit the crimes.

For its part, the United Nations General Assembly has passed numerous resolutions condemning terrorism. These statements invariably couple the condemnation with reaffirmation of the right to self-determination and a call to states to eliminate such "causes" of terrorism as colonialism, racism, etc. A resolution adopted in December, 1985, for example, unequivocally condemns all acts, methods and practices of terrorism and then urges all states to contribute to the progressive elimination of the causes underlying international terrorism. It further encourages them to pay special attention to all situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security.

The United Nations has shown some inclination, however, to move in the general direction of separating the issues of cause from the acts in question. A historic resolution adopted by the Security Council on December 18, 1985, which was sponsored by both the United States and the Soviet Union, unequivocally condemned all acts of hostage-taking and abduction without reference to the traditional underlying causes of such acts. Although this was not a binding resolution under Chapter VII

of the UN Charter, it is a unique statement from an influential UN body (the primary security organ), which, due to its broadly based political sponsorship, could signal important new initiatives in the international arena.

Nor have the specialized agencies in the international arena been silent. ICAO actively condemned aircraft hijacking for years. (*See* the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft; the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking); the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation.) In the area of violence at sea, the Charter of the IMO provides the competence necessary to address the issues in the international area. In 1983, the IMO adopted a resolution (A.545(13)) which recognized the grave danger to life and the navigational risks caused by piracy, and urged all governments to take "as a matter of the highest priority" the measures necessary to "prevent and suppress acts of piracy and armed robbery" from ships. The IMO Council kept the matter under review for further action as appropriate. In the wake of the *Achille Lauro* incident, the IMO 14th Assembly (November 1985) adopted a resolution (A.584(14)) designed to enhance physical security practices aboard ships and in ports. The resolution directed the Maritime Safety Council (MSC) to prepare technical guidelines implementing the resolution. The MSC has taken interim action on a proposed body of such measures, which focused on controlling access to vessels whether at sea or in port. These measures are expected to be formally adopted by the MSC later this year. This action will give governments a recommended basis for enactment of domestic legislation.

In conclusion, I'd like to recap some of what we've seen in the papers here today. Obviously, we are dealing with maritime violence which comes in numerous forms and fact patterns. Some of these incidents fall within the generally accepted definition of international piracy. Many do not, because of a lack of the intent required or their location in ocean space. The battle against such maritime terrorism, which poses a serious threat to all forms of peaceful ocean uses, will be an arduous one, as it has been throughout history. In my view, the best way to approach the issue is from a practical perspective. The only way to restore order on the oceans is for all nations to become involved in the process and realize that it is a common scourge which harms the world at large and not just the nation which has been the latest victim. Each ship, each master, each crew, and each government must become involved in counter-measures to cope across-the-board with the issues. In my view, this will be more effective than attempting to change the legal definition of international piracy. History has shown the limited efficacy of enforcement of international concepts which must be translated into the domestic laws of individual states before jurisdiction can be asserted. Individual self-help and regional cooperation are working in other areas. They can work in maritime terrorism as well.

In spite of the *Achille Lauro* incident, international response to unilateral initiatives by one nation is likely to be mixed. Many nations feel that they possess adequate tools to deal with violence at sea through assertion of jurisdiction over vessels flying their flag, through assertion of jurisdiction based on the nationality of the victim, or through assertion of jurisdiction based on the location of the offense (in their territorial or internal waters). Many other nations do not perceive violence at sea as a major international problem. Nonetheless,

nations must persist to overcome such international inertia and seek to garner the necessary support for cooperative action, as has been done in the case of acts of violence involving civil aviation. Simply because the problem is not now widespread does not mean that the potential for such does not exist.

* These comments reflect the opinions and conclusions of the author and not necessarily those of the U.S. Government or the Department of the Navy. The author wishes to thank LCDR Robin Blackwood and LCDR Michael Lohr for their assistance in the preparation of these remarks.

COMMENTARY

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Ladies and Gentlemen, dear Colleagues,

My comments will not deal only with piracy. According to the suggestions of the chairman of this panel, I shall also address the problem of the right of states to use force in enforcing their rights and freedoms at sea.

As far as piracy is concerned, my task has been facilitated by the interventions of previous speakers, and particularly by Mr. Brittin who gave us a clear explanation of scholarly opinions on piracy, the codification of international rules on piratical acts, the actual problems related to piracy, and his personal suggestions concerning the broadening of the scope of the notion of piracy under international law. As I concur with the majority of his conclusions, my remarks concerning piracy will be brief.

The contents of the provisions on piracy in the 1958 High Seas Convention (Arts. 14-21) as well as in the 1982 LOS Convention (Arts. 100-107) are a clear testimony that states decided, contrary to the opinion of some of the greatest jurists,[1] to give a narrow meaning to the notion of piracy. These provisions, taken together with the Commentary of the International Law Commission,[2] are a clear proof that both UNCLOS I as well as UNCLOS III insisted on including in the definition of piracy the requirements that the illegal acts have to be undertaken "against another ship or aircraft," that such acts have to be committed for private ends, and that the rights of all states to seize private ships and aircraft apply only to the high seas. In view of the fact that there were only some timid attempts at UNCLOS I to broaden the scope of the definition of piracy as suggested by the International Law Commission[3] and that UNCLOS III literally reproduced the 1958 provisions,[4] several authors, among whom Djamchid Momtaz,[5] conclude that these conventional rules represent a codification of customary law. However, the establishment of the exclusive economic zone (EEZ) and the Convention's provisions saying that the rules forming the regime of the high seas apply in the EEZ in so far as they are not incompatible with the special provisions on the EEZ, have raised a new question: are the provisions on piracy applicable to the EEZ without any modification?

On the basis of the codified rules on piracy, cases such as *Santa Maria, Anzoategui* or *Achille Lauro*, and particularly *Mayaguez*, cannot be characterized as piracy.[6] However, the international community has to find a legal basis for preventing and punishing such criminal acts at sea which endanger the safety of navigation and the lives of crews and passengers. In my opinion, the ideas for amending Articles 100-107 of the LOS Convention[7] at present are not realistic. In view of the complex nature of the Convention and the dissatisfaction of several states with some of the Convention's other solutions, the question of using the procedures provided for amending the Convention, immediately after its entry into force, is a very sensitive one.

The improbability of a revision of the codified rules on piracy in the near future and the impossibility of subsuming cases such as *Achille Lauro* to the existing definition of piracy, have inspired some

initiatives for the conclusion of a special international instrument deaaling with acts of unlawful seizure of ships on the high seas. Such an instrument could follow the example of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft: it should contain a broad and clear definition of the illegal acts it covers, strict obligations of states to punish or extradite persons who committed such acts, and a compulsory procedure entailing binding decisions for disputes between states.

Whatever approach the international community chooses -- a revision of UNCLOS provisions on piracy or the conclusion of a new instrument -- the new rules should not relate to acts illegal on grounds already recognized by international law, such as aggression or breach of peace.

The second part of my comments relates to the right of states to use force in order to enforce domestic and international rules concerning their rights and freedoms at sea. In my opinion, this question is not regulated clearly enough by specific rules of the international law of the sea. Confusion regarding this problem is often added by the intentional or unintentional merging of the law of war at sea with international law of the sea in time of peace.

In my view, in all the cases where there is no clear permission or prohibition of the threat or use of force at sea in time of peace, its permissibility should be evaluated on the basis of the fundamental principles of international law on friendly relations and cooperation of states in accordance with the Charter of the United Nations, such as the sovereign equality of states, the duty to refrain in international relations from the threat or use of force, the right to self-defense, the duty to settle international disputes by peaceful means, and the duty to cooperate in accordance with the UN Charter. These basic international law principles are relevant even in cases when only one ship is involved; namely, in the majority of cases, particularly in the case of government ships, vessels are considered as representing the interests and rights of the state whose flag they fly.

So far as the law of the sea is concerned, the right of the coastal state to take any step to protect itself from passage which is not innocent is established under the 1958 Convention on the Territorial Sea and the Contiguous Zone (Art. 16, para. 1) and the 1982 LOS Convention (Art. 25, para. 1). An even better expression of the scope of that right of coastal states under customary law is to be found in the 1956 Commentary of the International Law Commission:

> The coastal State may take the necessary steps in its territorial sea to protect itself against any act prejudidical to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law.[8]

It is clear that use of force cannot be forbidden to the coastal state, particularly if its security is endangered. However, it has to be used according to procedures established in international law and its degree has to correspond to the endangered or violated rights of the coastal state. Moreover, there are some exceptions to the right of the coastal state to take enforcement actions for violations committed within its maritime territory. Such an exception relates to foreign warships which, in cases of persistent violations of the laws and regulations of the coastal state, may only be required to leave the territorial sea immediately.

Furthermore, it seems that enforcement measures interrupting transit passage through straits and archipelagic sea lanes should not be undertaken except in cases of pollution causing major damage to the environment of the strait (Art. 233 of the LOS Convention).[9] All these restrictions are not applicable if the violations of foreign ships amount to a threat to the security of the coastal state: in such cases the right of self defense justifies all enforcement measures, including the use of force.

However, powers of enforcement exist even beyond the internal waters, the archipelagic waters, and the territorial sea. In zones beyond the maritime territory of a coastal state, namely in the contiguous zone, the EEZ, and in the waters above the continental shelf, the powers of enforcement are, as O'Connell says, "limited strictly to the purposes for which such jurisdictional zones are established..."[10] In these limits even force may be used.

As a logical consequence of the coastal state's right of protection of the areas under its sovereignty and jurisdiction, international law has recognized its right of hot pursuit on the high seas.

Apart from these expressly authorized situations, based on sovereignty and jurisdiction of coastal states over some marine zones, any other case of use of force should be evaluated on the basis of the general principles of the prohibition of the threat or use of force except in cases of self-defense and the duty to settle international disputes by peaceful means. The threat or use of force is not permitted even in the case of reprisals; only reprisals short of force are acceptable under the UN Charter system.

In respect of the duty to settle disputes by peaceful means the international law of the sea has lately achieved great progress: the 1982 LOS Convention contains an elaborate system for settlement of disputes concerning the interpretation and application of its provisions by peaceful means. Although it is true that the LOS Convention's dispute settlement system will be obligatory only for States Party to the Convention, the duty to settle disputes by peaceful means and to refrain from the threat or use of force are obligations under the UN Charter and general customary law. Therefore, states are not entitled to enforce the freedom of navigation by the threat or use of force in any sea area beyond national sovereignty or jurisdiction, whatever its pretended importance for the navigation of warships or merchant vessels.

There are situations where it is possible to understand the wish of states to protect the passage of their ships, particularly if the safety of the ships or human lives are in question or vital navigational routes are endangered. However, some recent cases of the imposition of particular opinions of the United States, besides being illegal, are not explicable in terms of their real national interests or of a genuine worry for the freedom of navigation. How could the U.S. decision, taken in 1979, to challenge the claims of some states having territorial seas broader than three miles, be understood at a time when the majority of states had a twelve-mile territorial sea and at UNCLOS III a consensus on such a breadth of the territorial sea had already been reached?[11]

It is equally difficult to understand and support their persistent decisions to send warships and carry out military manoeuvres thousands of miles off their own shores, in an area claimed by Libya as a historic bay and vital for the security and safety of the coastal state, whatever the final conclusion on the legal basis of the claim of Libya.

The justification for these actions provided by the U.S. Administration gave no convincing arguments. I quote an American author: "This area was cited as the best region of the Mediterranean in which to conduct missile firing exercises because it is generally free of commercial air and sea traffic..."[12]

Couldn't the U.S. Navy find an appropriate region for missile firing exercises in the vicinity of the United States coasts or at least a somewhat more appropriate area off the coasts of their Mediterranean allies? Doesn't the affirmation that "this area ... is generally free of commercial air and sea traffic" confirm the claim that the reason for the U.S. actions was not the wish to enforce the freedom of navigation, but that they had some "land-based" reasons? The assertion that this area was not important for air and sea traffic contributes to the Libyan claim to internal waters status for the Gulf of Sidra. Besides, such foreign action in the Gulf enforces Libya's claim that internal waters status is necessary for its security.

Be that as it may, one is tempted to ask: what would be the reaction of the United States if the Soviet Navy discovered that the saltiness of the Gulf of Taranto made it the most appropriate site for testing a new model of torpedo and decided to enforce the freedom of navigation in that Gulf without the permission of Italy? The intrusion of a Soviet submarine into the Gulf of Taranto in 1982 was characterized as illegal.[13] It has to be noted in this respect that Italy's contention that the Gulf of Taranto is a historic bay is four years younger than Libya's claim in relation to the Gulf of Sidra and that both claims have similar deficiencies if compared with the earlier historic bays claims.

The incidents in the Gulf of Sidra and the consequent international crisis are good examples of the consequences of an arbitrary decision of a state to threaten and use force to protect the model of the freedom of navigation it prefers. However, the superpowers must be aware of the fact that not only the deplorable consequences of the cases of unlawful and excessive threat or use of force at sea, but even their very concept of the freedom of the sea in favour of their enormous, almost metastatically developed navies, means, for many coastal states and hundreds of millions of individuals, a constant threat to peace and a permanent source of anxiety and fear.

NOTES

1. See: J. Oppenheim, *International Law*, ed. by H. Lauterpacht, vol. I, 8th ed., 1955, p. 601; C. J. Colombos, *The International Law of the Sea*, 4th ed., 1959, pp. 383-384.
2. *Report of the International Law Commission*, covering the work of its eighth session, 23 April - 4 July 1956, UN General Assembly, Official Records, 11th Session, Suppl. No. 9 (A/3159), p. 28.
3. See the intervention of Czechoslovakia, the proposals by Albania and Czechoslovakia (A/CONF.13/C.2/L.45) and Uruguay (A/CONF.13/C.-2/L.78) in: *UNCLOS I, Official Records*, vol. IV, pp. 78 (paras. 2 and 33), 84 (paras. 4 and 5) and 128.
4. At UNCLOS III piracy was only mentioned in relation to its application to new zones (Galindo Pohl - El Salvador), *UNCLOS III, Official Records*, vol. II, p. 235, para. 59.

5. Dj. Momtaz, "La haute mer", in: *Traité du Nouveau Droit de la Mer*, R. J. Dupuy, D. Vignes, ed., 1985, p. 368.
6. Cf. C. Guyard, "L'affaire du' Santa-Maria", 66 *Revue Générale de Droit International Public* 132 and 142 (1962); B. H. Dubner, "The Law of International Sea Piracy", 11 *New York University Journal of International Law and Politics* 483 (1979).
7. Suggestions for revising the 1958 Geneva provisions on piracy see in: International Law Association, *Report of the Fifty-Fourth Conference*, held at the Hague, 23 to 29 August 1970, pp. 706-771.
8. *Report of the International Law Commission*, 1956, *op. cit.*, p. 19.
9. A. W. Loewe, "Some legal problems arising from the use of the seas for military purposes" 10 *Marine Policy* 177 (1986).
10. D. P. O'Connell, *The International Law of the Sea*, vol. II, ed. by I. A. Shearer, 1984, p. 1071.
11. See: documents A/CONF.62/90 and A/CONF.62/92 in: *UNCLOS III, Official Records*, vol. XII, pp. 71 and 111.
12. "Transcript of News Conference at Pentagon on the Dogfight with Libyans", *N.Y. Times* 20 August 1981, at p. A8, col. 1, quoted in: J. M. Spinato, "Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra", 13 *Ocean Development and International Law* 66 (1983).
13. N. Ronzitti, "Somergibili non identificati, pretese baie storiche e contromisure dello stato costiero", in: *Scritti in onore di Dante Gaeta*, 1984, p. 395.

Jon Van Dyke: I would like to ask three questions of Mr. Brittin about the impact of the changes that he is suggesting. First, how would we interpret "without due authority"? The Abbas group did not even have the authority of the PLO. If it were an authorized PLO operation, would it then meet the definition? How would we interpret this phrase in regard to the attack on the *Rainbow Warrior* in Auckland? Was that an authorized act by the French authorities, or would we conclude that such an attack cannot have due authority in the way we would use that term? I was also curious why you retained the phrase "by the crew or the passengers of a private ship or private aircraft." Suppose a cruise ship like the *Achille Lauro* was boarded by people from shore while docked in Alexandria and then taken over and taken out into the high seas. Would there be any reason not to think of that as piracy, or do they have to be passengers in a formal sense of the word? Finally, would we conclude, if these changes took place, that the *Rainbow Warrior* attack and also the U.S. mining of the Nicaraguan harbors was piracy under this definition?

Burdick Brittin: In response to your first question about "without due authority," I meant those words to encompass actions that are taken without the authority of any state or recognized entity in the world community. It's restrictive in that sense. Let me go to your third question. The attack on the *Rainbow Warrior* and the mining of the Nicaraguan harbor were done with the authority of the states concerned, and that takes it out of the category. As a matter of fact, the Nicaraguan mining is an act of war of one state against another state. It is clearly to be differentiated from the actions committed by any group doing something without the endorsement of a particular state.

I don't think I understand your second question.

Jon Van Dyke: I am imagining that the terrorists come on board from shore, then hijack the ship and take control over it once out to sea. In your definition you are leaving in the concept that they have to be crew or passengers of a private ship, and I am wondering if that is too limited, because we could have people who were neither crew nor passengers who would in the generic sense be committing an act of piracy in taking over the ship.

Burdick Brittin: I think you're correct, Jon, and I think that that should be looked at also in the context of paragraph (1)(a) of Article 101.

Captain Thomas Robinson: Mr. Brittin mentioned two differences between terrorism and piracy, namely 1) that piracy is carried out from the pirate ship and 2) that it's done for private ends. There is a third difference between terrorism and piracy also: in many cases the terrorist enjoys some state support which a pirate does not. This state support can be open, as in the case of Libya, or it can be not so open, as in the case of other states who support the terrorists with funds, at least tacitly, because of either political or economic reasons such as the close ties with the oil-producing nations and the fear of economic reprisals. Therefore, I see a real difficulty in trying to get any international agreement to make terrorism consonant with piracy, as Mr. Brittin is suggesting. Because of that and, as mentioned by Captain

Schachte, the absence of a definition of an illegal act, the IMO's Maritime Safety Committee, rather than going forward with a new convention or a revision to the Law of the Sea Convention, chose to approach the problem from the direction of prevention rather than to deal with international response. Thus the Maritime Safety Committee is developing measures which deal strictly with improving security in ports and on board ship to prevent acts of terrorism.

Captain William Schachte: The United States' program of exercise of rights was simply regularized in 1979. At that time the navigational provisions of the treaty were pretty much solidified. At no time was that program ever designed to challenge, nor did it ever become involved in challenges to, territorial sea claims exceeding three miles. We do have a number of areas off the coasts of the United States that are used for the exercise of high seas freedoms and military maneuvers. Concerning Libya's claim in 1973, we've had a number of traditional high seas exercises in that area prior to some of the more celebrated incidents occurring in early 1980s and more recently. To my knowledge, of all the nations of the world, there's only one -- I believe it's the Sudan -- which has officially recognized that claim. The program of exercise of rights is not designed to be provocative. We are simply operating as we assume the rest of the world would operate within the confines of recognized customary international law as articulated or reflected in the Law of the Sea Convention, and any subsequent incidents were undertaken not in any vein other than in a very limited mode of self defense. I'm not equipped to speak on the Gulf of Taranto; I've been out of the business for a couple of years. We do have some distinguished law of the sea experts here from Italy who might provide some information.

Alan Hutchison: Regarding Mr. Brittin's discussion of how we could treat the problem of international terrorism under a traditional concept of piracy, it appears from other comments that it really can't be expanded. I would appreciate any further comments from the panel on that and on Professor Vukas' very good comment on what type of instrument we need to control international terrorism where terrorists can traditionally be treated as pirates.

To Captain Schachte: what legal basis does the United States have for the interception of that Egyptian airliner? If we treated those terrorists as pirates and as enemies of mankind, then I would assume that we had the right to intercept them. The United States has been the champion of the rule of law throughout the world, so it's incumbent upon many of us here today as international lawyers to come up with the theory of international law to allow us to combat terrorism.

Burdick Brittin: What you're talking about, really, is: what the hell is the world community going to be able to do? I stated towards the end of my paper that it's not practical or politically feasible to change Article 101 or any article in the 1982 Convention. However, the Humanitarian Convention of 1979 does have a bearing on the *Achille Lauro*. No question about it. Bill Schachte is talking about self help as a possible approach. I don't know what the answer is, but I do know that a segmented approach is probably going to emerge, depending upon the severity of the problem of terrorism and piracy at sea. There are instruments like the Humanitarian Convention, but perhaps a fuller response might have to be a series of bilaterals by the countries concerned. For example, the Coast Guard on the drug traffic control:

what did they do? Arrangements were worked out which permitted U.S. customs enforcement to operate in the territorial sea of both Colombia and the Bahamas. That's the type of bilateral arrangement consistently applied that lends itself to actions amenable to the world community.

Captain William Schachte: I was in the western Pacific when that series of incidents occurred, and I was not working international issues at the time. As I understood some of the press reports I did receive on the interception over the high seas, the predicate was the Hostage Convention which the United States had ratified, I believe, in October of 1985. Some of the specific provisions of that convention -- I believe Egypt is also a party to it -- concern the obligation to make available for prosecution persons involved in the acts that were proscribed by the convention. Perhaps my colleagues from the Pentagon would care to go further.

Geoffrey Dabb: Insufficient emphasis has been placed by the speakers on problems arising out of the interface between international law and domestic law. It's a similar problem to the one we had in the discussion on the first panel on interdiction at sea. Some countries have problems with the notion of universal jurisdiction, or in readily extending universal jurisdiction to actions committed outside their territory. Other countries don't have that problem to the same extent.

I suspect in the case of some common law countries that the problem arises from the fact that the notion of piracy is embedded in domestic law as an exception to the territorial principle of the application of jurisdiction. In order for the courts of these countries to exercise jurisdiction over a so-called case of piracy, it is necessary that the case have the classic or strict elements of piracy. It's not simply a matter of the courts unilaterally expanding the definition to take in a wider category of acts. In the Aircraft Hijacking and Unlawful Interference Conventions, the notion of universal jurisdiction was accepted by treaty, and countries then legislated to give effect to the treaty and thereby accepted the principle of universal jurisdiction in the case of those categories of acts.

This is a problem that the United States might have. Current legislation in Congress provides for the exercise of jurisdiction in relation to acts committed abroad outside the United States in cases of hostage taking and other cases of terrorism. That provides the necessary domestic law basis in the absence of a treaty for the U.S. to exercise jurisdiction in those cases. But Captain Schachte might be able to tell us whether there is now in the United States law a basis for exercising jurisdiction in normal terrorist cases where the United States has intervened in the case of a third state vessel. Where the flag state is another state, United States has taken protective action. On what basis could the United States proceed against the offenders in such a case on the high seas, if it is not a case of piracy, strictly so-called?

Finally, I think this is the main problem with the territorial sea. Most countries typically apply the *corpus* of their criminal and civil law to the territorial sea. When a vessel of a foreign state pursues alleged pirates or persons who have committed illegal acts of violence on the high seas into the territorial sea, they immediately become subject to the general *corpus* of the law of that state. There needs to be authorization under that law for acts of apprehension within the territorial sea. I wonder if this is not what was behind Lauterpacht's

statement that in such a case the apprehending state must surrender the alleged pirates to the coastal state. The theory would be that the apprehending state has acted as the agent of the coastal state pursuant to its laws and therefore its only recourse is to surrender the offenders to the coastal state to be dealt with under the laws of the coastal state.

Captain William Schachte: As concerns traditional modes, the right of self defense under Article 51 of the Charter and other such internationally recognized avenues is available. I do have a collection of United States legislation which is simply designed to implement various treaties to which we are party as far as the extension of that jurisdiction, and I'd be delighted to share it with you after we conclude our session.

Geoffrey Dabb: In the absence of a treaty?

Burdick Brittin: You might well be right on Lauterpacht's comment as to the entry into the territorial sea as the result of a chase. I also believe that previously the domestic laws in the great majority of states paralleled quite closely the international law. I do not know what state practice is now, and I think that it's too soon after the 1982 Convention to tell whether or not piracy will be confined to the territorial sea or not. I suspect that because the word "piracy" has a currency that covers a multitude of sins, it will begin to creep into various national jurisdictions.

Gary Barkus: Captain Robinson, I applaud your analysis and the fact that you brought in the legal correlate of right, duty, when you were talking about quantifying and being responsible for acts of piracy.

Professor Vukas, I was listening closely to your interesting but incomplete analysis of the use of air missile force. Despite what may be to some the reprehensible use of the American missile force in the Gulf of Sidra, at least the United States does not deploy its missiles in the afterburners of fully-laden passenger aircraft on regularly scheduled routes.

Captain Schachte, does the doctrine of *rebus sic stantibus* not apply to changing, modifying, particularly expanding, the definition of piracy? You don't seem to be in alignment with Professor Brittin. I thought that his analysis was cogent, logical, tantalizing, and he also subscribes to the theory that it's better to light a candle than to curse the dark so he brings in his own proposed modifications. How does *rebus* apply here? Hasn't the world shrunk? Aren't we in a wider audience now? Don't the ramifications of these events have more far-reaching consequences?

Budislav Vukas: Could you please repeat your question or at least explain to me in which sense my statement was incomplete? I'm sorry; I didn't understand. Coming from a region closer to Libya than Miami, my English is really poor, so -- could you clarify it for me, please?

Gary Barkus: You were citing examples of what you would probably describe as proportionality where the United States would best deploy its missiles. Couldn't we find a better place to activate our missiles or apply force? I was being sardonic in my statement, I hope not insulting, but it just seemed that you could have mentioned other uses of force. In the interests of balance, let's say, I mentioned that other incident. It's really not a question, Professor, it's simply a comment.

Budislav Vukas: Thank you.

William Schachte: There have been problems with piracy and its application as a moniker to acts of violence at sea pretty much throughout the history of seafaring people, as far back as Roman days. I don't feel that the solution, however, is to expand the scope of a doctrine which has been set up to counter acts which traditionally have happened on the high seas occasioned by the most base elements in mankind: greed, avarice, that sort of thing. This moniker did not seem to apply to other acts of violence occasioned by different causes. In using it, you have the same types of problems as were evidenced in other attempts to make such a broad application.

Andrew Anderson: I also endorse and applaud the efforts of Professor Brittin to at least light a candle, as was so eloquently put. It's interesting to note that the restatement cites one of the bases of universal jurisdiction for piracy as the common interest of all states in protecting commerce and navigation on the high seas. Unless all states can again find this common interest, there's going to be a series of unilateral actions and unilateral extensions of jurisdiction which are going to be contradictory to the maintenance of public order on the oceans. The United States has had Public Law 98-473 on the books since 1984, asserting jurisdiction over this type of hostage-taking act. Only the doctrine of foreign vessel immunity on the high seas prevents us from taking this action under domestic law. In doing so, we abandon the passive personality doctrine. I would suspect, in the proper case, that we would attempt to obtain permission of the flag state; and if the flag state refused such permission, refused to take appropriate actions itself, the doctrine of self help probably would apply. It's going to be a very difficult problem, and if the nations of the world can't arrive at some kind of common agreement, problems such as the mining of the Red Sea by Libya, violence on the high seas which has not thus far been mentioned today, will continue to multiply.

Also, while the discussion has primarily emphasized commercial vessels, the problem of violence against recreational vessels has multiplied to the point where there are very few recreational vessels on the high seas today that are not heavily armed. This also requires redress.

In dealing with passenger vessel safety, the security problems of access control, screening luggage, screening foreign crew members, negotiating in hostage situations, and rescue problems have been addressed and identified by the Coast Guard and the FBI. They are far-reaching and not easily soluble. Some of the analogies from the airlines are not easily translated onto the high seas. Unless some prompt action is taken to deal with the problem, we're going to be talking about it for many years to come.

Hasjim Djalal: I have two comments with regard to various types of acts of violence in the Southeast Asian waters. The first one concerns the boat people in the South China Sea and in the Gulf of Thailand. This act of violence is the result of the Vietnamese War. A lot of people have become refugees and the issue is not so much the act of violence *per se* but how to stop the refugees from coming out of Vietnam, how to handle them when they get out, and how to save them later on from the sea.

Many of us in Southeast Asia have done a great deal to stamp out these problems. Indonesia, for instance, has even allocated one whole island, the island of Galang, to be used for them as an intermediate stage before they are accepted as refugees in other countries. The United States is one of the countries that has accepted them, so have Canada, Australia, and many other countries. But many of these refugees still remain in the islands, and their acceptance into other countries is slowing down. The problem now is not so much life at sea there but how to promote and expedite their entry into the countries of acceptance. We are doing everything in our power to handle this problem, but it can only be done with the cooperation of other countries as well.

The second act of violence is in the Straits of Malacca and Singapore. The difficulty arose originally because there was no clear territorial sea boundary. We have tried very hard to delineate the boundary there, and we have reached agreement between Indonesia and Malaysia in the Strait of Malacca and between Indonesia and Singapore in the Strait of Singapore. But there are portions of the Straits which up to now have not been delineated, especially between Indonesia, Singapore, and Malaysia in the western sector of the Strait of Singapore.

I can tell you a lot about the difficulties in delineating these territorial sea boundaries in the Straits. You mentioned the Phillip Channel. The major part of the Phillip Channel is now part of the territorial sea which belongs to Singapore, and some parts also belong to Indonesia. Why is it so difficult to delineate the territorial sea in the Strait of Singapore? There are many reasons for that. One is Singapore's fear that any territorial sea boundary in the straits will somehow affect navigation. (I must apologize for this statement because there are none from Singapore here, so I cannot speak for them.) If you regulate traffic so much, it will hinder navigation. It will in the end cause some problem with what is generally called the freedom of navigation, which is so important to Singapore and to us as well. So it took us years to delineate the territorial sea boundary in the Strait of Singapore.

Another problem is smuggling. Singapore is not willing to make public its trade statistics with Indonesia. This smuggling has always been there. There is no clear boundary in some parts of the straits and this uncertainty therefore promotes smuggling. We have attempted for years to write an agreement on joint sea patrols in the Straits, but it has not been very successful because we do not know where the smuggling and the piracy come from. It can easily come from Indonesia or from Singapore, or move between the two during a single day! This is a very small and crowded strait. In this particular case I agree with you that we really do have to increase our capacity of enforcement, not only in the small area of the Strait of Singapore, but also in the larger zone of the archipelagic waters. We have done a great deal of study on that. However, there are practically no acts of violence in the larger body of the archipelagic waters. They are usually confined to the small area where there are major ports. We would like to increase law enforcement activities, primarily to find the snooping submarines in the larger zone, which is regulated under the innocent passage regime except in the sea lanes. Under innocent passage the submarine will have to travel on the surface as the normal rule. We usually do not know whether they are on the surface or snooping under water in the larger body of the archipelagic waters. So we do need increased law enforcement there.

Finally, with all due respect to my old friend Mr. Brittin, I am not in favor of amendments to Article 101. There are various procedures

for amendment of the Convention when the Convention enters into force. It has not entered into force and we don't quite know when it will. If it does enter into force, then that amendment can be made ten years later unless it is put through by special procedures. This procedure of amendment to Article 101 will take a much longer period. However, the problems, I agree, are pressing. I support the idea of an international conference to fight and to meet the challenge of international terrorism, because terrorism is not only a matter of violence at sea but equally of violence on land, in the air, and all over. I would like the panelists to comment on that if they can.

Burdick Brittin: In response to my good old friend Djalal, my suggestion as to how Article 101 can appear in the future was conditioned on the fact that it is not practical or politically feasible to amend at this time. I chose to give suggestions as to possible changes in 101 because it's a convenient vehicle for raising the basic issue as to whether or not our treatment of piracy and violence at sea encompasses too restricted a scope and should be much broader.

Let me go back to your first commentary on the refugee boats. The real problem there involves issues that are much deeper than the presence of those refugee boats. Terrible loss of life and property resulted over the years of that unfortunate exodus from Vietnam. Everybody agrees that it is piracy, and the capability really isn't there to enforce the area.

I add a little bit to what Bill Schachte was saying before about self help. Granted, self help can be the way to go, but there are some countries in this world such as Panama or Liberia -- I think Liberia has 1700 ships -- plying the entire seven seas. Their capability to monitor or to assist is very slight. It is this kind of thing that makes the world's climate different than it was, say, twenty or thirty years ago.

Paolo Mengozzi: I intervene just to add an element for the discussion kindly requested by Captain Schachte on the Gulf of Taranto and on the intervention made by my dear colleague Professor Vukas. The Italian decree which used the straight baselines referred to the concept of the historic bay. Professor Vukas was correct in referring to this element as common to the Gulf of Taranto situation and the Sidra Gulf. But there is a qualifying element in the Italian decree; it is substantially based on the idea of the semi-circle. This couldn't be invoked in the situation of the Sidra Gulf. A further element qualifies the Italian situation in comparison with the Libyan situation. While the Libyan decree gave rise to a series of reservations, the Italian stand didn't. These elements may be useful for the discussion.

The analysis made by Professor Vukas was a fair one because there have been interventions saying that Italy is in a weak position now to react to the Libyan claim because of the principle of reciprocity. The principle of reciprocity could weaken the Italian position towards Libya, but this interesting element would have to be worked out much more. In any case it relates to the bilateral relationship between Italy and Libya and in this spirit the Italian who used the argument of reciprocity made reference to this principle.

Budislav Vukas: I respond to my dear colleague and friend Professor Mengozzi and refer also to a remark by my co-commentator Captain Schachte. It is difficult to say that somebody proclaiming a historic bay could violate the Law of the Sea Convention, because it does not

contain a substantive provision on this question; it only says that nothing new has been done since 1958 in respect of historic bays. It states only the existence of such claims and even says, "the so-called historic bays." Nobody really knows what should be the width of the entrance to the historic bay. The whole concept is questionable. The theory has not in general been rejected, but one of the elements just mentioned by Professor Mengozzi is very important, although not universally recognized. This is the relevance of protests. Is it really very important that only one state challenges a certain claim to our historic and vital bay? It may be important in political terms, but I don't think that an international tribunal would make a difference between the two situations because of the fact that in the Bay of Taranto nobody protested and because Italy is a nice and peace-loving country having no enemies, whereas there is a big navy necessitating missile firing in the Bay of Sidra and it therefore protested. Could this really change the legal situation?

I don't think that Italy's basing its claim on the semicircle is relevant, because the semicircle is only one of the elements with which a state can claim that a regular gulf is internal waters; it must also satisfy the criterion that the entrance not be wider than twenty-four nautical miles.

Finally, to Mr. Barkus. Nobody can make a truly balanced statement in the twenty minutes allowed. Being invited to the United States, I had the feeling that I should give my reaction to an American action in the part of the world that I come from. I think that it is just for this reason that I was invited to this panel. I can assure Mr. Barkus that had I been invited to North Korea, I would discuss there the case of the *Pueblo* and not the Bay of Sidra.

Henry Richardson: I agree with the magnitude and the pressing urgency of finding effective solutions to the problem of violence at sea. One of the primary aims of the UN Charter at its drafting was to restrict the ambit of self-help, unilateral discretionary measures under international law. In the general maintenance of international peace and security, this remains an important aim.

My concern goes to some of the proposals that have been advanced by the panel. There have been, for example, calls for actions based on practicality, eschewing legal technicalities, as it was said, if these indeed conflicted with some notion of practicality. There have been calls for expansion of the notion of universal jurisdiction to cover terrorism, although it's admitted that the legal definition of terrorism is yet in any precise sense non-existent. There have been calls for an expansion of the notion of self help under international law, including an expansion of unilateral discretionary measures under the doctrine of self defense, and there has been a notation or at least a claim of the inadequacy of the 1982 Law of the Sea Convention.

My concern is for the effect of the combination of these measures, if you will, as a combined trend of inquiry where they are enacted in their entirety or in their substance on the authority of the entire international law process, as one of decisions resting on the expectations of the entire international community. Most of these measures emphasize an expansion of unilateral discretion of states, especially of states which have the resources to take such unilateral action. Although that is a minority of states in the world community, the authority of international law if this goes too far -- and my concern is that we're on the verge of its going too far at the moment -- is

indeed weakened. We then would have the pretext of international law but in actuality we would have simply a series of unilateral actions using law only as a cloak for national policy. The notion of a widespread multilateral treaty as it has been in the past is an adequate and certainly a valid safeguard against this danger, even though it may be politically somewhat more messy to negotiate and the time span may be extended. A widely-based multilateral treaty concerning violence at sea, not concerning terrorism because terrorism is not quite ripe for that kind of activity yet, would be an adequate safeguard rather than expansion *ad infinitum* in the direction of unilateral discretion under the doctrines that have been proposed.

Samuel Menefee: Mr. Brittin, your discussion of Article 101 has been extremely useful. I'm interested particularly in what you have to say about the necessity of two ships being involved in any piracy. Article 101(a)(ii) is normally taken to refer to *terra nullius*. Is there any reason why that cannot be applied to the high seas?

Burdick Brittin: To examine the technical question of how pirates or terrorists get aboard does not lend itself to solving the immediate problem. That is, there are people and property on board this ship that are in extreme danger. People risk being executed. That's the rationale behind the thought that it's not really important as to how they get aboard. I might say that in removing that you do help to overcome a bit to the question of containing and reducing violence at sea.

To Professor Richardson: I was not aware that we were talking about unilateral action with respect to some aspects of the problem but I assure you that it is certainly the furthest thought from my mind that things can be done in a way that is not condoned internationally. I would suggest, sir, that in many cases -- and I have participated in the law of the sea from 1958 right on through -- bilateral understandings produced a drive towards international worldwide discussions and resolutions which appear in the text of the 1982 Convention. I do not entertain the thought that what you do unilaterally is always acceptable. It has to be done within the framework of the consensus reached throughout the world community and as a goal it might be the framework for the kind of changes that I suggested in Article 101.

Jon Van Dyke: I would now like to ask the panel to make closing comments.

Thomas Robinson: This discussion has identified and clearly educated all of us in what some of the problems are. Certainly it's highlighted the need for further international effort and cooperation and really getting in there to solve the problem. That cannot be done by any individual country or without international cooperation. That's certainly the goal of all of us and the direction that we want to go.

William Schachte: I mentioned the quest for cooperative agreements, but as a practical procedure utilizing what is available at this time concerning historic bay claims and whatnot, I think the issue of claim and counterclaim is certainly an integral aspect of law of the sea. It always has been and always will be. Therefore acceptability of claims, if not protested diplomatically and otherwise, eventually ripens into law. That's the significance of any comments on the Gulf of Sidra. I would like to thank Professor Vukas for his participation. I think he

has provided us with an interesting dynamic which certainly would have been missing had he not been present.

Budislav Vukas: Thank you, Mr. Chairman, for giving me the floor and for having invited me to this very interesting panel in which I really enjoyed participating.

Jon Van Dyke: The problem has been clearly identified, but our panel does not agree on how to solve it. Should nations try to redraft the legal definition of piracy now and try to restructure it into something more acceptable, or should nations try through self-help activities to move customary international law into a different framework, perhaps outside the Law of the Sea Convention? The question of self help, as Professor Richardson pointed out, and as Colin Keating and Dr. Vukas have mentioned earlier, is fraught with dangers, and the question always is: what kind of self help are we talking about? The protective devices that Captain Schachte mentioned are certainly appropriate and useful, but once nations move into the realm of reprisals or other uses of force, they venture into difficult areas that may undercut the rule of law.

We must remember not only the important rule of proportionality but also the problem of reciprocity and the fact that what one nation does in one situation may provide an example or precedent for another nation's activity which may be less acceptable. The U.S. position historically has been opposed to reprisals and in support of the strong prohibition of reprisals that is in the 1970 UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations. More recently, however, the United States appears to have re-evaluated that position, and has used reprisals (*i.e.*, the attack on Libya in April 1986).

I remember a comment made at the time the Israelis attacked the nuclear plant in Iraq several years ago. One commentator on the action said that the raid was illegal, but perhaps was justified. Professor Anthony D'Amato from Northwestern responded that "the notion that any act can be illegal yet justified substitutes paradox for analysis."

I would like to thank our distinguished and hard-working panel.

LUNCHEON SPEECH

INTRODUCTION

Bernard H. Oxman
Faculty of Law
University of Miami

I suppose that the honor of introducing our luncheon speaker fell to me today because, as Dean Acheson put it, I was present at the creation in the sense that the creation many years ago of his long-standing responsibilities with respect to the delimitation of maritime boundaries between the United States and its neighbors was something that I had some part in, and actually it's not that mysterious. All I did one day as I lifted my suitcase was say, "Hey, Dave, take a look at the Gulf of Maine." I then proceeded, as was my wont in my Washington days, to get on an airplane to some part of the world.

Our speaker today is Assistant Legal Adviser for Oceans, Environment, and Scientific Affairs of the Department of State. He served as Deputy Agent of the United States before the International Court of Justice in the *Gulf of Maine* case, he was recently appointed by President Reagan to the United States-Canadian Pacific Salmon Commission. I have known him, as many of you have, for many years, and you know that he is smart, practical, feisty, and fun to work with. It is a very great pleasure for me to introduce David Colson, who will speak to us today on maritime boundaries.

THE MARITIME BOUNDARIES OF THE UNITED STATES: WHERE ARE WE NOW?

David A. Colson*
Assistant Legal Adviser
Oceans, Environment and Scientific Affairs
U. S. Department of State

I thought I should begin this talk with a story about Professor Bernie Oxman.

It was the fall of 1975. I had just joined the Legal Adviser's Office. I was assigned to the office that Bernie was in charge of -- known as L/OES. One day, we were having an office lunch. One of the lawyers was leaving the office. This person was responsible for discussions then underway with Canada concerning a proposed U.S. outer continental shelf lease sale in the North Atlantic which raised the question of the location of the continental shelf boundary between the United States and Canada in the Gulf of Maine area. Bernie tried to interest his lawyers in picking up this project, but he wasn't getting any takers. As Bernie will do, he decided to sweeten the pot. He began to forecast the interesting work that the project might entail. And, in this connection, he referred to the then dreaded prospect that Congress might indeed pass a 200-mile fishing law. He concluded that in that eventuality there would be a great deal of novel work for a lawyer who had some maritime boundary experience.

Being the new boy on the block, I decided I should volunteer, and I did so. Bernie looked at me and said: "David, you know, this is a ten-year project." I won't say what I thought of Bernie's predictive ability at that stage. Today, I'll say that Bernie was wrong again. It is now going on eleven years and the United States has yet to establish in an agreed and binding way many of the maritime boundaries with its neighbors.

I plan to review today the status of United States maritime boundaries. I note that the status of our boundaries has not changed in recent years -- except for the Gulf of Maine case -- so if you have heard this speech before, or if you are familiar with the article that Mark Feldman and I wrote in a 1981 edition of the *American Journal of International Law*, you are current. I would like, however, to focus on maritime boundaries in a slightly different way today by considering the process of boundary making.

Assuming no existing agreement, boundary making begins with the establishment of a boundary claim. This requires a responsible government authority to examine that nation's interests and the relevant criteria, and to determine an appropriate boundary position to be advanced.

Next, boundary making requires negotiations between neighboring claimant states. Perhaps agreement is possible, perhaps it is not.

If not, boundary making necessitates the management of the dispute or the management of the fact that there is no agreed boundary.

Finally, we are finding that boundary making may only be possible if dispute resolution procedures are used.

I would like to examine these four steps, concentrating on the first of them, noting United States practice, and suggesting considerations that U.S. experience would indicate should be weighed at turning points in the boundary making process.

Making the Claim

The most basic issue a government must decide in making a maritime boundary claim is whether it wishes to make a claim that in essence is an equidistant line, or whether it wishes to make an claim that is more advantageous to it than the equidistance approach. By equidistance I mean a line that is always equidistant from the land territory, including islands, of two countries. There are likely to be several factors that go into that decision. First, is there a credible legal argument for arguing for more than half? Second, is there a national interest, of a resource or security or other character, that demands an effort to seek more than half? And, third, are the political costs of maintaining a position asking for more than equidistance acceptable?

Let us take up these three factors in order.

First, the legal argument. In most boundary situations a clever, experienced boundary lawyer can identify a legal argument that would advance a position that gives the client state more than equidistance. There is always a difference between the shape or configuration of neighboring coasts, the location and size of islands, the relative use of the area, etc., which provide the boundary lawyer the basis for making a distinction that advantages his client.

Who, except a clever boundary lawyer working for Canada, would ever have expected that one could argue that Cape Cod was a long promontory that legally was non-existent, as Canada did in the Gulf of Maine case?

As well, there are always new theories, or at least ways of applying them, which advance a position beyond equidistance. For instance, in the Gulf of Maine, the United States first argued in the 1970s that it was entitled to a boundary based on natural prolongation -- sea floor topography. When the U.S. got to court a few years later, it decided that it would be more to its advantage to advance the theory that the boundary should be a perpendicular to the general direction of the coast, determined from the land boundary terminus.

The point is that it is not difficult to create a legal argument to justify asking for more than half. The fact that you can do so should not in and of itself drive government policy. A government should ask itself if there is a reason to assert a maximum legal case.

That brings us to the second point. What is the interest one is pursuing in establishing the boundary claim? Is more ocean area the objective? Are there specific areas of interest? What is known of the resource potential of ocean areas? What if the law changes? What are the national security implications? Should one consider what this boundary looks like if states are entitled in the future to make greater substantive and geographical claims in the ocean? Is the issue one primarily of having a sure stable boundary with a neighbor? All of these issues must be thought through and conclusions reached.

Having examined the interest at stake, the third thing one has to ask is what is the prospect of sustaining a maximum claim with one's neighbor -- be it in negotiations, dispute management, or in adjudication. Just because you make a claim doesn't mean that your neighbor will agree with it. Is the government prepared to maintain a claim of maximum advantage against its neighbor, if one expects that position to become a source of contention in the bilateral relationship? Perhaps so; perhaps not. Perhaps one answers that question differently for different neighbors.

I know that legal dogma would lead us to believe that there is something more theologic or juridical about making a boundary claim. But I submit to you it is a more flexible and political process.

Let me now review the maritime boundary claims of the United States. These claims were established through an interagency process in 1976 which considered the factors I have discussed. The positions taken were notified to neighboring states, published in the Federal Register, and appear on U.S. nautical charts. The United States has twenty-five or more potential maritime boundaries with at least fifteen countries. (Maritime boundaries referred to here are EEZ boundaries). The geography of each case differs. There are many places (if not all) where the United States could develop a legal argument that suggests it is entitled to more than equidistance. However, the United States has chosen to do so only in three cases: Canada in the Gulf of Maine area, the Bahamas, and the Soviet Union where there is an old governing treaty. Before addressing these three situations, I will identify the areas where the U.S. has advanced equidistance lines and note two situations where the U.S. might have argued for more but chose not to do so.

These two are Venezuela and Mexico.

The U.S. maritime boundary with Venezuela is one of the few that have been established by treaty, with the Senate having given its advice and consent to ratification. (TIAS 9890, entered into force 24 November 1980.) That boundary is based upon application of the equidistance method giving full effect to islands. In this case there is one island, in particular, that the U.S. could have argued should be discounted in establishing the equidistant line. That is Aves, a small Venezuelan island in the Eastern Caribbean. Why did the United States not argue about and stand firm on a maximum legal position in that case?

Well, first, let me say that it was not because it wasn't considered.

There were in fact several reasons why the decision was made not to do so. First, the interagency process that determined all U.S. boundary positions decided that U.S. interests, on balance, were best served by taking a consistent position on a worldwide basis to give islands full-effect in the equidistance method in all situations. The United States has many places where using small U.S. islands is to its advantage -- one instance not far from here is the maritime boundary with Cuba, where the Keys -- particularly Dry Tortuga -- serve the U.S. well if they receive full effect in an equidistance delimitation with Cuba. Thus, the government decided that consistency in U.S. island practice was important to U.S. international credibility. It was important, for instance, in negotiations with countries such as Cuba, and it would be important if a dispute led to court where inconsistency in U.S. practice would certainly be used against us. Thus, while Aves was a situation where an island might be discounted, the general U.S. interest seemed to be to the contrary.

As to resources and other U.S. interests, an amount of ocean space was clearly at issue, but it was deep water of the Caribbean. It was not known to have any particular resource potential. Thus, apart from the argument that more is better, resource considerations did not compel the U.S. to argue for more than equidistance.

The third factor was the political factor. It was and is important that the United States posture in the Caribbean be one of open friendly support for the countries of the region. The U.S. was convinced that a

claim of maximum legal advantage would create a maritime boundary dispute with Venezuela. This would be misconstrued in the region. The U.S. did not wish to be seen as aggressive and geographically expansive in the Caribbean.

Accordingly, all these reasons combined, plus concern for our general bilateral relationship with Venezuela, caused the United States not to stake out a claim of maximum legal advantage.

Here, consistent with these thoughts, I would like to make a point about state practice, generally, as legal precedent in international maritime boundary cases. It should be clear that the combination of factors (some not related to delimitation *per se*) that led to the U.S.-Venezuela Treaty were unique to that situation. For some other state to argue that this Treaty constitutes state practice in a legal sense that should bear on an issue in another setting is stretching the point. The international community needs to be cautious in looking at state practice in boundary making for this reason.

The second example is Mexico. The U.S.-Mexico 200 nautical mile zones overlap in three places: the west coast; the western Gulf coast; and there is an opposite situation between the Yucatan and Louisiana. In the U.S.-Mexico context, the use of U.S. islands off the California coast advantages the United States, while the use of Mexican islands offshore the Yucatan advantages Mexico in that area. Either side could have argued that the other's islands should not be given effect while its islands should. Obviously, however, that would not have gotten the negotiators very far. The question was: use them in both places or don't use them in either place.

The U.S. government examined this question in 1976. The answer that was arrived at was:

(a) the U.S. has the interest in establishing the precedent of using islands, generally;
(b) the oil and gas resource interest in 1976 was focussed offshore the California coast and not on the deep water of the central Gulf of Mexico;
(c) rich fishing banks would fall under U.S. jurisdiction off Southern California if full effect to islands was agreed; and,
(d) finally, the U.S. had an interest in bringing as much maritime space under U.S. jurisdiction as possible in the area offshore the San Diego Naval base.

All of these reasons argued for giving islands full effect in the delimitation with Mexico. There was no dissent from this point of view.

The U.S. and Mexico exchanged notes in November 1976 (TIAS 8805) on this basis and in 1978 they signed a treaty to the same effect. The exchange of notes is a binding international agreement that still governs the boundary relations between the United States and Mexico, pending ratification of the Treaty.

The Treaty, which contains in it the same line as found in the exchange of notes, has been stalled in the Senate now for six or more years. Some persons have asserted that the Treaty does not maximize U.S. resource interests in the central Gulf of Mexico by taking a maximum U.S. legal approach in that area. Well, no one said it did take such an approach. The justification for the agreement was and is that the totality of United States interests would be best served by an agreement with Mexico along the lines that were reached. For the U.S. to open the issue now and argue for more in the central Gulf would

likely (a) question the west coast arrangement and (b) not get us far with Mexico in all events. Some would have the U.S. throw away what has been achieved, bringing uncertainty to the U.S.-Mexico boundary relationships on both coasts. One must ask whether there is wisdom to that approach, given the unlikelihood that any possible positive benefit for the U.S. could be achieved by reopening the matter.

In this connection, I would like to say a word about resources. In the ocean we are normally uncertain as to the resource implications as we put lines on charts establishing national jurisdiction. We do the best we can with the information we have. In 1976, when U.S. positions were established, the oil and gas industry and the Department of Interior were supportive of the U.S. boundary position taken with Mexico because the focus was on the west coast -- the so-called borderland area off Southern California. Today, there is speculative oil and gas interest in the deep water areas of the central Gulf. Should that fact call into question the deal that has already been struck? Little oil would have been taken from the North Sea if those countries reexamined their boundary position each time a new find was made or a new legal justification developed. Without certain boundaries, the resource potential of the areas near boundaries will not be developed.

Let me now quickly review the maritime boundary situations where the United States has adopted an equidistance approach.

Venezuela. The boundary treaty was signed on 28 March 1978 and it entered into force on 24 November 1980, TIAS 9890.

Mexico. An executive agreement, entered into through an exchange of notes on 24 November 1976, (TIAS 8805) governs now for ten years. The boundary treaty which was signed on 4 May 1978 is before the Senate for its advice and consent to ratification.

Cuba. A boundary treaty was negotiated with Cuba in the first year of the Carter administration (signed 16 December 1977). It gives full effect to U.S. islands. In these geographical circumstances, that is advantageous to the U.S. Because of the political climate, the Senate has not acted on the treaty; however, every two years there has been an exchange of notes with Cuba provisionally applying the terms of the treaty pending its entry into force. I can say that the fact that there is an agreed boundary has been operationally useful.

In the Caribbean, besides the boundary with Venezuela, the U.S. has boundaries between the U.S. and the British Virgin Islands, a short boundary between the U.S. Virgin Islands and Saba (Netherlands Antilles), as well as a short boundary with Anguilla (U.K.). The U.S.-U.K. Virgin Island Fishing Treaty (signed 27 March 1979, entered into force 10 March 1983, TIAS 10545) establishes that the two countries have a common equidistant approach in this area. There has been no concerted effort, however, to refine the boundary, as yet, into agreement form. Likewise, there have been consultations with the Dutch. There is no problem with the equidistance approach. But there has not been an effort to develop a boundary agreement, as is the case with respect to Anguilla.

Between Puerto Rico and the Dominican Republic a maritime boundary is required. Depending upon precisely where that boundary terminates in the south, the U.S. could have a longer boundary with Venezuela. There have been several rounds of talks with the Dominican Republic. The Dominicans would like the U.S. to concede to it some areas near its coast in return for some areas farther offshore. The U.S. has been willing to discuss this trade-off, since there is no hydrocarbon potential in the area, and if Puerto Rican fishing interests that might be

affected by such a trade could be accommodated. These negotiations have maintained a slow pace.

Turning to the Pacific Ocean. The United States has three boundary segments with Kiribati, one off Howland and Baker Islands, one off Palmyra, and one off Jarvis Island. Kiribati has been notified of U.S. willingness to negotiate boundaries based upon equidistance. Kiribati expressed some interest, but indicated it would need time to prepare.

Around American Samoa there are five maritime boundaries: Tonga to the southwest; Western Samoa to the west and north west; Tokelau to the north; the Cook Islands to the east; and Niue to the south. The boundary with the Cook Islands has been negotiated and ratified (signed 11 June 1980, entered into force 8 September 1983, TIAS 10774). As well, the boundary with Tokelau has been negotiated with New Zealand and ratified (signed 2 December 1980, entered into force 3 September 1983, TIAS 10775). The U.S. has used equidistance in the other three circumstances without objection from the neighboring countries, but negotiations have not been held to establish the boundaries.

North of the Northern Mariana Islands a boundary is needed with Japan. Again, there is no difference in approach, but no attempt to negotiate an agreement with Japan has yet been made.

I also note that there are several boundaries between U.S. islands and between parts of Micronesia that will become freely associated states. Those boundaries are between Guam and the Federated States of Micronesia and between Wake Island and the Marshalls. These also have not been addressed, as yet.

The U.S. boundary position with Canada is that on three of the four U.S.-Canada boundaries equidistance is the appropriate method. In the Gulf of Maine area, the U.S. took the position that it was entitled to something more. The equidistance boundaries in and off Dixon Entrance, offshore the Strait of Juan De Fuca, and in the Beaufort Sea remain to be established by agreement.

Let me now turn to three more difficult situations where equidistance is not used: Canada in the Gulf of Maine, the Soviet Union, and the Bahamas. As you know, the boundary in the Gulf of Maine area was sent, by treaty, to binding third party adjudication before a chamber of the World Court (signed 29 March, entered into force 20 November 1981, TIAS 10204, decide by judgment of the International Court of Justice, 12 October 1984, *ICJ Reports* 1984, p. 246.) Although the United States did not do as well as we might have wished to do in that case, we did substantially better than the equidistant line.

With the Soviet Union the United States believes that the 1867 Convention which ceded Alaska to the United States governs the U.S.-Soviet maritime boundary in the Bering Sea, North Pacific Ocean, and Chuckchi Sea. There have been a number of rounds of talks with the Soviets focusing on the question of the precise cartographic representation of the 1867 Convention Line, as well as the application of that line. These talks continue in a business-like fashion.

The one place in all of this where the U.S. government has not established a formal boundary position is in the case of the Bahamas. I do not believe I should go into the reasons for that here. Suffice it to say that the line between the Bahamas and the United States is termed a fisheries enforcement line. The Bahamas was informed that this line does not necessarily constitute the U.S. boundary position. In the Strait of Florida the line is equidistant, but in the area of the Blake Plateau north of the Bahamas the line is on the Bahamian side of the equidistant line. The Bahamas protested the U.S. line. The United

States by virtue of its fishing enforcement line position would seem to be indicating its view that in the area north of the Bahamas the equidistance line produces an inequitable boundary for the United States.

Negotiations

Let me now move beyond the establishment of the claim to the negotiations that must occur if there is to be an agreed boundary. I want to point out some of the issues that pop up, other than the discussion of the location of the line, and that create difficulties in reaching final results. One of these is because of disputed sovereignty claims over land masses. This is a common problem around the world, which the U.S. has not avoided. In particular, there is about a forty-mile length in the northern Gulf of Maine that was not decided by the World Court decision because the U.S. and Canada did not submit to the court the dispute over Machias Seal Island. On the other hand the boundaries with the Cook Islands and Tokelau specifically were used to negotiate the resolution of sovereignty claims regarding a number of islands in those areas.

Another issue is the importance of technical clarity. It is not that easy to establish agreed equidistant lines: common charting practice is required. Dr. Robert Smith, of the Geographers Office of the Department of State, could regale you with tales of spheroids, datums, etc. that bear upon boundary making. The fact that these issues played a role in at least two international maritime boundary cases (Anglo-French/Libya-Tunisia) should indicate the importance that needs to be attached to them in negotiations. Sloppy treaty drafting will only create future problems.

A third issue is the legal effect of the boundary. The U.S. has sought to assure that the boundaries it negotiates will be used for all purposes and for all time. Further boundary negotiations are not required if the law changes. Thus, the establishment of the U.S. EEZ in 1983 did not necessitate a review of U.S. boundary agreements or positions since those agreements and positions automatically applied to the new jurisdictional claim.

Besides the 1867 Treaty, through negotiations we have established by agreement boundaries with five countries: Venezuela (by treaty); Mexico (executive agreement pending entry into force of a treaty); Cook Islands (by treaty); New Zealand with respect to Tokelau (by treaty); and Cuba (executive agreement pending entry into force of a treaty). One might also add the formal understanding with the U.K. contained in the U.S.-U.K. fishing treaty.

Managing the Dispute

As you can see, there are many places where no boundary has been established and, in fact, where no negotiations have occurred. This leads me to the third element of boundary making -- the management of a boundary issue pending its resolution. In most of the U.S. situations there is nothing to worry about. The lack of agreement over a ten-year period has gone unnoticed. The U.S. position is on the record; no objection has been received. Any judicial inquiry might say there is a tacit *modus vivendi* in these areas. The parties will formalize the issue when it is timely.

In some cases, however, there is an active difference of opinion which must be managed. I believe the United States has done a good job over the years in keeping its boundary disputes out of the political

spotlight. The United States has been prepared to forbear from the full operation of its laws in these areas to avoid exacerbating the dispute with its neighbors. This is a policy which has extended now through the administrations of three Presidents. The United States has sought appropriate means to preserve its interests without creating new bilateral tensions. For example, it has used the device of flag state enforcement in disputed boundary regions of active fishing importance with Canada. In that case there is an informal understanding which applies in the disputed areas: the fishermen of either side may fish without being subjected to the law enforcement authorities of the other country; neither side will authorize third party fishing in the area; and either side may enforce against a third party found fishing in the area. This understanding has served the U.S. and Canada well for more than ten years in the active fishing grounds of Dixon Entrance and for nearly eight years on Georges Bank pending the conclusion of the Gulf of Maine case.

For hydrocarbons the United States has indicated its interest in the disputed areas by moving its leasing process through a number of procedural steps. It has pulled up short of granting leases in areas of jurisdictional uncertainty.

Dispute Settlement

Let me now quickly mention the fourth component of boundary making. After the claims, the negotiations, the management of the dispute, one may find that there is a problem that still cries out for resolution. Dispute settlement may be the best realistic answer. This is the situation that the United States and Canada found them selves in 1981 following six years of very active negotiations on the boundary and related resource issues in the Gulf of Maine area. Political compromise was simply not possible. U.S. lawyers and Canadian lawyers made persuasive legal arguments, but they went in exactly opposite directions. Each side believed it was fundamentally and unerringly right, fully justified in its position by the law of maritime boundaries. No compromise.

So the case went to court. That is a great big interesting story that we don't have time for. The point I want to make is that after three years of exhaustive work by both sides, enormous expenditure of funds, and the presentation of the case, what did the two countries get but a compromise boundary line.

I hope this has taught us something about the boundary making process. I hope that in those areas of difference which remain to be negotiated we have the political will and statesmanship to reach agreements rather than looking to a court to cut the deal for us. I hope we will carry through on our agreements once they are reached. I hope that pending that, we will continue to manage the problems that arise in a responsible way.

Having said, that, I cannot resist closing with my own prediction: in ten more years the job still will not be finished.

* The views expressed are those of the author and do not necessarily represent the views of the Department of State or the United States Government.

Bernard Oxman: We do have time for a few questions. Dr. Knauss?

John Knauss: David, your talk about looking at the islands sounds like a very neat, business-like way to do it. When you actually got down to looking at the charts, however, what kind of definition did you use for an island that distinguishes it from a rock? Did that ever become a problem to you, as in certain areas of the South Pacific? Did you use the LOS Convention?

David Colson: We did look at it, and I think that the draftsman of that particular article was with the Department of the State at that time. But we decided that any piece of real estate could fit under the definition of an island, and we made the decision based upon what areas had U.S. territorial seas drawn around them. That's how we ultimately made the judgment. If it had a territorial sea, we decided that it was entitled to be used as a base point for drawing equidistant line boundaries.

Bernard H. Oxman: Professor Burke?

William Burke: This is a follow-up on that question. What formulas do you use, or what positions do you take, to avoid prejudicing third states on judgments about the appropriateness of baselines? For example, the case of Venezuela. There is a dispute whether Aves Island is an island.

David Colson: The question was: how does one avoid prejudicing third states' interests in a delimitation between State A and State B., as in the Aves Island case in the eastern Caribbean. Venezuela does have disputes with some of the other island countries in that part of the world over the effect that Aves Island should be given in a delimitation. The United States waited until the Dutch-Venezuelan boundary agreement, which used the equidistant and gave Aves full effect, had been negotiatated, so we felt that we were following at least one country's lead.

Secondly, I think it's important to focus on the first words of boundary delimitation formulas that are found in both the 1982 Convention and the 1958 Convention: that boundaries are to be determined by agreement between the states concerned. That's not just a hortatory statement of general good international conduct; it has a legal component which in large measure takes state practice out of maritime delimitation processes. I do not believe it is appropriate to make an argument that what happened between State A and State B is relevant to delimitation between States C and D, because all sorts of factors enter into judgments that states make about where they want their boundaries to be. We decide whether to argue strongly and take a case to court, as we might have done with Venezuela, or to not pursue a course of maximum advantage for other political reasons. And we have made that clear to all of the Caribbean states that are concerned about this particular issue.

Bernard Oxman: One more question?

Unidentified Speaker: I'd like to ask if you might follow up on your reference to the importance of rhumb lines and great circles. How much territory in the waters of Norton Sound do you think may be involved in connection with the difference in the Soviet Union using rhumb lines and the United States great circles?

David Colson: I think that over the length of the Convention line, and somebody might correct me -- it's something like 15,000 square miles.

Bernard Oxman: I hope you'll all join me in thanking David once again for his very fine presentation.

PART VII

DISPUTE SETTLEMENT WITH AND AMONG NON-PARTIES TO THE LOS CONVENTION

INTRODUCTION

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The theme to be discussed by the members of this panel is "Dispute Settlements With and Among Non-Parties to the LOS Convention." We have decided to approach this problem area by focusing on two main contentious issues.

In the first part of the presentations, we will take a closer look at the relationship between interests of the coastal state in controlling activities off its own coast and the interests of the flag state in conducting activities at sea without coastal state interference. In order to avoid disputes in this respect, the political challenge confronting the parties is to try to strike the balance between the freedoms of the flag state within the 200-mile exclusive economic zone with the sovereign rights and regulatory powers of the coastal state.

The second main issue to be dealt with is the resolution of conflicts with respect to competing or overlapping claims to deep seabed mine sites. The legal situation in settling conflicting claims to mine sites is complex and I would say uncertain. There is still no generally accepted and universally applicable treaty regime in existence and in which a valid title to a certain mine site could be acquired or conflicting claims could be adjudicated. The Law of the Sea Convention has not yet found general acceptance and has not even entered into force between those states which support it. So far, just two conflict resolution arrangements of a limited scope have been established, namely Resolution II concerning pioneer activities of 10 December 1982 and the Provisional Understanding on Deep Seabed Matters of 3 August 1984. The main question to be discussed in this connection is: do we at the present time have the necessary legal instruments to resolve conflicts over overlapping or competing claims to mine sites provided there is a political will to reach a solution?

The two issues addressed by this panel have one common feature, namely, the accommodation of different maritime interests. The process of accommodation, however, will be and is already subject to continuing pressures which might unbalance a just allocation of advantages between the various ocean states. Lack of relevant legal instruments and political will to settle conflicts might therefore lead to either confrontations or acquisitions as states grow reluctant to expand political, economic, or military power to protect their interests. But since none of these outcomes do further the peaceful uses of the oceans, it is necessary to take a closer look at the shortcomings of existing dispute settlement arrangements and their potential for conflict resolutions. And to do this I have the privilege to present you with and to draw upon the knowledge and experience of the distinguished members of this panel.

Our first speaker this afternoon is Professor Bernard Oxman, who will address the first issue in his paper, "Dispute Settlements With and Among Non-Parties to the Law of the Sea Convention: Navigation and Pollution." Professor Oxman has served as Assistant Legal Adviser of the U.S. Department of State and during the Ford, Carter, and Reagan administrations, he was vice-chairman of the U.S. delegation to UNCLOS III. As all of you know, he has written extensively on ocean law

issues. Among his more recent books is *Law of the Sea: U.S. Policy Dilemma* which was published in 1983.

Our second speaker is Dr. Choon-ho Park, Professor of Law at the University of Korea. Professor Park is a true internationalist. He earned his doctorate in public international law from the University of Edinburgh, he has had positions as Senior Researcher both at Harvard Law School and later on the East-West Center, and he is now in Korea. Dr. Park will present a paper written by Thomas A. Clingan entitled, "Dispute Settlement Among Non-Parties to the LOS Convention with Respect to the Outer Limits of the Continental Shelf," and will add his own remarks.

Then we move to the second case of dispute settlement with which this panel is concerned, namely the resolution of conflicts with respect to competing or overlapping claims to deep seabed mine sites. Our first speaker on this topic is Dr. Conrad Welling, the Senior Vice President of Ocean Minerals Company. He holds degrees in engineering, electronics, and aeronautical engineering and has been dealing with ocean affairs throughout his entire life, both in the Navy and in industry. He's the practitioner of the panel and will speak on "Conflict Between Mining Sites of NonParties."

Our final speaker is Professor Günther Jaenicke, Professor of Law at the University of Frankfurt. He has been a member of the West German delegation to UNCLOS III. He is well known to LSI audiences as one of those who has contributed most as a panelist in the annual conferences. Today he will speak on "Conflict Between Mining Sites of Parties and NonParties."

DISPUTE SETTLEMENT WITH AND AMONG NON-PARTIES TO THE LAW OF THE SEA CONVENTION: NAVIGATION AND POLLUTION

Bernard H. Oxman
Professor of Law
University of Miami School of Law

Coastal State and Flag State Interests

A central issue of the law of the sea has always been the balance between the interests of the coastal state in controlling activities off its coast and the interests of the flag state in conducting activities at sea free of coastal state interference.

Historically, this balance was struck geographically. Up to some geographic limit the coastal state controlled virtually all activities; beyond that limit all states enjoyed virtually untrammeled freedom to do as they wish. Maintaining a particular geographic limit for coastal state control was largely synonymous with maintaining the balance struck by the law of the sea between coastal state and flag state interests. Baseline issues apart, one did not have to be a sophisticated lawyer to know whether a coastal state or a flag state had literally stepped over the line.

The modern law of the sea elaborated by the 1982 UN Convention[1] takes an entirely different approach to achieving a balance of interest between coastal states and flag states. In vast regions of the sea extending up to 200 miles from the coast and beyond, rights are now shared in the same area: the coastal state has broad powers to control some activities such as fishing and mining while flag states enjoy broad freedom to conduct other activities such as navigation and overflight. Moreover, the coastal state has certain regulatory and enforcement powers over navigation itself for environmental purposes.

Maintaining the balance of such a system is no longer a simple matter of identifying and policing a geographic line. The most important limits on coastal state jurisdiction and flag state freedoms are no longer geographic but functional or substantive. Ships and aircraft enjoy broad transit rights through straits and archipelagoes in areas that are subject to the sovereignty of the coastal state. Freedoms of navigation, overflight, laying of submarine cables and pipelines, and related freedoms, co-exist with broad coastal state sovereign rights and regulatory powers in the 200-mile exclusive economic zone. Even beyond 200 miles, the classic high seas freedoms co-exist with the sovereign rights and regulatory powers of the coastal state over the continental shelf. The more the functional balance between the rights of coastal states and flag states shifts in one direction or another in any of these areas, the more the regime will resemble either the free high seas or internal waters.

The kind of questions we face today are whether a coastal state may stop and board a merchant ship or oceanographic ship in exactly the same area that the same coastal state undoubtedly may board a ship engaged in fishing. Precisely how many people are aware that one of the keys to understanding and maintaining the balance of the straits and economic zone provisions of the Convention is understanding the difference between a coastal state right to enforce respect for its interests and a flag state duty to respect those interests? How easily can one

convince political leaders to expend substantial political, economic, or even military resources to protect that distinction?

Shaping and maintaining the underlying balance between coastal state and flag state interests in the modern law of the sea will require constant attention to complex, and frequently subtle, questions of substantive rights and duties. Only rarely will the issue present itself cleanly like the old arguments about geographic limits. It will take considerable sophistication to understand why a particular assertion or action is unlawful and sets an undesirable precedent.

This is not a setting in which states are prone to take the kinds of bold action that are grist for the mill of those who like to pray at the altar of customary international law. It is not a setting in which Congress could easily be dissuaded from making any given claim at sea on the grounds that it is clearly illegal. Gone is the mathematical clarity of the law of the sea of (largely imagined) days of yore.

With respect to navigation, the problem is even more pronounced. While all states and their nationals enjoy free transit of straits and archipelagoes and freedom of navigation in the economic zone, the coastal state has certain rights to prevent, reduce, and control pollution from ships exercising those freedoms. The nature of those coastal state rights and the limitations on their exercise affect in a significant way the extent to which navigation is in fact free; they also affect the degree to which the coastal state is allowed to protect its shoreline and offshore resources. The issues are related. It is one thing to insist that questions of navigation safety and construction and manning of ships are essentially the province of the flag state if the coastal state has means other than unilateral enforcement to deal with flag states that are not meeting their duty to enforce international standards. It is quite another to expect the coastal state to tolerate safety and environmental hazards off its coast without any effective remedy.

None of this presents a problem from the perspective of those interested in free navigation if one of three assumptions is correct.

The first assumption is that coastal states have been educated by the Third UN Conference on the Law of the Sea and now recognize that their interests would not be served by interfering with global free navigation. If the history of the law of the sea is any guide, this is not a conservative assumption regarding the probable behavior of countries outside Europe, as even some in Europe.

The second assumption is that the major maritime powers, in particular the United States, will effectively oppose attempts by coastal states to extend their control over navigation. There is little in twentieth century history to suggest that the United States or other major maritime powers would now expend sufficient political or economic capital, not to mention military force, to dissuade coastal states from such a course of action. There are infrequent exceptions. Cambodia and Libya are examples of those rare coastal states where we had no major political or economic investment that might be compromised by a firm response. More typically, representatives of companies with investments in Ecuador apparently persuaded President Nixon to waive statutory sanctions against Ecuador for seizure of U.S. tuna boats, and the U.S. government is in a perpetual quandary about how to dissuade Canada from making one expansive claim after another. It is foolhardy to suppose that a program of global exercise of rights is not subject to significant political and military rights.

While a program of global exercise of rights is very important, it cannot work over the long term if the platform of recognized legal principles on which it rests is permitted to erode. In response to particular problems of the moment the United States can be expected to take ever-expanding coastal positions that compromise its own ability to insist on restraint from other coastal states. Regulation of billfish, abortive claims of coastal state jurisdiction over the deep seabeds, enforcement of marine sanctuaries, telling federal courts that the freedom of navigation on the high seas is not an enforceable part of the law of the United States, and utterly unnecesssary fussing about the duty of optimum utilization are but a few recent examples. More troubling is the presence of ambiguous language on the central issue of accommodation of uses in the proclamation establishing an exclusive economic zone.[2] If that language was, as rumored, a result of a compromise between defense and navigation interests on the one hand, and the coastal regulators of the Commerce and Interior Departments on the other, it merely proves a central underlying point: U.S. interests in protecting the principle of the freedom of the seas carry more weight in domestic decision-making in the context of multilateral negotiations than in the context of isolated domestic conflict with admittedly desirable domestic goals, be they resource development, environmental protection, drug enforcement, or control of terrorism. If the U.S. wishes to preserve legal principles that protect its own long-range interests in global mobility and navigational freedoms, it must find some mechanism to protect those principles from its own *ad hoc* expedient decisions.

The third assumption is that the text of the 1982 UN Convention on the Law of the Sea regarding navigation rights and pollution from ships is sufficient to restrain coastal state incursions on navigation. That assumption rests on certain further assumptions: that other non-parties to the Convention will join the United States in respecting the relevant provisions as indicated by President Reagan;[3] that the United States, including the Congress and the courts, will itself continue to respect the balance of the zone over time under a variety of contrary pressures; that parties to the Convention will apply it to non-parties; that the words of the Convention will yield to only one interpretation when the underlying question is that of balancing competing interests; and that self-interpretation and self-restraint are adequate to keep behavior within reasonably narrow limits. These are not conservative assumptions.

These assumptions are all the less conservative when one examines the temporizing of government officials on the legal status of the provisions of the Convention apart from those dealing with deep seabed mining. Should we continue to debunk the entire Convention when its rules provided the only generally accepted legal basis for asserting a right independent of foreign consent to fly military aircraft from England to Libya over the Strait of Gibraltar? When Floridians were recently imprisoned by St. Vincent, should we have hesitated to point out that the Convention prohibits imprisonment for fisheries violations? Can we expect Congress, or even allies like the Federal Republic of Germany, to be scrupulous in their respect for the non-seabeds provisions of the Convention when the Executive reserves to itself the discretion to decide in each instance which provisions it will and will not respect and what they mean?

Compulsory Dispute Settlement As A Substantive Issue

The balance of the law of the sea is now up for grabs. The question is whether that dynamic balance is to be left solely to the unilateral action of states and domestic bargaining processes, or whether inherent in the very complexity of that balance is the notion that some third-party arbitration is necessary to police it.

In his Oceans Policy Statement of 10 March 1983, President Reagan indicated that the United States would act in a manner consistent with the balance of interests achieved in the 1982 United Nations Convention on the Law of the Sea with regard to matters other than deep seabed mining. He declared:[4]

> 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.
>
> 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.

Even if one were to assume that all states recognize that they are legally bound by all the provisions of the Convention regarding navigation and pollution from ships, including the most detailed restraints, it is evident that the drafters of the Convention were still concerned that the balance might continue to be subject to coastal state pressure on navigation and flag state laxity in enforcing safety and environmental standards. Thus they took the unprecedented step in global multilateral diplomacy of subjecting to compulsory arbitration or adjudication cases in which the coastal state is alleged to have violated the provisions of the Convention regarding navigation, overflight, and pollution as well as cases in which the flag state is alleged to have violated its environmental and other duties.[5]

To recall the reflections of John R. Stevenson, then the Special Representative of the President, and the author on the eve of the Conference:[6]

> The developing factual (as distinguished from legal) situation in the oceans is one in which every country increasingly believes that it has, in effect, the option of pronouncing and attempting to achieve relevant acquiescence in its interpretation of the law, provided it is prepared to run such risks as may be entailed. Such a system can operate through existing customary law, or, in effect, through unilateral interpretation of treaties. The degree to which this can be done in the case of a treaty is largely a function of the specificity of the treaty and the legal talent applied to the endeavor. Given the current trends in the law of the sea, there is reason to believe the process might continue even if a treaty were widely ratified. In the broadest sense, the purpose of the law of the sea negotiations is to put an end to the direct relationship that such a system entails between the enjoyment of a right and the application of power. A system of

compulsory, impartial, third-party adjudication is thus an essential element of the overall structure.

If the provisions of the Convention regarding both freedom of navigation and environmental protection are subject to substantial and continuing pressure, and if states are reluctant to expend substantial political, economic, or military capital to protect the integrity of those provisions from corrosive precedents, then a "third option" -- a choice other than acquiescence or confrontation in the face of alleged violations -- is needed to protect that balance. That "third option" is compulsory and binding third-party settlement of disputes.

The issue presented for the United States is whether this dispute settlement obligation should be regarded as part of the balance of the Convention to which the President referred. From the perspective of a state that is not party to the Convention, two related questions are posed: What are the objectives of its law of the sea policy? What is the content of customary international law?

Needless to say, these questions will not arise as between states that are parties to the Convention. Those states would be bound by the entire Convention, including its dispute settlement provisions. They are questions that arise where one state is not, or is not yet, party to the Convention. Since the Convention is not yet in force, they arise for all states today.

The questions presumably would not arise for those who pray at the temple of state practice and would deny or minimize the impact of the Law of the Sea Conference and Convention on the content of law of the sea policy and customary international law even with respect to matters other than deep seabed mining. At least at present, state practice gives scant evidence of compulsory dispute settlement forming part of the process of acquiescence out of which norms of customary law may arise.

But if, like President Reagan and the International Court of Justice, we recognize the intimate relationship between the modern customary international law of the sea and the development of the Law of the Sea Convention -- if in jurisprudential terms we recognize that the Conference and Convention have themselves shaped the expectations of governments in important ways -- then we are compelled to raise the question of the relationship under customary law between compulsory dispute settlement and the "substantive" norms set forth in the Convention.

This inquiry does not turn on one's view of the argument made in the context of deep seabed mining that the Convention is a single "package deal" whose provisions cannot be incorporated selectively into customary international law. Those who subscribe to the single "package deal" approach must of course include compulsory dispute settlement in the package. In effect, they take the position that every provision of the Convention is in some respect a political *quid pro quo* for every other provision. While they may or may not be correct as a political matter, their argument does not rest on a direct substantive or legal relationship between different provisions. It is one thing to say that agreement on a particular right was conditioned on the availability of compulsory dispute settlement to control its abuse; it is quite another to say that agreement on a particular right was conditioned on agreement on another substantively unrelated right.

The relationship between compulsory dispute settlement and other provisions of the Convention poses a much narrower question than is

asked by the "package deal" advocates. The issue is whether, and to what extent, compulsory dispute settlement is to be regarded as an integral part of the substantive settlement reached on certain issues. To be more precise, to what extent is compulsory dispute settlement part of the balance between coastal state and flag state rights that lies at the heart of most of the Convention?

It is unusual, to say the least, to raise the question of whether the duty to submit to arbitration on certain issues constitutes an obligation of states under customary international law. Yet we should be bold enough to ask, "Why not?"

The role of compulsory dispute settlement in the Law of the Sea Convention seems to satisfy the criteria identified by the International Court of Justice in the *North Sea Continental Shelf* cases for determining whether provisions of a multilateral convention are amenable to absorption into customary international law.

One such criterion relates to reservations. If a provision is subject to reservations, it is unlikely that the drafters were of the common opinion that the provision already was or ought to be binding on all states. The dispute settlement provisions of the Law of the Sea Convention are not subject to reservation and, with certain precise exceptions, are mandatory.

Another criterion relates to the norm-creating character of the treaty provision. In this regard one might note the categorical character of the duty to arbitrate or adjudicate disputes under the Convention.[7] While this duty is subject to important exceptions, if one examines the dispute settlement system as a whole as it bears on the central question of the balance between coastal state and flag state rights, three general principles clearly emerge:

(1) Interference with navigation and related rights and freedoms is subject to compulsory arbitration.[8]
(2) Violation of international navigation and pollution standards by flag states is subject to compulsory arbitration.[9]
(3) States may exclude disputes regarding military activities and matters before the U.N. Security Council.[10]

A state need not conclude that the dispute settlement obligation is a condition for the assertion of certain rights under customary international law in order to conclude that compulsory arbitration of certain disputes is desirable. The importance of linking the dispute settlement obligation to certain substantive rights and duties is that it enhances a government's ability to persuade others.

The Nature of the Link to Substance

Since the jurisdiction of the coastal state over the exploration and exploitation of natural resources is, as such, not subject to compulsory arbitration under the Convention, it follows that the mere assertion of coastal state rights over resources as set forth in the Convention does not, in itself, raise an issue regarding corresponding arbitration obligations. The question arises with respect to those rights and duties that are subject to compulsory arbitration.

First there is the obligation of the coastal state to exercise its rights with due regard for navigation, and the reciprocal obligation of the flag state to exercise its navigational rights with due regard for the rights of the coastal state. While this formula derives from very traditional principles of the law of the sea, it is a subtle one:

neither the coastal state nor the flag state has a right to control the activities of the other in order to enforce the "due regard" obligation. Rather each must rely on compliance with an international legal obligation by the other state concerned. The capacity to "enforce" that international legal obligation through compulsory arbitration obviously can be of considerable importance in maintaining the balance. I suspect that coastal states will not long be satisfied merely with a flag state duty on this all-important question of accommodation of uses if that duty is not enforceable by arbitration. The real choice may be between compulsory arbitration and direct enforcement by the coastal state.

Article 60 of the Convention provides a specific example of the problem. Under that article, as under the Convention on the Continental Shelf, the coastal state has the right to establish safety zones around offshore installations that all ships must respect. The difference is that under the Continental Shelf Convention those zones could not exceed 500 meters, while under the new Convention they may exceed 500 meters where reasonable and consistent with relevant international standards. The added flexibility of the new Convention -- while undoubtedly desirable when one considers the possibility of offshore airports or nuclear power plants -- leads to an added measure of uncertainty regarding the degree to which the coastal state may interfere with navigation. Unilateral interpretation of the safety zone power, coupled with unilateral interpretation of the question of whether a safety zone overlaps a sealane essential to international navigation, could alter the underlying balance of the regime dramatically. As critical areas of the sea relatively close to shore become more and more crowded with fixed uses, the question of whether the coastal state alone will decide the extent to which navigation will be accommodated is in fact a basic question regarding the future reality of a theoretical right to navigate.

The question of environmental protection goes to the heart of the underlying balance, and best illustrates the "substantive" nature of the dispute settlement obligation. Despite its technical complexity, the underlying problem is easily understood.

Coastal states are reluctant to rely exclusively on flag state diligence to ensure protection of coastal waters from pollution by passing ships. They have two alternatives, both of which are used by the Convention depending on the context. One alternative is to give the coastal state the right to establish or enforce environmental standards itself. The other is to impose an obligation on flag states to enforce certain environmental standards that is subject to compulsory arbitration.

Flag states are reluctant to give coastal states the power to establish or enforce environmental standards on their ships because they fear this will prejudice or effectively eliminate their underlying navigational rights and freedoms. They have two alternatives, both of which are used by the Convention depending on the context. One is for flag states to assume a duty to enforce certain environmental obligations that is subject to compulsory arbitration. The other is for flag states to concede certain carefully circumscribed coastal state prescriptive or enforcement rights over ships, with the exercise of those rights subject to compulsory arbitration.[11]

Coastal states were generally prepared to accept the flag state duty solution on two basic aspects of environmental protection: navigation safety and design, construction, manning, and equipment of ships. Given the significance of both questions for protection of coastal

waters, I do not think it probable that coastal states would have yielded to such a solution were the flag state duty not subject to compulsory arbitration. Perhaps more importantly, I do not believe coastal states will long accept this solution unless the international standards themselves are adequate to the problem and each flag state is reasonably diligent in enforcing the relevant standards. Absent compulsory arbitration, the reaction to a "bad" flag state will be unilateral coastal state enforcement. In brief the rule that the coastal state may not regulate navigation unilaterally with respect to safety or design, construction, manning, and equipment can be understood as a stable rule only in the context of compulsory arbitration.

Flag states were prepared to accept limited coastal state enforcement powers under carefully circumscribed conditions with respect to discharges of pollutants in coastal waters, including straits, archipelagoes, and economic zones. The key to this system was that abuse of these enforcement powers by coastal states would be subject to compulsory arbitration, including the capacity to secure rapid release of arrested vessels by order of an international court. For their part, the coastal states were prepared to accept restraints on their enforcement powers because the flag state duty to ensure compliance with all generally accepted international standards was itself subject to compulsory arbitration.

The bald fact must be faced that, absent compulsory arbitration, coastal state power to enforce regulations with respect to pollution from ships constitutes a unilateral right to determine the extent to which navigation rights will be respected.

For the United States, that problem arises in the worst possible context. The existence of strong and pervasive environmental concerns among Americans makes it likely that:

(1) the United States will, as a coastal state, eventually claim extensive rights to control foreign ships for environmental purposes in the exclusive economic zone, claims that will damage U.S. navigation interests when foreign coastal states invoke the precedent; and
(2) it will be difficult for the United States to respond with more than words to foreign coastal state claims to control navigation that are articulated in the rhetoric of environmental protection.

Compulsory arbitration may be the only way to maintain the balance.

Effect of Compulsory Arbitration

Of course, compulsory arbitration is no panacea. Some of the time, some governments will flagrantly flaunt even a binding judicial decision, be it domestic or international.[12] But few wish to get into that position.

The effect of compulsory arbitration on states is not that much different from the effect of the possibility of a law suit on private behavior. It encourages clients to seek legal advice before acting. It encourages lawyers to be cautious in rendering that advice. It provides those who have already acted in potential violation of the rules with a face-saving way out of their dilemma: they need not yield to outside pressure, but only to the rule of law as embodied in the binding judgment of a disinterested tribunal.[13] It permits those who are confident they are acting within their rights to seek a judgment themselves.

While the right to bring an action under the Convention is generally limited to states, there is a special provision that permits an application for prompt release of a vessel or crew to be made "by or on behalf of the flag State of the vessel."[14] The flag state could, by a general statute or in specific cases, authorize the owner or operator of the ship or a labor union representing the crew to seek prompt release on its behalf.

Shipping companies, airlines, importers and exporters, oceanographers, travelers, and consumers have an interest in having compulsory dispute settlement procedures available in order to discourage unlawful detention of ships and aircraft and to obtain prompt release in the event of an arrest. There are elaborate safeguards written into the Convention for this purpose to which compulsory settlement would apply.[15]

Workers and labor unions as well as employers share those interests for the purpose of protecting the crew. For example, the Convention provides that only monetary penalties, and not imprisonment, may be imposed for a pollution violation by a foreign ship in the economic zone.[16] There is a broad provision that "recognized rights of the accused" must be observed in the conduct of proceedings for such a violation.[17] Human rights advocates would share an interest in having international tribunals interpret and apply this provision.

Enviromentalists have an interest in having these procedures available in order to encourage both flag states and coastal states to fulfill their substantial environmental obligations under the Convention. They also have an interest in the broader precedent of international arbitration or adjudication to interpret and enforce such obligations.

The nation has an overall security, economic, and environmental interest in encouraging states to behave in accordance with the balance between coastal state and flag state rights established by the Convention, and in discouraging occasional temptations on its own part to set adverse precedents by doing otherwise. A policy of encouraging agreement in advance to compulsory dispute settlement on navigation and pollution issues to the extent required by the Convention would enhance our ability to achieve those objectives. It would also underscore the seriousness of our desire to ensure that we and others behave in accordance with the rules elaborated by the Convention regarding navigation and pollution.

Scope of Compulsory Settlement

Since the purpose of the endeavor is to ensure respect for the provisions of the Convention relating to navigation, overflight, and pollution and the balance those provisions establish in coastal areas, the compulsory arbitration or adjudication would be for alleged violations of the rules of law stated in those provisions (and perhaps some others).[18] While the United States has not signed the Convention, it should have no difficulty regarding those rules as fair and balanced statements of the relevant law, as President Reagan himself indicated.[19]

One should be able to derive a formula from the Convention that could prove acceptable to the many states that have signed the Convention as well as those, like the United States, that have not. In this connection, the United States and perhaps others might wish to exclude military activities or other matters for which the Convention permits exceptions to compulsory arbitration or adjudication.[20]

Choice of Forum

The Convention gives states broad latitute to choose the forum for dispute settlement, including arbitration, the International Court of Justice, or the Tribunal on the Law of the Sea to be established when the Convention enters into force.[21] Arbitration is the applicable procedure unless both the "plaintiff" and the "defendant" have expressly accepted a different procedure.[22] Assuming we wish to take an approach consistent with the Convention, we have a wide choice available.

Arbitration has the advantage of enabling the parties to select the judges and other procedures.[23]

From the perspective of unifying and stabilizing the law and its interpretation, one disadvantage to specifying only arbitration is that the decisions of a standing global court may have greater practical impact as "precedent," that is, as authoritative statements of the law that other states in other situations will be more inclined to respect. A further disadvantage, from a "plaintiff's" perspective, is that it takes substantial time to constitute an arbitral tribunal, thus delaying any attempt in the interim to obtain provisional measures or an order releasing a ship from detention. For this reason, the Convention[24] provides that if no agreed tribunal is available within ten days, an application for prompt release of a vessel or crew may be submittd to the Tribunal on the Law of the Sea. Access to the Tribunal is not restricted to parties to the Convention.[25]

Even if there is a general preference for selecting arbitration in all cases, it might be useful to include at least the exception contemplated for prompt release of a vessel or crew, specifying either the International Court of Justice[26] or the Tribunal on the Law of the Sea when established.

Congressional Action

A policy of encouraging and accepting compulsory third-party settlement of disputes entailing a binding decision should have the approval of Congress for both political and legal reasons.

This could be achieved by submitting dispute settlement treaties to the Senate for advice and consent to ratification. It would seem more efficient and effective, however, to ask both houses of Congress to enact a statute setting forth the circumstances under which the United States accepts such compulsory settlement. These would presumably include a condition of reciprocity. Such reciprocity could be established either by agreement or by parallel national legislation.[27]

Incentives

The most difficult obstacle to this approach is convincing other states to agree.

Some state will share our concerns, and may agree for essentially the same reasons that we have if we are persistent enough. A few are sophisticated enough to worry about our own potential violations as a coastal state, and the precedent they would set. Others may refuse to accord us the benefits of compulsory dispute settlement, whatever the benefits to them, because we have refused to sign the Convention.

Persuading the majority is likely to require more incentives than mere reciprocity. For this purpose, states can be divided into two groups: maritime and coastal.[28] What is needed with respect to each group is an offer of something more than it can have without agreement to compulsory settlement.

The provisions of the Convention regarding coastal state rights to enforce pollution standards against foreign ships were agreeable to many maritime states only on condition of compulsory settlement of disputes to protect navigation from abuse of those rights. It would be reasonable for the United States to take the position that it will not recognize such coastal state enforcement powers unless the coastal state has agreed in advance to compulsory third-party dispute settlement with respect to such powers.

Conversely, the provisions of the Convention limiting the standard-setting and enforcement powers of coastal states with respect to pollution from foreign ships were agreeable to many coastal states only on condition of compulsory settlement of disputes to ensure that flag states comply with their environmental obligations. It would be reasonable for the United States to take the position that it will not necessarily respect all of those limitations with respect to flag states that do not accept compulsory settlement of disputes.

The coastal state interests will probably prove the more intractable. To many it would not be credible that the United States would resist, more than verbally, the exercise of powers that it is prepared to concede may be lawfully exercised by a state that accepts compulsory dispute settlement. A definite set of statutory sanctions, such as closure of U.S. ports to a state that arrests a U.S. vessel for non-resource activities, could overcome some of those doubts.

The fact that there are many difficult obstacles to overcome in persuading other countries to go along does not mean that we should not try. We succeeded against heavy odds in the Convention, although in those negotiations we had additional leverage based on the links between dispute settlement and our substantive negotiating positions as well as our potential participation in the Convention.

We lose nothing by a sincere effort. Whatever we gain is probably better than what we would otherwise have. The fact of the matter is that we cannot maintain that we are able to enjoy the major benefits of the non-seabed provisions of the Convention without ratifying it unless we find some way to achieve the benefits of compulsory arbitration as a restraint on others and on ourselves.

One might add that this would be a particularly propitious time for the United States to undertake such an effort. Whether one agrees or disagrees with the reactions of the United States government to the decisions of the International Court of Justice in the *Nicaragua* case, it would be a mistake to give the impression that these reactions reflect a generally negative attitude in practice toward the compulsory submission of all legal disputes to disinterested tribunals in accordance with the rule of law. We are told that current United States policy, while rejecting open-ended acceptance of the compulsory jurisdiction of the International Court of Justice, encourages third-party settlement of appropriate types of disputes. Here is a chance to put that policy into action on a broad front, and to show that it means more than merely saying we might agree to arbitrate particular disputes *after* they arise if we think we have a fair chance of winning.

The compulsory dispute settlement provisions of the Law of the Sea Convention tend to echo the concerns of the United States regarding the decision of the International Court of Justice to hear the *Nicaragua* case. The Convention permits the exclusion of disputes regarding military activities[29] or disputes before the United Nations Security Council.[30] States have the right to withhold classified information.[31] Either party may opt for arbitration by an *ad hoc* panel rather than

submitting disputes to a court of fixed composition elected by the representatives of a large number of states.[32] The Convention is quite strict in requiring a tribunal to ensure that jurisdiction exists before proceeding with a case,[33] even with respect to provisional measures.[34] The obligation to arbitrate or adjudicate does not apply if the parties are seeking a settlement by other peaceful means.[35]

There are many types of disputes for which there would be a consensus among affected constituencies that compulsory arbitration is appropriate. A national and international consensus emerged with respect to law of the sea disputes in the course of negotiating the dispute settlement provisions of the Convention. Far from letting it lapse, we should seize the occasion to build on it.

Conclusion

The United States should accept and promote agreement in advance with other states that either party may submit to arbitration or adjudication disputes concerning the interpretation and application of the rules set forth in the 1982 UN Convention on the Law of the Sea regarding matters other than the regulation of deep seabed mining, including navigation, overflight, and related uses and the protection and preservation of the marine environment, to the same extent as parties would be required to submit such disputes to binding arbitration or adjudication under the Convention.

NOTES

* The views expressed herein are the author's own.

1. United Nations Convention on the Law of the Sea, 10 December 1982, UN Pub. Sales No. E.83.V.5 (1983), *reprinted in* 21 Int'l L. Mat. 1261 (1982) (hereinafter cited as Convention).
Proclamation 5030 of 10 March 1983 establishing an exclusive economic zone off the U.S. coast and Statement by the President on U.S. Oceans Policy of 10 March 1983. 19 Wkly. Comp.Pres. Docs. 383-85 (14 March 1983).
3. *Id.*
4. *Id.*
5. States are permitted to file optional exceptions excluding disputes relating to sea boundary delimitations or involving historic bays or titles, disputes concerning military activities (but not law enforcement activities unless they concern fisheries or marine scientific research), and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter (unless the Council decides otherwise). Convention, Art. 298, para.1.
6. Stevenson and Oxman, The Preparations for the Law of the Sea Conference, 68 *Am. J. Int'l L.* 1,31 (1974).
7. Convention, Art. 286.
8. Convention, Art. 297, para. 1.
9. *Id.*
10. Convention, Art. 298, para. 1.
11. There is of course a third alternative of refusing (or neglecting) to establish an effective system of rights and duties to deal with the problem and then pontificating about international law when

coastal states take matters into their own hands.

12. The "enforcement" of an order by any court directed to someone in command of a substantial armed force depends in large measure on the "public opinion" of the commander's supporters, subordinates, and subjects as well as the ability of others to control or exploit any resistance on his part.
13. Rare is the politician who does not on occasion rely on the courts to provide him with a graceful means of descent from a far-out limb.
14. Convention, Art. 292.
15. Convention, Pt. XII, Sec. 7. Note for example that Article 232 provides for liability for pollution enforcement measures taken against a ship that are unlawful or exceed those reasonably required in light of the available information.
16. Convention, Art. 230, para. 1.
17. Convention, para. 3.
18. It would be impractical in this context to propose compulsory settlement under customary international law generally rather than under the relevant rules set forth in the Convention. States that have signed or ratified the Convention and states that usually oppose compulsory settlement would find a proposal for compulsory settlement of law of the sea disputes under unidentified rules of customary international law difficult to accept. Such a proposal also would seem to invite states to contend and tribunals to decide that the rules of customary law are different from those set forth in the Convention. This would contradict the underlying objective of stabilizing the traditional law of the sea around the body of rules set forth in the Convention.
19. See note 2 and text accompanying note 4 supra.
20. See note 5 *supra*. While Articles 297 and 298 of the Convention provide for conciliation of certain fisheries, scientific research and boundary disputes excluded from the obligation to arbitrate or adjudicate, the essence of those provisions is that at least some states (and some U.S. domestic constituencies) were reluctant to undertake an obligation in advance to accept a legally binding decision in such matters. The addition of conciliation on such matters to a U.S. policy of seeking reciprocal agreement on compulsory arbitration would complicate and add political controversy to the endeavor and entail a decided risk that other states would propose only conciliation of disputes that under the Convention are subject to arbitration or adjudication. Accordingly, the author does not propose the inclusion of the conciliation provisions as part of the overall policy recommended.
21. Convention, Arts. 280, 282, 287, para.1.
22. Convention, Arts. 282, 287, paras. 3,5.
23. The parties can also achieve these objectives in part by submitting a dispute to a smaller chamber of the International Court of Justice or the Tribunal on the Law of the Sea selected for that case and appointing *ad hoc* judges to sit with the chamber. This was done by Canada and the United States in the *Gulf of Maine* case.
24. Convention, Art. 292.
25. Convention, Art. 288, para.2, Art. 291, para.2; Ann. VI, Art. 19, para. 2, Art. 20, para. 2, Arts. 21, 22, 32, para. 2.
26. It is not clear whether the Statute of the International Court of Justice would permit private parties to appear "on behalf of" the flag state.

27. The Deep Seabed Hard Mineral Resources Act of 1980 uses a concept of "reciprocating states" that may present a useful analogy. Pub.L. 96-283 Sec. 118, 30 U.S.C. Sec. 1428.
28. Most states, like the United States, have both interests. Nevertheless, one interest may be more important than another to a particular state.
29. Convention, Art. 298, para.1 (b).
30. Convention, Art. 298, para. 1 (c).
31. Convention, Art. 302.
32. Convention, Art. 287.
33. Convention, Art. 294.
34. Under Article 290 of the Convention, provisional measures may be indicated only if the tribunal considers that *prima facie* it *has* jurisdiction. The standard long articulated by the International Court or Justice for the indication of provisional measures is that the jurisdictional provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court *might* be founded. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 179-80 (Provisional Measures Order of 10 May), 206-07 (Sep. Op.Schwebel, J.)
35. Convention, Arts. 280-86.

APPENDIX

Outline of Compulsory Arbitration and Adjudication Under the 1982 U.N. Convention on the Law of the Sea

Disputes regarding the interpretation or application of the 1982 Convention on the Law of the Sea that do *not* involve the exercise of coastal state sovereign rights or jurisdiction are in principle subject to compulsory arbitration or adjudication, with specified exceptions.[1]

Disputes regarding the exercise by a coastal state of its sovereign rights or jurisdiction are subject to compulsory arbitration or adjudication under the Convention.[2]

(a) when it is alleged that a coastal state has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in Article 58;
(b) when it is alleged that a state in exercising the aforementioned freedoms, rights or uses has acted in contravention of the Conven tion or of laws or regulations adopted by the coastal state in con formity with the Convention and other rules of international law not incompatible with the Convention; or
(c) when it is alleged that a coastal state has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal state and which have been established by the Convention or through a competent international organization or diplomatic con ference in accordance with the Convention.

Certain coastal state violations of the Convention regarding marine scientific research are also subject to compulsory arbitration or adjudication.[3]

On the other hand, "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."[4]

States are permitted to file optional exceptions to compulsory arbitration or adjudication[5] excluding:

-- disputes relating to sea boundary delimitations or involving historic bays or titles;[6]
-- disputes concerning military activities (but not law enforcement activities unless they concern fisheries or marine scientific research rights that are otherwise excluded from arbitration or adjudication and
-- disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter (unless the Council decides otherwise).

The Convention gives states broad latitude to choose the forum for dispute settlement, including the International Court of Justice, the Tribunal on the Law of the Sea, or arbitration.[7] Arbitration is the applicable procedure unless both the "plaintiff" and the "defendant" have expressly accepted a different procedure.[8]

While the right to bring an action under the Convention is generally limited to states, there is a special provision that permits an application for prompt release of a vessel or crew to be made "by or on behalf of the flag State of the vessel."[9] The flag state could, by a general statute or in specific cases, authorize the owner or operator of the ship or a labor union representing the crew to seek prompt release on its behalf.

NOTES

1. Convention, Art. 286.
2. Convention, Art. 297, para. 1.
3. Convention, Art. 297, para. 2. Certain scientific research disputes excluded from compulsory arbitration or adjudication are subject to conciliation. *Id.*
4. Convention, Art. 297, para. 3. Certain fisheries disputes excluded from compulsory arbitration or adjudication are subject to conciliation. *Id.*
5. Convention, Art. 298, para. 1.
6. Certain excluded boundary disputes are subject to conciliation. Convention, Art. 298, para. 1(a).
7. Convention, Arts. 280, 282, 287, para. 1. This latitude is limited only with respect to deep seabed mining disputes. These disputes would normally be submitted to commercial arbitration or the Seabed Disputes Chamber of the Tribunal on the Law of the Sea. Convention, Arts. 187, 188, 287, para. 2; Ann. III, Art. 5, para. 4, Art. 13, para. 15.
8. Convention, Arts. 282, 287, paras. 3,5.
9. Convention, Art. 292.

DISPUTE SETTLEMENT AMONG NON-PARTIES TO THE LOS CONVENTION WITH RESPECT TO THE OUTER LIMITS OF THE CONTINENTAL SHELF

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Since, strictly speaking, it is not yet clear which states or how many states are going to be ultimately parties to the Convention, of course with the exception of the twenty-nine that have already ratified the Convention, it is valid to discuss dispute settlement in general terms, that is, without reference to the disputants as parties or non-parties to the Convention.

I'll just single out as an example one of the different kinds of shelf boundary problems: the dispute between or among coastal states within 400 miles of one another. In such geographical surroundings, boundary disputes are further complicated because of the EEZ boundary problems. The other day, Dr. Hasjim Djalal of Indonesia asked something about the non-coincidence of the EEZ boundary and the continental shelf boundary where the surface boundary and the bottom seabed boundary would not coincide. Indonesia's unilateral claims to the EEZ and continental shelf already have produced four or five such instances, and Papua New Guinea and Australia already have a boundary treaty in the Torres Straits to deal with that situation. Further up north in the East China Sea, a boundary dispute between the coastal states of Japan, China, and Korea has arisen. Here political problems also exist because five parties are arguing over what would under normal circumstances require only three. We have a saying in the region that those five countries, because of political disagreement, don't even meet to discuss anything solid. When they meet, they don't talk. And when they talk, they don't negotiate. And when they negotiate, they don't agree. And when they agree, they don't carry it into practice.

Those specific regional problems I will leave to the later question-and-answer session, time permitting and interests sustaining.

DISPUTE SETTLEMENT AMONG NON-PARTIES TO THE LOS CONVENTION WITH RESPECT TO THE OUTER LIMITS OF THE CONTINENTAL SHELF

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The topic assigned to me today is a much narrower one than the preceding papers, so I can be proportionately brief. Let me begin by saying that the title is somewhat misleading. This paper deals not so much with dispute settlement as it does with dispute avoidance. Here we are considering a mechanism to facilitate a global system for stabilizing national boundaries, and, therefore, we do not deal with disputes between states involving the continental shelf. I shall, in the time allowed, discuss three topics. First, I shall sketch out the mechanism provided in the Law of the Sea Treaty for verification of outer boundaries of shelves. Second, I shall give my own views whether a non-party, such as the U.S., can avail itself of the treaty procedures. And, finally, I shall discuss the desirability from a non-party perspective of so doing.

It is well understood that the need for a precise legal outer limit to the shelf arose not only because of dissatisfaction with the vagueness of the 1958 formulation,[1] but because of the change in the structure of the legal regimes themselves. In 1958, there was no pressing need for a precise definition because on the one hand, there was no anticipation of the explosion in new technologies and the exponential increase in demand such as that actually experienced due to the shortages in the early 1970s. The open-ended exploitability test[2] of the 1958 Convention created exclusive coastal state jurisdiction far more distant seaward than the then existing technology[3] would be able to benefit from for the forseeable future, and the estimated costs of drilling in extremely deep water did not seem justified by the then existing price of oil. And, on the other hand, there was no legal reason to seek a more precise definition because there was no opposing international legal regime to the seaward, the boundaries of which would require ascertainment. By 1974, both of these conditions had changed. The rapid increase in the price of oil made possible the development of newer technologies, dispensing with the older bottom-based drilling rigs and bringing in newer devices such as submersible and semi-submersible drilling rigs that could be towed to any desired location. And, as the Law of the Sea Conference opened, it was clear that the negotiations would have to include consideration of the deep seabed mining question, and it was equally clear that what was anticipated was some kind of international organization that would play a role in resource regulation beyond the limits of national jurisdiction, wherever they might be. Thus, there was a realization among the negotiators that a more precise definition of the outer boundary was not only desirable but essential to the successful conclusion of the treaty.

Two separate questions were involved in the shelf negotiations. The first was the limit itself and the second, a related issue, was the method of verification of those boundaries on a global scale. As to the first issue, the history of Article 76 of the treaty reveals its com-

plexity. This has all been discussed elsewhere,[4] thus only a brief review is necessary here. The tension was between those states seeking either to extend their shelf jurisdiction as far seaward as possible or to confirm the seaward jurisdiction that some felt they already had under existing rules of international law, and those states that were key advocates of the "common heritage of mankind." The latter, of course, sought to prevent what they perceived as a coastal state incursion into the international seabed area. The common position among that group was, at the outset, that in no case should coastal state jurisdiction extend beyond 200 nautical miles from the baselines from which the territorial sea is measured, a distance coincident with the outer limits of the exclusive economic zone. Perhaps the most vocal proponents of that position were to be found in the land-locked and geographically disadvantaged states group, who could not directly benefit from extended coastal state jurisdiction and whose benefits, by and large, if any, would have to be derived from the international area in which they would share. These tensions were eventually negotiated out, albeit laboriously, through a compromise that involved the drafting of Article 82 concerning revenue sharing. In exchange for agreement to fairly extensive coastal state shelf jurisdiction, the LLGDS sought, and obtained, an agreement to share revenues from the shelf, derived mostly from oil and gas exploitation, beyond the 200-mile line.[5] Without this revenue sharing agreement, I am quite sure that the shelf limits permitted by the treaty would have been severely limited, and that in turn would have prevented a number of significant coastal states from accepting the treaty as a whole.

Having reached agreement on the outer limit, coupled with revenue sharing, it was next realized that some mechanism was necessary to verify that the limit established by any particular coastal state was in accord with the rules set forth in Article 76. If this mechanism was not institutionalized in the treaty, then the potential for conflict between an individual coastal state and the Authority would be great, with resulting uncertainties and delays. It was also understood that this mechanism could not be institutionalized within the Seabed Authority itself, since the Authority was an interested party. Obviously, an independent body was the answer, one that had no ties either to the coastal states or to the Authority. Thus Article 76 was amended to refer the issue to a Commission on the Limits of the Continental Shelf, to be established under Annex II to the Convention.

The Commission, sometimes referred to as the Boundary Review Commission, would consist of twenty-one members who shall be experts in the field of geology, geophysics or hydrography.[6] This suggests that the body is not conceived as being a dispute settlement body in the juridical sense. That this is true is further supported by the fact that the Commission does not pass binding judgment upon the legitimacy of the lines proposed by the coastal state. The Annex provides that the functions of the Commission shall be to consider data submitted by coastal states concerning the outer limits of their shelves where they extend beyond 200 nautical miles, to make recommendations in accordance with Article 76, and to provide scientific and technical advice if requested by a coastal state.[7] Article 76 also refers to these recommendations and to the fact that recommendations of the Commission are to be made to the coastal state involved. It then states that "The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."[8] Thus it is the coastal state, and not the Commission itself, that shall make the final

decision. That decision is limited only in that it must be made on the basis of the Commission's recommendations. There is no requirement that the coastal state adopt the recommendations in their entirety. Whether the final adoption is perceived to be "on the basis"[9] of the Commission recommendations may itself be a question that could be resolved by traditional juridical dispute settlement procedures provided for in the Convention, a question of treaty interpretation being involved. This view of the Commission is in accord with the wishes of the various negotiators. Coastal states, by and large, were not willing to submit such an important question as the limits of their shelf jurisdiction to any kind of binding arbitration in the juridical sense. One fear, underscored by the fact that the composition of the Commission should have due regard to insuring equitable geographical composition,[10] was that the mainly industrialized coastal states could easily be outvoted by a majority of developing state Commission members. Hence, the Commission's powers were restricted to making recommendations which affect the final decision in a fairly remote way. Obviously, there is the potential for stalemate. In this regard, Article 8 of the Annex specifies that in the case of disagreement with the recommendations, the coastal state shall, within a reasonable time, make a revised or new submission to the Commission. What is envisaged, then, is a negotiated solution between the coastal state concerned and the Commission. Finally, it should be noted that the submission by coastal states must be made within ten years after the Commission comes into being.[11] The implications seems to be that the coastal state may make its submission at any time during that period, but it may do so only once. Thus if it desires an early decision, it may not revise its boundary later in the period based upon additionally discovered evidence.

Having reviewed in general outline how the Commission works, and having given the opinion that it would be in the best interests of the Authority to have the Commission examine the submissions of non-parties as well as parties, I now turn to the question whether the Convention would permit non-parties to have access to the Commission. I believe that it does. With regard to States Parties, they not only have the right to submit their boundaries to the Commission, but they must.[12] It is clear to me that non-parties do not fall within this mandatory proscription. The question before us is whether the Commission in the ordinary course of its work is somehow proscribed from considering the submission of a non-party. I can find no language in the treaty or the Annex that would seem to limit the scope of the Commission's work in this manner. It is directed to consider the submission by any coastal state, and no distinction is drawn between those that are parties to the Convention and those which are not.[13] The argument has often been made that because the treaty is contractual in nature, non-parties have no rights and duties thereunder. But this is a broad and inaccurate overstatement. International law has long recognized that parties to treaties may, in certain circumstances, bestow rights upon non-parties. The Law of the Sea Treaty refers to entities who have rights or duties in different ways in different places. The most common characterization is "States Parties." When that term is used, it is absolutely clear that non-parties are neither bound by obligations nor may claim rights under the treaty *qua* treaty. Thus, for example, only States Parties may be members of the International Seabed Authority,[14] and only States Parties may initiate procedures toward the amendment of the Convention.[15] But in a large bulk of the Convention other terms are used, such as "States,"[16] "coastal States,"[17] "archipelagic States,"[18] and

the like. Article 76 refers to the continental shelf of the "coastal State" and provides that "coastal States" may make submissions to the Commission. Except with regard to elections to the Commission, upon which I shall comment subsequently, Annex II uses the term "coastal States" whenever it speaks of the submission procedures. The fact that a treaty may use one term in one place and an entirely different term elsewhere gives rise to a problem in interpretation. One possible reading is that the term "coastal States" must, in the context of the treaty as a whole, be construed as meaning "coastal States Parties" to the Convention. But the immediately obvious response to that is that if the negotiators had so intended, they would have said so, and they did say so where it was clear that the intention was to restrict certain rights and duties only to those states that became parties. But that argument seems without foundation. When one examines other parts of the treaty, it is easy to conclude that different terms were used because the negotiators wanted to make clear that they wanted certain benefits of the treaty to be universally available. For example, the term "States" is the one commonly used in provisions which almost everyone would recognize as embodying principles of customary international law, such as those relating to piracy [19] and the flags of ships.[20] Many such provisions were carried over from the 1958 Geneva Conventions, and I am not aware that anyone has seriously argued that those provisions were not intended for the benefit of all states, whether parties to those conventions or not. This interpretation is not inconsistent with generally accepted treaty law. States may, if they so desire, contract to bestow benefits on non-party states to an agreement. Article 36 of the Vienna Convention[21] adopts this view:

> A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

This view has been used to justify, for example, bestowing the benefits of limited treaties concerning various international waterways on other members of the international community, though they are not parties to those treaties.[22] The only question, then, is whether the contracting parties to the Law of the Sea Treaty intended such benefits to extend to third states. I believe that the language of the treaty in the context of the negotiations and the treaty as a whole indicates such intent, in the light of the obviously beneficial result to be achieved in the working of the system as a unit.

I turn now to the related question whether a national of a non-party may sit as a member of the Boundary Review Commission. Here I come to the opposite conclusion, but for a similar reason. Annex II clearly states that the members of the Commission shall be elected by States Parties "from among their nationals," although they shall serve in their personal capacities.[23] This leaves no room for interpretation, for the limitation is explicit. During the negotiations, the intention was that the Commission be a panel of experts and not political appointees. It was envisaged that the best experts available should constitute its membership. This was, unfortunately, watered down by the insistence on equitable geographical representation, and, it appears, now by the provision eliminating nationals of non-parties. It was clear

during the Conference who many of the experts might be, and many of them are now excluded. It may be that the texts were too tightly written with the result that it will be difficult to have an experienced expert panel if the Commission is ever constituted. But that is another matter.

I now turn to the question of permitting non-parties to submit their boundaries to the Commission for verification. I believe it takes little imagination to confirm that desirability. From the perspective of the International Seabed Authority, it would seem incontrovertable that it would be important that the Area subject to its jurisdiction be clearly delineated, thus averting the need for multiple challenges to coastal state jurisdictional claims it may consider to be excessive and not justified by Article 76. It is just as obvious that these boundaries need to be globally complete, leaving no gaps. To accomplish this it would be necessary for the Commission to verify non-party boundaries as well as those submitted by parties. For a non-party coastal state such as the United States, there are corresponding benefits. American oil companies, for example, would benefit from the stability that would come from international recognition of U.S. Article 76 limits. On the negative side, it has been argued that recognition of the Commission and its functions carries with it implicit recognition of the Authority and its jurisdiction over deep seabed mining, a concept rejected by the United States. While the United States rejects the principle of exclusive jurisdiction of the Authority over the area, it must accept that for the parties to the treaty, the Authority will be a juridical reality. It will be advantageous to all concerned to delimit the Area over which the treaty bestows jurisdiction to the Authority, even though there is a dispute as to mining rights beyond that limit. Thus I find the argument somewhat specious.

My conclusions, then, are these. First, proper interpretation of the treaty would lead one to conclude that a non-party, while not required to, is permitted to submit its outer shelf boundary determination to the Commission. Secondly, from all standpoints, it would be desirable to do so. Third, submission to the Commission would be without prejudice to the status of the area beyond the shelf. Finally, it is important if the U.S. is to sustain its position that the non-seabeds provisions of the treaty are generally acceptable for the U.S. to demonstrate that with regard to the shelf, it has complied with the provisions of Article 76.

NOTES

1. See Convention on the Continental Shelf, 499 U.N.T.S. 311, 15 U.S.T. 471, T.I.A.S. No. 5578, Article 1.
2. The text permits coastal states to exercise jurisdiction over the natural resources of the shelf to a depth of 200 metres or, "beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." While the text does not make clear the relationship of the depth and exploitation criteria, it seems that the intent was that they should be complementry to one another.
3. In the early years, technology was slow to develop. Through 1946, nine wells were drilled in the Gulf of Mexico, all in shallow water

and close to shore. Drilling was from rigid platforms. The first mobile platform, in the form of barges converted to platforms, came in 1947. Berryhill, The World Wide Search for Petroleum Offshore -- A Status Report for the Quarter Century, U.S. Department of the Interior (1947). By 1969, the greatest water for a producing well in the Gulf of Mexico was 340 feet. Report on the Continental Shelf, Department of the Interior (1971).

4. Much of this history can be found in the excellent series of reports published in the *American Journal of International Law*, by John Stevenson and Bernard Oxman, between 1974 and 1981. For a discussion of the workings of Article 76, see especially, Oxman, The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980), 75 A.J.I.L. 211 (1981), at 227.
5. Article 82 provides that no payments be made for the first five years of production at a site. In the sixth year the rate of payment is 1 percent of the value of production at the site, and rate increases by 1 percent each year thereafter until the twelfth year, where the rate is 7 percent, and the rate remains fixed beyond that year. The obligation to pay is upon the coastal state, and not the individual exploiter. While this formula was acceptable to the U.S., a provision exempting net importers from making payments was not seen as desirable.
6. Law of the Sea Treaty, Annex II, Article 2.
7. Law of the Sea Treaty, Annex II, Article 3(1).
8. Law of the Sea Treaty, Article 76(8).
9. The U.S. had hoped to establish a stronger link between the recommendations of the Commission and the decision of the coastal state. It had desired language more along the lines of "in accordance with," but this language was too strong for some coastal states having broad margins.
10. Law of the Sea Treaty, Annex II, Article 2.
11. Law of the Sea Treaty, Annex II, Article 4.
12. Annex II, Article 4 provides that "Where a coastal State intends to establish, in accordance with article 76, the outer limits of itscontinental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission . . ." This mandatory language would bind States Parties.
13. Law of the Sea Treaty, Annex II, Article 3 contains no exclusionary language.
14. Law of the Sea Treaty, Article 156(2).
15. Law of the Sea Treaty, Article 312.
16. See, e.g., Law of the Sea Treaty, Article 3.
17. See, e.g., Law of the Sea Treaty, Article 76.
18. See, e.g., Law of the Sea Treaty, Article 46.
19. Law of the Sea Treaty, Articles 101-106.
20. Law of the Sea Treaty, Articles 91-94.
21. Vienna Convention on the Law of Treaties (1969), reproduced in 63 A.J.I.L. 875 (1969).
22. Examples are the conventions governing the use of the Dardanelles and the Kiel Canal. Non-party states are considered to be third-party beneficiaries.
23. Annex II, Article 2.

CONFLICT BETWEEN MINING SITES OF NON-PARTIES

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I will discuss negotiations on mine sites in the deep seabed between non-parties to the Law of the Sea Treaty. This is in effect a case history of activities between consortia representing many corporations of various industrial countries.

While the main efforts in negotations took place in the early 1980s, the events that led up to these negotiations took place mainly in the 1970s with some events starting in the 1960s. At the time of the negotiations, some of the partners in the various consortia were incorporated in countries that had signed the treaty. Of the nine countries in which the partners were incorporated, six: Canada, Japan, France, the Netherlands, Belgium, and Italy -- signed the treaty. Only three: the United States, Great Britain, and West Germany -- had not. However, the negotiations were held not on the basis of Part XI of the Law of the Sea Treaty but on the basis of commercial interest.

I would like to review a little of the history leading up to our activities. I'll go way back in the scientific history at the risk of boring some of you who are well acquainted with the scientific background, but I think that it is pertinent to later discussions.

The first recognized scientific oceanographic exploration was accomplished in the 1860s by the HMS *Challenger*, an English vessel. One of the activities was an investigation of the ocean floor. Since sonar had not been invented until World War I, the methods used to investigate the ocean floor were very primitive. The ocean depth was laboriously determined by lowering a weight on a line until the line slackened. In deep water this took a considerable amount of time, and the ship had to be virtually still in the water. Such procedures greatly limited the number of soundings made. It is reported that a sticky substance was placed upon the bottom of the weight, it was lowered to the ocean floor, and occasionally a manganese nodule would be stuck to it. The fact that any nodules at all were recovered by this method indicated the tremendous area of the ocean floor that was covered by manganese nodules. The probability alone would prohibit you from getting any returns that way. Further exploration of the ocean floor in the twentieth century increased knowledge of the manganese nodule deposits. However, it wasn't until after World War II that sufficient information was available to indicate their commercial potential.

Until then the manganese nodules had remained a scientific curiosity. Their commercial value depended upon the nickel, primarily, and also the copper, cobalt, and manganese content. A number of post-World-War-II technical developments led to greatly increased knowledge. These included the development of new instruments like precision depth sonar, increased navigation accuracy, use of video, and improved dredging and sampling techniques. As a result, a number of scientific papers were published which gave some information on the grade and abundance of the nodules. At this time in the early 1960s, the mining industry throughout the world had experienced a healthy growth since the end of World War II. This information came to the attention of the mining companies and they looked at the seabed as a potential site for mining these particular metals. Industrial expansion and the expected growth of

Third World countries gave assurance at that time that the resulting growth rate of minerals would continue for some time into the future.

The history of mineral development suggests that intensive exploration for commercial grade minerals will continue throughout the world. The decrease in the average grade of many ores, which has been going on for some time regardless of the advances in exploration techniques, leads mining companies to continue the search for richer grades. One alternative to richer grades is the availability of large amounts of ore. If large-scale mining can be accomplished by economies of scale, then lower grades can be economical. Scientific reports indicate that the ore grade of manganese nodules is good but that the deposit could be exceedingly large. Even though the grade may not be as high as some of the grades on land, economy of scale would overcome that shortcoming and a large scale operation could be developed.

For the most part, the development of mineral resources has always been a high-risk venture. This includes not only finding the resource but recovery, process, and utilization of the final product. The modern industrial age of man was preceded by the well-known Bronze Age and Iron Age. These designations denote the importance of minerals to the development of modern industry. As with other activities of man, mining has evolved over the last two centuries into a highly technical and capital-intensive activity. Previously, minerals were found purely by accident. However, the evolving science of geology has helped man to know where to look and thus greatly increased the efficiency of exploration.

The methodology of exploration is a constant evolution of science and technology. This applies to the oceans as well as the land. It also implies very high front-end costs. Furthermore, exploration cost at sea is considerably higher than exploration on land. The industry knew that if they were ever going to develop this resource, large expenditures had to be anticipated.

After initiation of a Third UN Conference on the Law of the Sea, it became apparent to many of us in the mining companies of the United States and other industrial countries that the direction the conference was taking on matters of the deep seabed would not be favorable to obtaining the high investment risk capital necessary for the development of these resources. As a result, efforts were initiated by the U.S. Congress, supported by the American Mining Congress, in conjunction with many mining countries, to develop legislation that would provide a legal basis for launching a United States activity to mine the deep seabed and thus a method by which we could obtain the necessary risk capital to proceed.

After many years of discussion and review, the Deep Seabed Hard Minerals Resources Act was passed by the United States Congress and signed into law by President Carter in 1980. The act established an interim program to regulate the exploration and commercial recovery of hard mineral resources of the deep seabed by U.S. citizens. Two provisions of the act are important to the subject matter of negotiations between non-parties to the Law of the Sea Treaty. Priority in issuance of licenses is given to applicants who began exploration prior to the establishment of the act. The act also provided for contribution of profit to the United States, who in turn would turn it over at some future date if the Law of the Sea Treaty came into existence and the United States were party to it.

The Deep Seabed Hard Minerals Resources Act also gives equal recognition to citizens of what is called a "reciprocating state."

That is a state which has passed an equivalent legislation to that passed by the U.S. and that as such would be recognized by the United States. During the period of the 1960s and 1970s, six ocean mining consortia were established. Many of them were international in composition. The partners of these consortia are located in nine countries: the United States, Canada, Great Britain, France, Germany, Japan, Italy, Belgium, and the Netherlands. As stated earlier, the Deep Seabed Hard Minerals Resources Act of the United States provided for the reciprocal recognition of the activities of these other countries.

As a result of this effort, other countries passed similar legislation and were recognized. Negotiations between these countries produced a memorandum of understanding by which each would officially recognize the deep seabed hard minerals mining claims of the other after due process of negotiations. At various times in the same year, the six consortia filed applications with their respective governments for licenses to explore and mine various parts of the north-central Pacific Ocean floor. Following the application for license, the countries in which the applications were filed notified the applicants that the claims overlapped with one or more of the claims of the others. This came as no surprise to many of the applicants who, over the many years of exploration, had learned the approximate areas in which others were exploring in the Pacific. Exploration ships and mining test ships kept no secret of approximate areas of activity. However, the extent of the overlap in many cases was somewhat of a surprise. The applications for licenses were treated as confidential by the governments' agencies and therefore the detailed extent of overlap was not known by each consortium. Discussions among the various consortia led to the consensus that it was preferable by far to settle conflicts by themselves rather than by responsible agencies of the various governments, who agreed. Discussions could thus remain on a commercial level with no political bias. Also, it was strongly believed that a settlement should be based upon technical and economic factors on which the various consortia were far more knowledgeable than the government agencies.

It was determined that two factors were necessary for conflict resolution by the parties of the conflict. The first was a time limit for negotiation which if exceeded would automatically transfer the conflict to compulsory arbitration. The second was the exchange of coordinates for the areas applied for, and this required a secrecy agreement. It was all part of the package. The agreement to arbitrate was reached early in 1982 after which coordinates of the claims were exchanged. The overlaps were extensive, sometimes including two, three, four, and five parties, because the applicants had little concrete information about exactly how much area would be required for commercial mining and therefore applied for large areas.

Even after years of exploration, our knowledge of the deposits was limited. In the process of exploration, one must first search in a large area and then select smaller areas for more detailed effort. Therefore, the application for the large area was really made with a lack of knowledge. Conflict resolution between two parties can be difficult enough; resolution between multiple parties, in this case six, would present an almost impossible task. Therefore, the parties agreed to several principles that would help them to negotiate. First, all overlap areas would be considered primary and non-overlap areas would be considered secondary. This designation did not mean that the primary areas were better. Second, each party indicated its areas of most prime consideration. This allowed for two-party negotiations -- in

other words, there were three groups of two each that started initial negotiations.

Furthermore, after some discussion it was determined that the total amount expended, allowing for inflation, was a significant factor. Each party had expended on the order of $100 million, so up to a half a billion dollars of effort had been expended in this area. While exploration effort was primary, the amount of effort and time expended on mining processing techniques, etc. had to be taken into account, too. We found out, though, that generally all of the six consortia could be considered as primary in the exploration category because of the amount of effort they had spent over the many years.

Also considered was that no companies in their marketing programs would consider mining manganese because it would flood the market. The main metals to mine were nickel, copper, and cobalt, which we felt would not make a great market impact.

An important factor to be considered in negotiations as viewed here was the equity ownership of each party. As stated above, each party to the negotiations had spent considerable time and money on the effort. Thus valuable equity ownership of information existed -- we had gained a tremendous amount of information. A settlement that provided for the release of a surveyed area would make the data obtained in that area of little value to the previous explorer of that area. So it was agreed that once a settlement was made we would exchange data on all areas we had given up to the companies that had taken them over. This, of course, was a great incentive to continue the negotiations.

As we continued with the negotiations, we recognized that it was extremely important to complete them before we had to submit to compulsory arbitration. Not equal area but equal estimated mineral deposit value was the basis for negotiation, and because a tremendous amount of exploration effort had been spent, we knew, at least in that case, the value of one area as compared to another area, though in absolute terms we still had a lot of information to gain.

In summary, a number of factors provided for a favorable resolution of the conflict of claims. First and foremost, each party to the conflict had accomplished considerable initial work in establishing itself as a true pioneer explorer. Its knowledge was not limited to the physical and chemical nature of the resource but included mining, processing, and marketing knowledge necessary for its commercial and economic development. Second, a resource was recognized as being large enough to provide for an initially sufficient number of potential mine sites. There is an excellent probability that a large number of additional sites would be found over a period of time. Third, the negotiations and discussions were on a commercial, non-political basis -- in other words, business-like -- that enabled us to come to a resolution that was not detrimental to any one particular party. Following the agreement on claim coordinates that represented non-overlap of the six consortia, amended applications were filed with the respective government agencies. The amended applications were subsequently accepted because there was no conflict. In the approximately three years following the agreement, a considerable amount of exploration data was exchanged, proving that avoidance of conflict could be extremely profitable. We're still in the process of exchanging data to the benefit of all the pioneer explorers. So the approaches to the problem, the methods of solution, and the recognition by all that each party was knowledgeable and had valid claims provided a solid basis for resolu-

tion. To my knowledge, all parties to the conflict have expressed satisfaction that the agreement reached was an equitable one.

CONFLICTS BETWEEN MINE SITES OF SIGNATORIES AND NON-SIGNATORIES OF THE LAW OF THE SEA CONVENTION

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The Problem

It is common knowledge that at present the commercial interest in the mining of manganese nodules on the international seabed has waned, if not totally vanished. Economists believe that the excess capacities of the land-based producers of the metals contained in the nodules as well as the high costs and legal risks connected with mining on the international seabed will make such mining ventures unprofitable throughout the next decade. It will be, therefore, rather unlikely that the mining industry will proceed beyond the first exploratory phase which was primarily directed to the discovery of exploitable mine sites and the development of mining techniques unless further activities would be subsidized by governments for political reasons.[1]

In view of the suspension of mining activities on the international seabed, the mine sites which so far have been discovered and explored by the various mining consortia and state enterprises for later commercial exploitation will have to be held "in storage" for a while until a change in the economic, political, or legal situation will render the mining of manganese nodules profitable or necessary. For the time being, it will have to be the primary concern of the mining enterprises which have already invested technical knowledge and a substantial amount of money in the discovery and exploration of a certain mine site to attain an internationally valid exclusive claim to that mine site for the future and to have this legal position protected against competing or overlapping claims of others. The attainment of such a protected position presupposes in the first instance the resolution of conflicts with respect to all competing or overlapping claims to that mine site, in particular the resolution of conflicts in the relations between signatories and non-signatories of the Law of the Sea Convention, where such conflicts are still unsettled. My report will deal specifically with the rules which will apply to conflicts of that kind.

The Available Conflict Resolution Arrangements

The legal situation with respect to the settlement of conflicting claims to a mine site on the international seabed is complex and far from satisfactory.

There is still no generally accepted and universally applicable treaty regime in existence under which an internationally valid title to a certain mine site on the international seabed could be acquired and conflicting claims could be adjudicated. The Law of the Sea Convention which purports to establish such a universally applicable legal regime for the international seabed has not yet found general acceptance and has not even entered into force between those states which support it. Therefore, the fact that a state has or has not signed or ratified the Convention is not a relevant argument for or against its claim to a certain mine site.

Thus far, two conflict resolution arrangements of limited scope have been established to the benefit of so-called "pioneer investors" which provide for reciprocal recognition of mine sites after prior resolution of overlapping claims conflicts. The term "pioneer investors" means those states, state enterprises, and private consortia or companies which had already, up to a certain date, invested a substantial amount of money in the development of techniques for mining and processing manganese nodules and in the discovery and exploration of a suitable mine site on the international seabed. These two arrangements are the following:

(1) The Resolution II relating to "pioneer activities" which had been adopted by the Law of the Sea Conference and later attached to the Final Act of the Conference of 10 December 1982[2]; and
(2) The Provisional Understanding on Deep Sea Matters signed on 3 August 1984 by Belgium, France, the Federal Republic of Germany, Italy, Japan, the Netherlands, the United Kingdon, and the United States.[3]

In the context of my report it will be necessary to demonstrate the limited scope and legal effect of both arrangements:

(1) Resolution II provides the option for states which have signed the Convention on the Law of the Sea, to register their "pioneer investors" together with their respective mine sites with the Preparatory Commission for the Establishment of the International Sea-Bed Authority. No "pioneer investor" and mine site may be registered before all conflicts of overlapping claims have been successfully resolved, either by voluntary settlement or by using the arbitration procedure provided for in Paragraph 5 subpara. (c)-(d) of the Resolution.[4] So far France, India, Japan, and the Soviet Union have applied for registration under the Resolution and are about to resolve their conflicts of overlap. When this procedure will have been completed, each of the "pioneer investors" represented by one of the four states will then, under the terms of the Resolution, have the "exclusive right" to continue its "pioneer activities" on its registered mine site -- that is, to proceed with the exploration of that mine site. However, this title to the registered mine site will be valid only among the four states which so far have availed themselves of the option contained in Resolution II and thereby accepted the terms of the Resolution; it will be valid also *vis-a-vis* any other state which may later do the same. This title will have no legal effect *vis-a-vis* third states which have not opted for the Resolution or otherwise accepted its terms, and certainly not *vis-a-vis* those states which have not signed the Convention. As the Resolution II has not been made an integral part of the Convention and has not been signed or accepted as a separate instrument, it is difficult to perceive a legal construction by which a mere resolution of a conference could impose an obligation on states to recognize its provisions as legally binding.[5] For the same reason it cannot be maintained that the Resolution II is the only means by which a "pioneer investor" may acquire the right to proceed with the exploration of its mine site.

(2) The Provisional Understanding of 3 August 1984 contains the conditions and procedures under which the eight signatory states will respect authorizations for deep seabed operations on a specified mine site issued under the national deep sea mining legislation of one of the signatory states. Although the Understanding is not limited to the case of the "pioneer investors" and will also apply to future authori-

zations under the national legislation of one of the eight states, the primary purpose and direct effect of the Understanding relates to the reciprocal recognition of the mine sites of the mining consortia which had already engaged in exploration activities on these mine sites. The Understanding acknowledges that the six mining consortia composed of companies from the eight states have resolved their conflicts of overlap by agreement, and, more importantly, prescribes that the national exploration licenses for the respective mine sites on the basis of the agreed boundaries have to be respected by all States Parties to the Understanding. Thereby each consortium acquired an exclusive concessionary right to its respective mine site which will be legally valid in all States Parties to the Understanding and which will be protected against any later claim by persons or companies under the jurisdiction of the states. However, this legal protection will not reach beyond the limits of jurisdiction of the eight states; it does not confer an internationally valid title to the mine site *vis-a-vis* third states. The limited membership of the arrangement between the eight reciprocating states remains the main defect of this system, in particular since the states which maintain the exclusive nature of the Resolution II system have so far refused to recognize national authorizations to engage in activities on the international seabed outside Resolution II.

Consequently, the legal protection of the mine sites of the "pioneer investors" offered by both arrangements is far from perfect. Only France and Japan, which are parties to both Resolution II and to the Understanding of 3 August 1984, can claim an exclusive title of their "pioneer investors" to their respective mine sites *vis-a-vis* the parties to both arrangements. As both arrangements taken together encompass all present "pioneer investors," France and Japan have probably achieved the best possible legal protection for their "pioneer sites" that may be attainable under the prevailing circumstances. Between those other states which are parties to only one or the other of the two arrangements, there exists no readily available conflict resolution procedure and no treaty obligation to respect each other's mine site. This is particularly true between those states which have not signed the Convention on the Law of the Sea and are thereby precluded from using the option of Resolution II, and those states which have signed the Convention but are not willing, for political reasons, to join also the arrangement between the reciprocating states.

The Legal Protection of Explored Mine Sites Under General International Law

The unsatisfactory situation between the two groups of states which have not yet been able to agree on a common legal platform for settling possible conflicts between their respective mine sites poses the question whether recourse may be had to principles of general international law for closing this gap. To be more specific: does the law of the sea provide principles and criteria which could form the legal basis for settling such conflicts and which would protect the mine site of a "pioneer investor" after it had been cleared of overlapping claims, against later claims of others. There can be no doubt that the relationship between the various "pioneer investors" in respect to their activities at sea is governed by the legal regime of the high seas as long as no other generally agreed regime for governing such activities has been put into effect, and I maintain that the legal position which a "pioneer investor" has acquired in relation to a certain mine site on account of his activities and expenditure in

discovering and exploring that mine site is already legally protected under the regime of the high seas. The following three arguments support this contention:

(1) The general principle governing the legal regime of the high seas that states shall conduct their marine activities with due regard to the marine activities of other states, a principle which has found expression in Article 2 para. (2) of the High Seas Convention and has been reaffirmed in Article 87 para. (2) of the new Convention on the Law of the Sea;
(2) The recognition of the legally protected position of "pioneer investors" in relation to the mine site they have discovered and explored with substantial expenditure, by Resolution II of the Law of the Sea Conference;
(3) The principles and criteria for the settlement of disputes relating to competing or overlapping claims to a mine site which have been agreed on in the conflict resolution arrangements for the settlement of such conflicts between "pioneer investors."

In the following I shall examine these three lines of argument more closely:

The Duty to Pay Due Regard to the Activities of Other States

This principle, which has found expression in Article 2 para.(2) of the High Seas Convention and has been reaffirmed by Article 87 para.(2) of the Convention on the Law of the Sea[6], is the basic norm for the resolution of conflicts between states in the exercise of the freedoms and other lawful uses of the high seas and their resources. It is generally recognized that this principle does not apply to the traditional freedoms of the high seas only, but also to all other lawful uses, and it is also not controversial that this principle does not apply to activities of states only, but likewise to the activities of their nationals in relation to each other. There is no reason why this principle should not apply also to conflicts with respect to activities on the international seabed. In fact, the Law of the Sea Convention applies this principle expressly to the relationship between activities on the international seabed and other activities in the marine environment of the high seas and prescribes that activities on the seabed shall be conducted "with reasonable regard" to other activities in the marine environment and *vice versa* (Article 147 paras.1 and 3).

Although the obligation to pay due regard to the marine activities of other states focuses primarily on conflicts between activities of a different kind, it applies with even greater force to activities of the same kind, and therefore also to conflicts between competing activities on the international seabed. It seems that the basic importance of this principle for the resolution of conflicts between competing claims to mine sites on the international seabed has not yet been fully realized, particularly in those cases where no special procedure for the resolution of such conflicts has been agreed upon. One should, therefore, examine the application of this principle to conflicting uses of the sea more closely.

The object and purpose of the principle to pay due regard to each other's marine activities is to provide a guideline for securing the peaceful coexistence between states in the uses of the sea. In those cases where a permissible use of the high seas, *e.g.*, in the exercise

of the freedoms of navigation or fishing, has the effect of excluding temporarily the exercise by others of the same freedom on the same spot, the principle of paying due regard to each other's activities has the effect of putting the first user into the privileged position to exercise his right of navigation or fishing undisturbed. This holds true also with respect to the exercise of such rights as the laying of cables and pipelines or the implantation of artificial structures and installations on the international seabed which have been recognized as freedoms of the high seas (cf. Article 87 para. 1 of the Law of the Sea Convention), despite the fact that these activities necessitate a permanent use of a limited area of the seabed and preempt others from using the same area for the same purpose. The obligation to leave such uses undisturbed has found expression in those provisions of the Law of the Sea Convention which specifically protect cables, pipelines, and artificial installations or structures from interference by other users of the sea. For example, Articles 79 para. 5 and 112 para. 2 expressly provide that, when laying cables and pipelines on the seabed, states shall have "due regard" to cables and pipelines already in position and shall, in particular, not prejudice the possibilities of repairing them. While the obligation to pay due regard to the marine activities of other states does not necessarily imply a priority of the first user, it nevertheless protects the first user to the extent necessary for a reasonable and continued exercise of his activity, provided however that the short- or long-term exclusion of others from a similar use of the sea in the same area keeps within reasonable proportions. Thus, in case of conflict, the principle of paying due regard to each other's marine activities will provide the arbitrator with the legal authority for adjudicating the case by the yardstick of reasonableness and equity. The term "due regard" by itself may not provide clear-cut criteria how far the protection of the first user should go; but it provides the legal basis for the application of equitable criteria -- that is, of criteria which are relevant for determining the limits of a reasonable exercise of the protected right.

The question remains how far the obligation of paying due regard to the marine activities of another state protects also the "pioneer activities" on the international seabed. Does it follow from this obligation that those mining enterprises which had been the first in discovering and exploring a certain mine site, by this activity acquire a quasi-possessory relationship to that mine site with the effect of precluding others from exploring and exploiting the same mine site? The answer should be in the affirmative if the respective mining enterprise has already made a special technical effort and expended a substantial amount of money in the discovery and exploration of a mine site and has made known its intention to proceed with the exploration and development of that mine site[7] so that it could be considered a localized, valuable, and continuing activity on a definable area of the seabed. The argument that the relationship of the mining enterprise to the discovered and explored mine site is not evident -- as in the other uses of the sea mentioned before -- in a manifest and clearly visible physical presence of the explorer's equipment on the mine site may be of some relevance in relation to other uses of the sea of a different kind; however, this argument loses its validity in relation to a competing claim to the mine site which equally does not manifest itself by permanent physical presence.

We can leave aside here the controversy about the legality of mining activities on the international seabed because we are concerned

only with the exploratory activities of the "pioneer investors" which is without prejudice to the later regime of exploitation.[8] In any case, in respect to the privileged position which they have acquired on account of their exploratory activities, all "pioneer investors" stand on the same legal plane in relation to each other and there is no legal justification whatsoever to discriminate among them on account of whether they have opted for Resolution II or not.

The Recognition of "Pioneer Activities" by the Law of the Sea Conference

The recognition of "pioneer activities" by Resolution II of the Law of the Sea Conference as activities which may confer an exclusive title to the discovered and explored mine site is a special application of the principle of paying due regard to each other's marine activities. It supports the thesis that the discovery and exploration of a mine site by a substantial amount of technical effort and financial expenditure results in a legally protected claim to that mine site.

"Pioneer activities" in the sense of Resolution II means all activities relevant to the identification, systematic analysis, discovery, and evaluation of manganese nodules and to the determination of the technical and economic feasibility of their exploitation, including any at-sea observation and evaluation activity which has as its objective among others the location, concentration, and grade of manganese nodules and the testing of equipment for their recovery. States, state enterprises, and private companies or consortia which had expended, before 1 January 1983 (or 1985 in the case of a developing country), at least US$30 million in pioneer activities and no less than 10 percent of that amount in the location, survey, and evaluation of a specified mine site, may claim that mine site as a "pioneer area" to be allocated to each of them by the Preparatory Commission for the Establishment of the International Sea-Bed Authority with the effect that they shall then have the exclusive right to continue their exploration activities on that mine site.

Of course, "pioneer activities" do not *per se* confer an exclusive right to the respective mine site on the "pioneer investor" under the terms of Resolution II; additional conditions have to be met, such as the signing of the Convention by the sponsoring state, the prior resolution of conflicts of overlap, and the allotment of only one site to each "pioneer investor" listed in the Resolution. These additional conditions, however, are immaterial in the present context because all "pioneer investors" which qualify as such under the terms of the Resolution, had or have still the option to meet these additional conditions because the resolution remains operational until the entry into force of the Convention and prescribes no time limit within which a "pioneer investor" must make use of the option offered under the terms of the Resolution. What matters in the present context is the fact that Resolution II regards the investment of a substantial amount of technical effort and financial expenditure in the discovery and exploration of a mine site as a sufficient basis for the recognition of a legally protected position in respect to that mine site. Thereby the Resolution points to the criteria which have been considered relevant and equitable in applying the "due regard" clause to mining activities on the international seabed.

The Relevant Criteria for the Settlement of Disputes Relating to Conflicting Claims to a Mine Site

In case of a conflict between rival claims to the whole or part of a certain mine site the "due regard clause" does not offer concrete criteria for the resolution of such a conflict between "pioneer investors," particularly in cases where both parties to the dispute can prove some technical effort and expenditure invested in the discovery and exploration of part of the mine site. However, as I said earlier, the principle of "due regard" opens the way for identifying and applying equitable criteria in these cases.

In this context the question arises where such equitable criteria could be found. Resolution II and the Agreement on Conflict Resolution of 2 September 1982[9] which preceded the Provisional Understanding of 3 August 1984, both contained a list of rather explicit criteria which had been agreed between the participating states as directives for the adjudication of rival claims to a mine site by an arbitration tribunal. As we deal here primarily with conflicts between states which are not parties to the same arrangement, the criteria listed in the one or the other of the two arrangements will not be directly applicable. Nevertheless, as the criteria prescribed in both arrangements are practically the same, they may, as far as they are identical, be considered as generally recognized equitable criteria for determining which party has the better claim to the whole or part of the mine site in dispute. Even if one would not like to go so far as to regard these criteria as part of general international law, certainly none of the parties may validly dispute the relevance and equitableness of criteria in intergroup conflicts if the same criteria have been accepted as binding for the resolution of like conflicts within its own group.

In both conflict resolution arrangements[10] the arbitral tribunal is directed to find a solution which is fair and equitable, having regard, in particular, to the following factors:

(1) the date on which the pioneer investor commenced activities at sea relating to the area in conflict;
(2) the financial cost of activities relating to the area in conflict;
(3) the continuity and extent of activities relating to the area in conflict;
(4) the time when activities were carried out and the quality of activities in the area of conflict.

These criteria focus essentially on the first discovery of the mine site and on the weight of the technical and financial effort invested in the exploration of that mine site. These criteria do not only provide the necessary basis for the judicial resolution of the conflict; they imply also an agreement on the principle that the listed activities confer on the investor a legally protected position in relation to the explored mine site. This position may be defended against rival claims or other interference with all means of defense that may lawfully be employed under international law.

The Possible Procedural Approaches to the Resolution of Conflicts Between Signatories and Non-Signatories of the Convention

I had shown earlier that the legal protection of the mine sites of "pioneer investors" against overlapping claims is rather incomplete under the existing arrangements for the resolution of such conflicts. But I hope to have demonstrated that in those cases where these ar-

rangements do not apply, as it is primarily the case in conflicts of mine sites between a signatory and a non-signatory state of the Law of the Sea Convention, the principle of paying due regard to each other's marine activities provides the legal basis for applying equitable criteria in the settlement of such conflicts. Moreover, the reliance on principles of general international law has the advantage of providing a neutral legal basis for settling rival claims between members of the two groups of states without requiring one party to the dispute to recognize the other party's policy with respect to the legal regime which should eventually govern the exploitation of the international seabed. As a reasonable assurance of undisturbed tenure is a prerequisite for further investing technical effort and money in the exploration of a mine site, it lies in the self-interest of every mining enterprise and sponsoring state, whether it belongs to the signatories or non-signatories of the Convention, to have its exclusive claim to the mine site recognized by any other actual or potential deep sea mining enterprise. This will be necessary or at least advisable irrespective of the international legal regime which will eventually govern the commercial recovery of manganese nodules.

If all states which are interested in deep sea mining realize the necessity or advisability of at least having the boundaries of their respective mine sites mutually recognized, an appropriate procedural approach must be sought for this purpose. Several alternatives present themselves:

(a) The most comprehensive solution would be an agreement between all states whose enterprises have performed "pioneer activities" on the international seabed up to a specified date. Such an agreement would have to provide for the exchange of the coordinates of the claimed mine sites and to require a voluntary settlement or, if negotiations fail, an arbitration procedure in case of overlaps. As the question of who has the better claim to any part of the mine site will have to be decided by application of equitable criteria based on principles of international law, it should normally be for the states themselves to pursue the claim of the enterprise sponsored by each of them. However, nothing would prevent the parties to the agreement to delegate the conflict resolution procedure to their respective enterprises, either generally or at the option of one of the parties to the dispute. Subjecting a mine site to the procedure under such an agreement would have the effect of finally settling the claim to that mine between the states concerned after either no overlap has been discovered or the better claim to the mine site in conflict has been decided by arbitration. The States Parties to the agreement and their nationals would then be estopped from putting up a conflicting claim to a mine site which has passed the procedure under the agreement. The agreement might contain a reservation to the effect that it is without prejudice to the legal regime which would eventually govern the exploitation of the mine sites and does not imply any recognition of the other party's legal position in this respect in order to overcome the ideological barrier, if any, to enter into such an agreement.

(b) A less satisfactory solution would be an *ad hoc* voluntary conflict resolution between those states or mining enterprises which discover overlapping claims to the mine sites explored by each of them, either by a negotiated agreement or, if negotiations fail, by arbitration. The early discovery of such conflicts presupposes that

the boundaries of the mine sites under exploration have been made public by disclosing the coordinates which have been registered with the national authorities under the respective national legislations. It must, however, be doubted whether the mining enterprises will be inclined to disclose these data before they can be sure that rival claimants will be prepared to enter into a voluntary conflict resolution procedure. On the other hand, the public announcement of a claim to a certain mine site may fortify the legal effect of the first discovery and exploration of that mine site as basis of an exclusive claim to it under the "due regard clause" of the regime of the high seas, provided the claim is accompanied by a substantial investment in the exploration of that mine site. If rival or overlapping claims could be settled by a voluntary conflict resolution procedure on an *ad hoc* basis between signatories and non-signatories of the Convention, this would nevertheless improve the legal protection of explored mine sites in the relations between the two groups of states because the parties to such a procedure would then be estopped from further claims to the mine site in question. It must, however, be made clear that this protection will only be a relative one because its legal effect will be restricted to the parties of each conflict resolution procedure. In any case, this procedure might be a way of at least settling the conflicts between the present "pioneer investors" which are known to each other, and it would leave them in a fairly protected position against later claims of "newcomers."

Whichever alternative might eventually be chosen for the settlement of disputes relating to conflicting claims to mine sites between signatories and non-signatories of the Convention, each of them would be helpful in creating a climate of mutual respect and tolerance between the two groups of states. Of course, the mutual recognition of the boundaries of the mine sites which have already been explored by the "pioneer investors" will provide no answer to the question of the legal regime which will eventually govern the exploitation of these mine sites, and will not remove the legal risk caused by this uncertainty. But the provisional settlement of the problem of distributing the available mine sites between all "pioneer investors" without discrimination may pave the way and provide the necessary time for a later agreement on a generally acceptable legal regime for the commercial exploitation of the resources of the international seabed.

NOTES

1. In addition, the recent discovery of extensive cobalt-rich manganese crusts on the surface of marine rocks in the Pacific within the limits of the 200 mile zones and continental shelves of Pacific states may have the effect of further postponing the mining of manganese nodules on the international seabed because these crusts provide an alternative source of the same metals as are contained in the manganese nodules. The fact that the manganese crusts may be mined within a zone of national jurisdiction with a known legal regime under which an investor can acquire the necessary security of tenure for his investment will considerably lessen, if not eliminate, the legal risks which stand in the way of international seabed mining. Although the technical problems of mining the

manganese crusts have apparently not yet been solved, it may well be that, once a future rise in metal demand will require the opening of new reserves, the extraction of manganese crusts may effectively compete with the recovery of manganese nodules and postpone mining on the international seabed even further.

2. 21.I.L.M.(1982) 1245, 1254. The Resolution had been adopted at the 11th Session of the Conference on 30 April 1982; it had been put to the vote together with the Convention and three other substantive resolutions of the Conference as an integral whole. The result of the voting had been 130 in favour, 4 against, with 17 abstentions.
3. 23 I.L.M.(1984) 1354.
4. It is not quite clear from the wording of Paragraph 5 of the Resolution whether conflicts with respect to overlapping claims must be resolved in relation to all states and their nationals which qualify as "pioneer investors" under the terms of the Resolution or only in relations to those states and their nationals which have applied for registration under the Resolution.
5. It is only by virtue of Article 308 para.(5) of the Law of the Sea Convention that the exclusive right to the mine which has been accorded to a "pioneer investor" under the terms of Resolution II, will later have to be recognized by the International Seabed Authority in allocating mine sites under the regime of the Convention. Thus, only then, after the coming into force of the Convention, the exclusive right of a "pioneer investor" registered under Resolution II will develop into full legal force, but here again only in relation to those states which have ratified the Convention and certainly not in relation to those states which remain outside the Convention.
6. Article 87 para.(2) reads as follows: "These freedoms shall be exercised by all States with due regard to the interests of other States in their exercise of the freedom of the high seas and also with due regard for the rights under this Convention with respect to activities in the Area.
7. The intention to proceed with the exploration of a certain mine site could be shown, for example, by applying for the national or international registration of that particular mine site either under the national deep sea mining legislation or under Resolution II of the Law of the Sea Conference.
8. Even the so-called "Moratorium Resolution" which had been adopted by the United Nations General Assembly on 15 December 1969 against the opposition of nearly all the industrialized states, did not go so far as to outlaw exploratory activities on the international seabed. The Resolution purported only to inhibit "activities of exploitation" pending the establishment of the envisaged international regime.
9. This Agreement had been signed by France, the Federal Republic of Germany, the United Kingdom, and the United States. It became largely redundant after the voluntary conflict resolution between the mining consortia sponsored by these states had been incorporated in the Provisional Understanding of 3 August 1984. The principles and criteria for the resolution of conflicts of overlap were contained in the Appendix 2 of the Agreement of 2 September 1982 (for the text see 21 I.L.M.(1982) 950).
10. Paragraph 5 subpara.(d) of Resolution II; Appendix 2 para.(1) subparas (a)-(e).

Willy Ostreng: The floor is open for comments.

Alan Hutchison: I have two questions, the first to Professor Oxman. The solicitor of the U.S. Department of the Interior recently issued an opinion on the extent of the continental shelf which stated that the continental shelf is not a geographic or a geological concept. Under the Outer Continental Shelf Lands Act, the Department of the Interior says that it can now give mineral leases well beyond the 200 miles if the seabed is economically exploitable. This statement seems to run counter to the Law of the Sea Convention. I would appreciate your comments.

Secondly, to Mr. Welling, after spending a half billion dollars, what was the outcome of all the mining exploration in practical terms?

Bernard Oxman: Whether or not the Congress and the courts are bound by President Reagan's Ocean Policy Statement, it would seem to me that the Secretary of the Interior is bound by his boss's statement of policy. President Reagan indicated that on issues of this sort, as I read his declaration, we would act in a manner consistent with principles of international law as contained in the Convention. The Convention itself defines the continental shelf in a way that makes clear that it is a juridical concept. It is two-pronged: you can go to 200 miles or you can go to the outer limits of the continental margin beyond 200 miles. It contains complex provisions defining the outer limit of the continental margin. If the Secretary of the Interior means that the continental shelf of the United States extends to the outer limits of the continental margin determined in a manner compatible with Article 76 of the Convention, then I see no international law problem. The only question is a domestic law problem of whether the Outer Continental Shelf Lands Act was meant to apply to the whole area, subject to coastal state sovereign rights under international law, including areas within 200 miles that are unquestionably beyond the continental margin.

Conrad Welling: I indicated that the industry has spent about a half a billion dollars. My company spent $130 million in the process of many years. First was for exploration activity to find out if we had a commercial deposit, second was to test our mining concept, and third, to develop a processing capability. We got to the point where it was technically feasible -- there were no technical breakthroughs required. The task was one of engineering and operations -- in other words, developing the technique to do the job. What stopped us was the minerals market, and we will not proceed until the market recovers.

Budislav Vukas: If I understood correctly, Professor Jaenicke stated that, in his opinion, the pioneer investors who signed neither the Convention nor the Final Act have rights to exploration of the seabed. How could you claim this on the basis on a provision contained in the Preamble of the 1970 Declaration of Principles, where the General Assembly unanimously stated that there is an area of the seabed beyond the limits of national jurisdiction where the regime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area or the exploitation of its resources? How could such rights be created at the same time in which the Conference on the

Law of the Sea established all these procedures which were accepted by the great majority of states?

My remarks to Professor Oxman are the following. Many of the states participating in UNCLOS III, which in other conferences and in relation to other matters do not accept procedures entailing obligatory decisions, decided at UNCLOS III to accept such procedures as the package deal, especially because they were aware that such procedures are necessary because of the existence of Part XI. It would be very useful in disputes concerning navigation if such procedures applied to states that are not parties to the Convention, but I think that this would be contrary to the basis on which many new states, many socialist states, accepted the whole system. Yugoslavia had no problems in accepting this system in relation to many activities just because we needed it for Part XI. Now you suggest that we leave aside Part XI and we apply the rest to all the states. I think that this would be contrary to the spirit and concept of package deal we discussed two days ago.

Günther Jaenicke: You referred to the resolution of 1970 which stated that the high seas regime did not contain substantive rules in this respect. I do not interpret it in the sense that the high seas regime would not be applicable. The problem is that for mining the deep sea, we need more elaborate rules. But the basic rules of the high seas apply. Especially where someone has started exploration on the mine site at substantial cost, he should not be disturbed in proceeding further. I think that the general principle that one should not disturb another in doing so could be inferred from the high seas regime even if the more substantive words should be elaborated by a treaty generally agreed upon. But we have no generally agreed treaty up to now and that's the problem. Until then I do not see why this provision should not apply in particular between all the investors, who are partly signatory states and partly non-signatory states. The Soviet Union and India have claimed to be pioneer investors. What is right for the one is also right for the other. They are all on the same legal plane. They should not disturb each other. I want to maintain here that for the moment all those who have expended a lot of technological effort and money should not disturb each other's activities in this respect, leaving the question of the eventual legal regime to a later stage. I am of the opinion that the "due regard" clause applies to such a situation.

Bernard Oxman: I don't want to renew the debate we've heard here before about the package deal problem. The record on the precise point you raised and what you said is probably true of many countries, including, from the looks of the record, interestingly enough, one socialist country of some prominence. The Soviet Union displayed enthusiasm for compulsory arbitration on navigation and fisheries questions long before displaying any enthusiasm for compulsory arbitration in seabed questions. Indeed the USSR was reluctant, as were many other countries, including developing countries, to accept the notion that an arbitral panel or a tribunal could review political decisions of the Sea-Bed Authority for consistency with the treaty. Compromise texts on that issue emerged.

The package deal problem really raises the issue of how the overwhelming majority of states who have signed the treaty and those states who have planned to ratify will deal with the situation posed by the

United States' refusal to accept the treaty because of Part XI. Objectively speaking, you have two options. One is to take the attitude toward the United States that, "If you don't accept the treaty as a whole, those other things that you would like, that you need our cooperation to get, you're not going to get." The other is to try to make sure that the rest of the treaty doesn't fall apart during this interim period. That, I think, is a difficult policy choice. There's an awful lot in this treaty, apart from Part XI, of very considerable interest to most countries in the world that they can accept and live by while the deep seabed mining question, to one degree or another, remains unresolved. I just fear that the confrontation mode of the package deal may result in a situation in which (1) there is no agreement on deep seabed mining, and (2) the rest of the Convention falls apart. The other option, the "gradual luring" approach, may prove to be more productive in the end.

I am not an expert on deep seabed mining, but Mr. Welling can correct me if I'm wrong. Whether or not Part XI was wise in light of economic and technical realities as they were understood in the late 1970s, which is really when Part XI was written, I am told by people whose judgment I respect that it is already evident that we have made objective mistakes. Some of the economic and technological assumptions that were made then are now proving to be incorrect. This problem is already being addressed in the Preparatory Commission. This is always the trouble with laying down detail before you know what you're talking about. I will admit here that it was the United States that asked for the details; I think it's a cultural manifestation of the tendency of American lawyers to make every document 500 pages long. Be that as it may, you're now faced with a situation in which it is possible that no matter what one does, and whatever political view one has on deep seabed mining, we are now dealing with an objectively troublesome text. If that's the case, my personal advice to you is that the carrot may be a better policy than the stick. But I have to recognize that it's your choice.

Conrad Welling: There's no question that the American companies have to raise the investment capital; they can't depend upon the government to subsidize them. I have to go out and raise the capital with banks and big financial institutions; we do not have it ourselves. The word I got from them was "We cannot support you with the text of Part XI." I had no other choice. If they came to me today and said, "We will finance you under Part XI," I would have no objections. I've said this to Elliot Richardson many times. The basis is strictly a practical approach to the problem.

Barbara Kwiatkowska: I have one question to Professor Oxman. Suppose your proposal is accepted and implemented. How could such a compulsory dispute settlement outside the Convention be accommodated with that under the Convention once the Convention enters into force and United States is not a party to it?

Bernard Oxman: First, I proposed compulsory dispute settlement under the rules of law contained in the Convention regarding navigation and pollution and other matters. Therefore the rules would basically be the same. Second, the Convention itself allows arbitration as one of the options, so that as I see it it doesn't much matter. Indeed, as far as I can tell, there's no reason not to use the Convention rules on how to

establish an arbitral tribunal. Thanks to the efforts of Professor Sohn, they're probably better than most other rules on how to establish an arbitral tribunal. Happily, I don't see any inconsistency whatsoever there.

Conrad Welling: In our compulsory process we selected an arbitral tribunal. But we were able to complete negotiations before we had to set it into motion. I agree that that's the approach, and we certainly used it in our own private negotiations.

Tullio Treves: My remark is provoked by one of the replies by Professor Oxman about the cultural reasons why Part XI is so long and detailed. I don't really think it is the cultural outlook of the American lawyers. The mechanics of the negotiation during the Third Law of the Sea Conference were such that for each simple idea containing a strong ideological charge, there was a reply: let's try to dilute it through details. The end result was that for each line of what the developing countries would have liked, there were three articles of two pages each. It has, of course, implied the necessity of going into details which now are troubling us. I don't think it would have been easy to do it otherwise, but this is the situation in which we find ourselves.

I would like the opinion of Professor Jaenicke on the following point. He remarked that two systems exist now for settling conflicts arising from overlaps of claims: one between the eight parties to the memorandum of 1984 and the other in the Resolution. He remarked, and I think he is right, that two countries, Japan and France, have achieved the best possible protection under the present legal conditions because their claims have been cleared with the other six participants to the memorandum and they are in the process of being cleared with those other pioneers that are not parties to the memorandum, *i.e*, the Soviet Union and India. Professor Jaenicke went on with the most interesting series of ideas about how conflicts between the non-signatory members, parties to the memorandum, and the signatories of the Convention which are not parties to the memorandum could be overcome. Perhaps there is another way that may not be simpler but that could be taken into account. This would be to follow more or less the route taken by France and Japan with those members of the four international consortia of which American companies are important parties. Some members of these consortia -- at least one for each consortium -- are also signatories to the Convention. Such a signatory could try to solve possible conflicts of overlaps with the Soviets, because it is only with them that the question arises under the system of the Resolution. This would be similar to what the French and the Japanese have done. It may raise questions within the consortia, but a question within the consortia is at the private law level which would not possibly imply political judgments on the part of the American government. I just submit this possibility for comment and thought. The whole question seems a little less urgent than some countries think it is, because all the consortia are retreating under a tent and waiting for times in which deep seabed mining will be economically more interesting than it is under the present market circumstances.

Günther Jaenicke: If I understand you correctly, you mean that those partners of the consortium that belong to the signatory states might go to arbitration. If a company in a consortium belonged to, say, Canada, I think that Canada alone would be able to register under Resolution II

because all the states to which the companies belong must sponsor them. But the other way in which the consortium deals directly with another investor with overlapping claims would probably be easier.

Hasjim Djalal: I am one of the very few representatives of the developing countries still left in the room, and that makes it more difficult for me to make comments. First, I would simply like to put on record that the position as expressed by Professor Jaenicke is and has been challenged in the conference by the Group of 77 and also in the PrepCom, which has taken the position that unilateral legislation against the Convention is not acceptable. It is in fact declared illegal. The mutual understanding that exists between the states outside the context of the Convention has also been declared unacceptable and illegal. The Group of 77 and the PrepCom have taken the position that no regime outside the Law of the Sea Convention shall be accepted for the seabed mining.

Second, I'm very much intrigued with what Bernie is saying about the effort to prevent the dismantling of the Convention. This is a positive thing that we should be thinking about. How are we going to do that? I'm sympathetic to the problem; I don't know quite how to overcome it at this moment. I understand from hearing Mr. Conrad Welling, whom I have always had the pleasure of listening to through all the years of discussion on the seabed mining issues, that despite the $130 million that his company has spent, seabed mining is not in sight. The market price is low, there are technical difficulties, and so forth. We were told earlier that mining is not possible before the end of this decade; now we are told it is not possible before the end of this century. If that is the case, what is the difficulty with accepting the Law of the Sea Convention now if the seabed mining provisions are going to be applicable only ten or fifteen years from now? In the meantime Mr. Welling and Bernie and I could perhaps find a way to overcome the problems. In the next years we will have to think how not to unravel the Convention but at the same time also how to see that it is workable and to prevent a few of these seabed miners from undermining the Convention through efforts outside of the Convention, which the majority of states will not be able to accept. Nor will it be good for the miners either. What is the use of two or three seabed miners going to the seabed when everybody else is protesting it? I do not see how that is the right way to go, but I do see that we must be thinking, as Bernie said, about how to prevent the dismantling of this Convention, yet at the same time taking into account other views.

Conrad Welling: I have no desire to dismantle the Convention. I have stated in the past in public forum that I was hopeful that changes could be made in Part XI that would allow us to proceed. As slim as that may seem to some people, I do feel hopeful that this can be done. We will not, of course, engage in deep ocean mining, possibly until the turn of the century, simply because of the time it takes. It would take at least ten to twelve years from the time we've decided to go ahead to the time we're in production, and we won't proceed until the market returns. Hopefully, time is on our side and changes can be made in Part XI that will allow us to proceed when the time comes.

Lee Kimball: I hate to follow Ambassador Djalal because Bernie's going to accuse me of abandoning principle for expediency once again, but on this business of the mine site overlaps, I'd like to get a little more

explicit. Tullio Treves referred to the fact that the outstanding conflict between signatories and non-signatories is between the Soviet Union and, as I understand it, the licenses issued by the United States and Germany. Dr. Jaenicke, you mention as a less desirable possibility *ad hoc* agreements to resolve conflicts between signatories and non-signatories. Do you see them as potentially bilateral or limited multilateral agreements? Under the deep sea mining law, could Germany agree to designate the Soviet Union as a reciprocating state in the way that has occurred *inter se* among the other Western pioneers and Japan? Would you see that kind of designation as compatible with the 1984 provisional understanding?

I had a second quick question for Connie Welling. There's been quite a bit of talk of the timing of deep seabed mining, and there have been many predictions that it may be the year 2005 or the second decade of the twenty-first century before commercial operations might indeed be viable. The 1985 report under the U.S. Deep Seabed Hard Mineral Resources Act reads that the companies who receive licenses in 1985 do still plan to apply for exploitation permits within the ten-year period of the license. Do you really think that this is a possibility, that you will be doing commercial exploitation just following that ten-year period?

Günther Jaenicke: If I understood you correctly, you asked whether it's possible to conclude an *ad hoc* agreement with the Soviet Union about the resolution of conflicts. I'm not aware that this is under negotiation but it may be a possibility. If both sides reserve their position with respect to the eventual regime, I do not think that it will cause problems for them just to resolve the boundary conflicts between the mine sites. But both sides must have the political will to do so. I hope that in the long run this political will will be forthcoming.

Conrad Welling: Lee, as far as the license timing is concerned, we had planned originally to apply for a mining license in the second five-year period, which would end in the early 1990s. We may be able to extend that, but I hope the market will return before that ten-year period. It would still take us into 2005 or so before we would be operational.

Kilaparti Ramakrishna: The first question is addressed to Professor Bernie Oxman. It concerns Professor Jaenicke's prefatory comments to his presentation about the inappropriateness of talking about conflicts between mining sites of parties and non-parties, since the Convention has not come into force and only less than half the required number of ratifications have so far been received. This view is not uncommon; in fact in the past three days amongst the participants that I had occasion to talk with, there are two distinct stances. Those who are the proponents of the Convention felt that a large number of states had signed the Convention and that, given the time multilateral conventions generally take to come into force -- thirty ratifications is a fairly good number -- we can be very hopeful of the outcome. The others would talk in a disparaging manner about the progress and say that we have taken twelve years to bring this Convention into existence and only so many have ratified. Some kind of understanding and appreciation of reality on this subject is needed for any meaningful discussion. I don't see anything wrong with the title of this particular panel,

"Dispute Settlement With and Among Non-Parties to the LOS Convention," as it is drafted in the Convention. This is only one aspect of the problem.

The second aspect of the problem concerns the difficulty of not having the background material for the Convention, particularly after 1976. This is felt mostly in the PrepCom meetings. There is a disturbing trend amongst the debates in the PrepCom meetings to try to expand or read their own meanings into the different provisions of the Convention. If it continues it will result in various obvious problems.

A question to Professor Park, who mentioned the possibilities of conflicts in the continental shelf delimitation where the sea between two opposite states is less than 400 miles. Supposing the continental shelf of one of the states extends beyond the 200 miles and the other's doesn't. Would or could State A claim jurisdiction on the entire continental shelf going beyond the equidistance line? Are there any problems like that?

Choon-ho Park: If the surface boundary -- that is, the economic zone boundary -- and the seabed boundary -- that is, the continental shelf boundary -- do not coincide, then it would be very inconvenient to manage. In the case of Australia and Papua New Guinea and to a lesser extent Indonesia (where it's not a case of opposite states) where there is non-coincidence, they will soon find it terribly inconvenient. In the East China Sea this problem is coming because in the northern part there are three to five claimants, disputants, depending on how you call them. South Korea claims 270-280 nautical miles from the nearest land, and the claimants are all within 400 miles of one another, so there quite possibly this issue of coincidence or non-coincidence will arise.

Edgar Gold: Professor Oxman, I was really most impressed by your forceful and eloquent statement of how important a reliable international legal framework is for the future of the oceans. I think we all agree with that. For some of us, views such as you expressed, given the position you occupied on the U.S. delegation and the trust you generated, provides some hope that the U.S. might one of these days rejoin the international community in the law of the sea effort. Furthermore, your reference to the Nicaragua case, which you maintain is not an indication that the U.S. is abandoning accepted international dispute resolution methods, is also very welcome news. However, despite your reassurance, the Nicaragua case appears to illustrate that the U.S. still has a very elective approach to international law. This was also shown to us by David Colson's excellent luncheon address. Considering, however, that like Canada's, the United States record of accepting international conventions in marine-related aspects is not very great, and that international law in the United States is always subject to so many domestic pressures and interpretations, do you really believe that the United States would submit to and enforce a decision by any international tribunal unless the *a la carte* menu would first virtually guarantee that the dish was indeed to the United States' taste?

Bernard Oxman: I'll give a very short answer to that question: yes. I think that had the United States been prescient enough to alter its declaration of acceptance of compulsory jurisdiction of the International Court of Justice to conform to the conclusions of those who drafted the dispute settlement provisions in the Law of the Sea Conven-

tion, which is the considered view of the world as a whole done in rather substantial harmony, this problem would not have arisen. My understanding is that the Department of State has made clear that the actions of the United States government with respect to the jurisdiction of the International Court of Justice do not constitute a comprehensive rejection of compulsory arbitration.

Renate Platzoeder: A number of participants of this meeting have asked me what has been done by the Federal Republic of Germany in preparation for the establishment of the Law of the Sea Tribunal. Immediately after the Conference on the Law of the Sea had decided that the seat of the tribunal shall be in Hamburg, a governmental working group was set up to deal with the matters involved in the establishment of the Tribunal. Next, a suitable piece of land owned by the federal state was reserved. The Tribunal will be located in one of the most elegant quarters of Hamburg. Then, an experienced group of architects was commissioned to design a first model based on the respective report of the UN Secretary General (Doc. A/CONF.62/L.76, 18 February 1981). It is the same group which designed the European Patent Office, an international institution with its seat in Munich. Furthermore, working relations were set up between the UN Secretariat and Hamburg. In 1984, a UN delegation led by Undersecretary-General Nandan came to Hamburg and Bonn. The model for the buildings of the Tribunal presented by the Mayor of Hamburg was well received by the UN delegation and the press.

On this occasion, the offer was made that the Tribunal is welcome to sit in the Hamburg High Court if the facilities of the Tribunal were not completed in the case of an unexpected early entry into force of the Law of the Sea Convention. A few months ago, the Chancellor of the Federal Republic of Germany was invited to dinner by the Mayor of Hamburg who is at the same time the head of state of Hamburg. As a follow-up to this dinner, the federal government decided that the establishment of the Tribunal will fall within the competence of the Federal Minister of Justice and beginning in 1987, the Tribunal will have a title in the federal budget. The Federal Republic of Germany has not signed the Law of the Sea Convention and the question has been raised whether the seat of the Tribunal will remain in Hamburg.

Two points will clarify the legal and political situation. First, prior to the decision on the seat of the Tribunal and of the International Seabed Authority, it was agreed that the decision taken by the Conference on 24 August 1981 should be incorporated in the Convention (see, Article 156, paragraph 4, and Article 1, paragraph 2 of Annex VI). This decision is "subject to the requirement that the States specified should have ratified the convention by the time of its entry into force and should remain Parties to it thereafter" (see, paragraph 38 of the Final Act of the Law of the Sea Conference which refers to the Introductory Note to the Draft Convention on the Law of the Sea, Doc.A/CONF.62/L.78, 28 August 1981). In other words, the seat of these two institutions cannot be changed until after the entry into force of the Convention. In the case of the seat of the Tribunal, Article 41 of Annex 6 will apply. If one wants to change the seat of the Tribunal, a consensus decision of the states parties will be required. Secondly, the Federal Republic of Germany has at no time excluded to become party to the Convention. Germany participates actively in the Preparatory Commission and is working for a generally acceptable deep seabed mining regime together with other industrialized countries.

Only a few days ago, the Secretary-General of the United Nations paid a visit to Bonn. He was assured by the Foreign Minister on behalf of the federal government that the Federal Republic of Germany will contribute as much as she can to overcome the structural and financial crisis of the United Nations. This is once again a reaffirmation of the continuing policy of cooperation towards and within the United Nations which dates back to the moment the Federal Republic of Germany set first foot in the United Nations some thirty years ago.

Willy Ostreng: Thank you, Renate, for that clarification. The last intervention from the floor comes from Ambassador Koroma.

Abdul Koroma: My question is directed to Professor Jaenicke. I do understand the spirit behind his presentation, but since this is a law conference, it is incumbent upon us as lawyers to seek clarification whenever necessary. It was Professor Jaenicke's thesis that the non-signatories to the Law of the Sea Convention were nevertheless within their rights to operate mine sites in the seabed based on their high seas freedoms. One would be prepared to be accommodating without being seen necessarily to acquiesce in what is considered to be an illegal act. That is to say, for non-signatory parties to engage in mining of the mine sites, which obviously should fall within the competence of the International Sea-Bed Authority, will be in violation of the Law of the Sea Convention itself. I take the argument that the Law of the Sea Convention has not yet come into force but that there is a substantial school of thought that the various resolutions and declarations of the United Nations will not lend legitimacy to such an act. Even if we are prepared to be accommodating, we cannot be seen to be endorsing an illegal act. I do not accept the proposition that parties or consortia or states that have not signed the Law of the Sea Convention itself would be acting legally by undertaking mining based on their so-called high seas freedoms. These would be contrary to our understanding of the Convention and contrary to various resolutions and declarations of the United Nations General Assembly.

Günther Jaenicke: I am glad to comment on that statement and also on Ambassador Djalal's statement. The idea behind my presentation was to accommodate the situation and the relations between the pioneer investors until the time of exploitation. I think even the Group of 77 which took the initiative on the moratorium in 1969 wanted only to prohibit the exploitation, not prospecting and exploration, in the meantime. I specifically said that all that I had proposed would be without prejudice to the regime which would eventually govern. With respect to the understanding between the eight countries, I also stress that it is only provisional, at least for us and others, to provide for the resolution of conflicts between mine sites. The agreement between the eight states of 1984 contains the express provision that nothing in this agreement shall prejudice the rights and obligations of the parties to that agreement under the Law of the Sea Convention, should it ever enter into force. So it's only a provisional understanding and it's only meant to resolve the conflicts of the mine sites between these states. Whatever legal opinion you may have with respect to seabed mining in general, I do not think that, until the Convention has entered into force, any exploratory activity undertaken by these states is prohibited.

Willy Ostreng: I have no choice but to conclude this meeting. Thanks to the members of the panels for their contributions and to the knowledgeable interventions from the floor.

GENERAL COMMENTS

INTRODUCTION

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One final segment of our formal program remains, and I would like to make just two remarks with respect to it before introducing the speaker. First, the papers of these two gentlemen were put under the heading of "General Comments" at the end of the program to allow them more breadth of expression and flexibility than perhaps they would have had under the constraints of the specific panels.

The second remark I want to make is that Dr. Valery Andrianov of the Soviet Maritime Law Association, realizing the time constraints that we are under here, has agreed to give up his time to Dr. Tsarev and to submit his paper to the proceedings so that ultimately you will have the benefit of his thought.

So I'm happy to welcome here today Dr. Victor Tsarev, Doctor of Law, Soviet Maritime Law Association in Moscow.

MARITIME LEGISLATION OF COASTAL STATES AND THE 1982 UN CONVENTION ON THE LAW OF THE SEA

V.F. Tsarev
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This paper is an attempt to examine the peculiarities of the most recent maritime legislation of coastal states and its relation to the 1982 Convention on the Law of the Sea and to valid international maritime law.

It is commonly acknowledged that the study and use of the world ocean has become one of the major problems of humanity along with such problems as the preservation of peace on earth, the protection of the environment, adequate food supply for the population, a sufficiency of energy and raw materials, etc. It is significant that the international community, with good reason, links the solution of these latter problems with a successful resolution of the problem of the world ocean.

In this connection the comprehensive Convention on the Law of the Sea, elaborated and adopted within the framework of the United Nations, is justifiably regarded as a major and timely instrument, contributing to the further development and improvement of the legal order on the world ocean, an important component of the overall international legal order which in its turn represents the underlying essence of the world order.[1]

The emergence of the concept "world order" in Soviet science is rightfully linked with the tasks of practical politics. This term (in its present meaning) was used for the first time in documents of the Group of 77.[2] Putting aside a detailed analysis of the content of the term "world order,"[3] since this is not the goal of the present paper, it should be noted that its emergence is caused by a qualitative progress in the development of human society and its productive forces. The global nature of the current problems, the growing interdependence of states[4] in the broadest sense of the word, the emergence of the material base for an "integral system" of international relations[5] show that at present there is a great need for not only adequate theoretical constructs but also for practical solutions that would contribute to an orderly functioning of the system of international relations.

Taking into account that the systems of international and national law interact, and also that this is particularly true for maritime law where the objects of the regulatory properties of the two systems of law frequently overlap and where, consequently, "norms of national law take part in regulating international relations, while some norms of international law participate in regulating national relations,"[6] contributing thereby to a normal functioning of the complex system of international relations in the use of the world ocean, the need for a smooth interaction of the two systems of law and their uniform application becomes apparent.

Should we consider the correspondence between maritime legislation of coastal states and the 1982 UN Convention on the Law of the Sea, given the fact that the Convention has not yet entered into force? Yes. The Convention has already begun to exert a considerable and positive influence on the development both of international as well as national maritime law. In particular, many legislative acts of states have established new maritime law, as enshrined in the Convention, and have

brought the regime of traditional maritime law (territorial sea, contiguous zone, continental shelf, etc.) into correspondence with the provisions of the Convention. Evidently, this process is irreversible. In this context, studying and understanding trends in the development of this process acquire a special importance.

Maritime Legislation of States from the Point of View of Its Correspondence to the 1982 UN Convention on the Law of the Sea.

In this analysis of legislation, special attention shall be given to questions of navigation.

The majority of changes in maritime legislation were introduced during the work of the Third United Nations Conference on the Law of the Sea, as well as after the adoption of the Convention in 1982. These two circumstances brought about the adoption and introduction into national legislation of new concepts on maritime law: economic zone, archipelagic waters, etc. Changes in national legislation also involved traditional concepts in maritime law, such as territorial waters, the regime regulating international navigation in them, the contiguous zone, the continental shelf, the regime of marine scientific research, etc.

Consequently, the new maritime legislation of coastal states, to a greater or lesser extent, has affected their various interests that are linked to the study and use of the world ocean and its natural resources.

Territorial Sea

At present, of 136 coastal states 114 have territorial waters with breadths ranging from three to twelve nautical miles. Eighty-nine states set the breadth of the territorial sea (the territorial waters) at twelve nautical miles.[7] Four countries set it at six miles (the Dominican Republic, Greece, Israel, and Turkey), Norway and Finland set it at four miles; eighteen states states have three-mile territorial sea (Australia, Bahrein, the Bahamas, Belise, Belgium, Denmark, Federal Republic of Germany, Great Britain, German Democratic Republic, Ireland, Jordan, the Netherlands, Quatar, St. Vincent and the Grenadines, St. Lucia, Tuvalu, United Arab Emirates, the United States of America). Some countries have extended the breadth of the territorial sea to over twelve miles (Albania - 15, Angola - 20, Syria 35, Nigeria and Togo - 30, Cameroun, Madagascar, and Tanzania 50, Mauritania 70, Gabon 100, Senegal 150).

Fifteen states have extended their sovereignty over sea areas up to 200 nautical miles from the coast (Argentina, Benin, Brazil, Chile, Congo, Ecuador, El Salvador, Ghana, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia).

The most significant departure from provisions of valid norms of international maritime law and the 1982 Convention regulating the regime of navigation in the territorial sea is represented by the fact that national maritime legislation of some coastal states ignores the right of innocent passage in the territorial sea. This is reflected in acts, adopted by the states, containing provisions requiring preliminary permission from or giving advance notification to competent authorities of the coastal state about the entry of foreign ships used for non-commercial purposes into its territorial waters.

This regime (notification) regulating the entry of ships into the territorial sea has been adopted by Finland (Order No. 656 of 19 September 1980 amending Order for the control over state territory (terri-

torial waters and air space)) and Sweden (Decree on the rules regulating the access of foreign state ships and state aircraft to the territory of Sweden of 17 June 1982). The legislation of Pakistan (1976 Law on the territorial waters and sea zones of Pakistan) requires preliminary permission from the government for foreign military ships to enter into or to pass through its territorial waters. In order to enter the territorial waters of Ecuador (Decree No. 821 of 29 December 1980 regulating entry into the territorial waters) any ship making a scientific, cultural or tourist voyage has to acquire written permission from the Minister of Defense. The request should be submitted thirty days prior to the entry into the territorial waters.

The legislative provisions of the above states run counter to Articles 17 and 24 of the 1982 Convention. In accordance with these articles, ships of all states enjoy the right of innocent passage through the territorial sea. States should not hamper the exercise of the right of innocent passage or impose requirements that have the practical effect of denying this right.

Important departures from the 1982 Convention are evident in legislation of coastal states with regard to regulating the passage of nuclear-powered ships or ships carrying nuclear and other noxious substances and materials. In such cases states establish a special regime for the entry and passage of ships through their territorial waters. The Maltese Law No. XXVIII of 1981, amending the 1971 Law on territorial waters and coastal zones, makes the passage of such ships conditional on obtaining preliminary permission from or giving advance notification to the competent authorities. In accordance with the Guinea legislation (Presidential Decree No. 336 of 30 July 1980) carrying toxic and dangerous substances through the territorial waters without prior permission is prohibited and is regarded as a violation of the regime of its territorial waters.

Entry of nuclear-powered ships or ships carrying nuclear weapons into the waters of Fiji is banned (Note of the High Commissariat of Fiji of 28 April 1980). Peru (Decree No. 027-77-EM of 16 November 1977) has also established a regime requiring prior authorization for the entry of such ships into the waters under its sovereignty. The legislative provisions of these states run counter to Article 23 of the 1982 Convention which provides for such ships normal conditions for the exercise of the right of innocent passage through the territorial sea of foreign states provided they carry the necessary documents and observe special precautionary measures established for such ships by international agreements.

Apart from the departures from the regime of navigation in the territorial sea established by the 1982 Convention, already described, there are also other instances of lack of correspondence between national legislation, on the one hand, and valid international maritime law, the generally recognised practice of states, and the 1982 Convention, on the other. Thus in its national legislature, Malta, instead of the generally accepted concept "innocent passage" through the territorial sea, employs the term "passage." A similar difference in terminology may also arise as a result of an arbitrary interpretation of the meaning of the concept "innocent passage" accepted in international law which would be tantamount to establishing an arbitrary regime for the navigation of foreign ships. The 1981 Maltese Law allows for the designation of sea lanes and traffic separation schemes in the territorial sea on the basis of rules developed by the Prime Minister of Malta. Yet in accordance with paragraph 3 of Article 22 of the 1982 Convention,

the coastal state in designating such sea lanes shall take into account the recommendations of the competent international organizations and the interests of international navigation.

The legislation of Malta provides for the possibility of arrest or seizure of ships for the violation of any of the adopted laws and rules. The application of these measures with respect to foreign state ships is at variance with the principle of immunity of state property. This also clashes with the 1982 Convention (Article 28, para. 2) which provides for levying execution against or arresting the ship in a number of strictly limited cases only.

There is an obvious deviation from the Convention in the legislation of Burma (Law No. 3 of 1977 on the territorial waters and sea zones of Burma). Thus, in exercising its right of innocent passage a foreign ship is allowed to anchor only when this is rendered necessary by *force majeure*. Yet the 1982 Convention includes stopping and anchoring insofar as incidental to ordinary navigation or necessary by *force majeure*, distress, or for rendering assistance to persons, ships, or aircraft in danger or distress.

Contiguous Zone

The legislation of a number of states allows far broader rights in contiguous zones than the ones provided for in the 1982 Convention. The most common departure from the requirements of the Convention is creating for the coastal state a right in its national legislative acts to exercise control in the contiguous zone with respect to security questions of the state. This observation is valid for the legislative acts of the following states: Bangladesh, Burma, Egypt, India, Pakistan, Sri Lanka, and Venezuela. There are also other deviations from the 1982 Convention. Thus, Malta by its 1981 law has set the breadth of the contiguous zone for the purposes of controlling pollution of the marine environment at 24 nautical miles. This contradicts both valid international law and the 1982 Convention (Article 33). The relevant provision states that in the contiguous zone control may be exercised only to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations. Pollution control, just as the control exercised with respect to the security questions of a state in the contiguous zone, is an illegal action from the point of view of the valid norms of international maritime law.

The Commonwealth of Dominica has gone one step further in establishing in its legislation the scope of rights in the contiguous zone. Law No. 26 of 1981 on the territorial sea, the contiguous zone, the exclusive economic and the fishing zone creates sovereign rights in the zone in order to prevent infringement of customs, fiscal, immigration, and sanitary rules within the limits of its territory or its territorial sea which contradicts Article 24 of the 1958 Convention on the territorial sea and the contiguous zone and Article 33 of the 1982 Convention. These Conventions postulate that the coastal state may exercise control in its contiguous zone only in order to prevent infringements that fall under the law.

Archipelagic Waters

The legislation of some archipelagic states contains norms that extend the status of internal waters on their archipelagic waters (the Philippines, Indonesia, Fiji). Yet in accordance with the 1982 Convention in contradistinction to internal waters, ships may exercise innocent passage in archipelagic waters.

Some states, in violation of the conditions defined by the 1982 Convention, have established in their legislation the regime of archipelagic waters for some sea areas as if these states enjoyed the legal status of archipelagic states as it is defined by the 1982 Convention. This is valid for the legislation of the following countries: The Democratic Republic of Sao Tome and Principe, Iran, Portugal, and Spain. The legislation of Fiji (an amendment to the law on the sea spaces of 1978) allows deviations from the provisions of the Convention that regulate the conditions of international navigation in archipelagic waters. Thus, it states that the right to navigate through and to fly over the archipelagic waters of Fiji should be exercised in conformity with the laws of that country. Yet in accordance with the 1982 Convention (Articles 42 and 45) an archipelagic state may adopt laws and regulations relating to passage through archipelagic waters only in respect to the safety of navigation and the regulation of maritime traffic, the prevention of marine pollution, fishing, the loading or unloading of any commodity, currency, or person.

Economic Zone

In accordance with the most recent data sixty-five coastal states have established 200 mile economic zones.

The legal regime of the economic zone, established in national legal acts of coastal states, has a direct bearing on the regime on foreign navigation. Many states that have adopted acts establishing 200mile economic zones allow considerable deviation from the provisions of the 1982 Convention. Thus, "total control," "exclusive right," "jurisdiction," and "exclusive jurisdiction" are proclaimed with respect to marine environmental protection (Guyana, the Philippines, the Seychelles, and Spain). Morocco has proclaimed its exclusive competence in questions of marine environmental protection.

A number of states in one way or another have extended their territorial rights to the sea space of the economic zone (the Cook Islands, Guyana, Haiti, Kenya, Pakistan, Vanuatu, Western Samoa).

Establishing "an exclusive right" and "jurisdiction" or "exclusive jurisdiction" with respect to marine environmental protection in the economic zone contradicts Article 56, paragraph "c" of the Convention which states that a coastal state has jurisdiction only in respect of the indicated type of activity.

Extending territorial rights to the economic zone goes against the provisions of Article 56 that provide the coastal state only with functional rights to use the natural resources of the economic zone and with concrete juridical powers.

The most common deviation from the 1982 Convention in the legislation of coastal states on the economic zone is the imposition of jail sentences of various duration as a penalty for the violation of any norms and regulations for the protection of the marine environment from pollution from vessels (Bangladesh, Burma, France, Ghana, Great Britain, Guyana, Japan, Libya, Malta, Mauritius, the Netherlands, Nigeria, Pakistan, the Philippines, Portugal, the Seychelles, Vanuatu, and Western Samoa). This penalty contradicts the UN Convention on the Law of the Sea (Article 230) which states that only monetary penalties may be imposed for violations of laws and regulations of the coastal state on the prevention of pollution of the marine environment beyond the territorial sea. The same is also applicable to the territorial sea with the exception of cases of a willful and serious act of pollution in the territorial sea.

Continental Shelf

Some states (Chile, Colombia, Ghana, Iran) have in one form or another claimed territorial rights to their continental shelves that run counter to Article 77 which states that the coastal state may exercise over the continental shelf sovereign rights only for the purpose of exploring it and exploiting its natural resources. The legislation of a number of states treats the question of the outer limit of the continental shelf in a manner that is considerably different from the provisions of the 1982 Convention. Thus Ghana's legislation, for instance, in has made the outer limit of the shelf conditional on the criterion of "exploitability".

The legislation of Bangladesh provides for the possibility of establishing the outer limit of the shelf beyond 350 nautical miles.

This approach to the question of the outer limit of the continental shelf contradicts the 1982 Convention (Article 76) which states that the outer limits of the continental shelf in any case shall not exceed 350 nautical miles or 100 nautical miles from the 2,500 meter isobath.

A serious violation of the 1982 Convention is the provision contained in the legislation of some states (Guyana, India, Pakistan) providing for these states the possibility to declare the areas of the continental shelf "special areas." Yet the 1982 Convention (Article 211, para.6, (a)) provides for the establishment of "special areas" only within the limits of the economic zone for the prevention, reduction, and control of pollution from vessels. At the same time the coastal state in establishing such areas should satisfy some conditions which it has no right to violate.

Scientific Research

There are some clear deviations from the provisions of the 1982 Convention in the legislation of coastal states regulating marine scientific research. Frequently, national acts give broader powers with respect to regulating marine scientific research in the economic zone than the ones contained in the 1982 Convention.

Thus, Colombia has proclaimed "exclusive jurisdiction" in respect of scientific research in its economic zone; Sri Lanka, Pakistan, and the Philippines have established "exclusive rights and jurisdiction"; Burma, Guyana, and Kenya have passed legislation establishing "exclusive jurisdiction" regulating the activity linked with carrying out marine scientific research within the limits of their 200 mile economic zones. The Moroccan legislation establishes exclusive competence in respect of this type of activity in the zone.

Some states establish in their legislation more restrictive conditions for obtaining permission for the conduct of scientific research than the ones contained in the 1982 Convention. For example, in accordance with the Spanish legislation, in order to conduct scientific research in the economic zone and on the continental shelf an opportunity should be given to Spanish specialists to study the scientific project and to examine the means of its realization directly in the scientific center of the requesting state. Yet there are no such provisions in Article 248 of the 1982 Convention. In order to enter Spanish ports, foreign scientific research vessels that are not conducting and do not plan to conduct scientific research in the territorial sea and the economic zone of Spain should provide the competent authorities with information about the program of the research and the exact geographical areas where they will be conducted. These provisions do not

correspond to the existing international practice for the regulation by coastal states of the order of entry of these ships into their ports. Moreover, Article 255 of the 1982 Convention envisages a duty on the coastal state to promote marine scientific research by facilitating access to their harbors and by rendering them assistance if necessary.

In accordance with the Italian legislation, marine scientific research may be suspended "if there is a serious ground for this." This formula provides the Italian authorities with unlimited powers for the cessation of scientific research activities which run counter to Articles 284, 249 and 253 of the Convention which contain a concrete and exhaustive list of reasons for the suspension and cessation of marine scientific activities.

The Australian legislation enforces more restrictive conditions for the conduct of marine scientific activities in the territorial waters, on the continental shelf, and in the fishing zone than the conditions contained in Article 249 of the 1982 Convention. In particular, the scientific vessel must observe the Australian system of reporting the movements of ships and inform the authorities every twenty-four hours of its position.

The Canadian legislation adopts a procedure for the entry of scientific research vessels into Canadian ports that requires prior permission. This procedure should be regarded as a departure from Article 255 of the 1982 Convention which placed an obligation on the state to facilitate access to its ports of scientific research vessels.

In order to conduct scientific research activity in the zones of the national jurisdiction of Peru, a number of conditions that are not contained in Article 248 of the 1982 Convention should be satisfied. In particular, it is necessary to provide the Peruvian authorities with a description of portable and stationary scientific research equipment on board the ship, the program of the research, and so on.

The Peruvian authorities also require that the foreign scientific research vessel should arrive at a Peruvian port prior to the beginning of the scientific research so that competent personnel can inspect all the equipment and sections of the ship that are linked with the systems and the equipment used for the conduct of scientific and technical research. None of these requirements correspond to the provisions of the 1982 Convention.

Fishing

Much legislation of coastal states is taken up by the questions of utilizing fishing resources. It should be noted that a number of countries have acquired wider powers in respect of the bioresources of their economic zones in comparison with the 1982 Convention. States (the Bahamas, Bangladesh, Cape Verde, Commonwealth of Dominica, the Comores, Haiti, People's Democratic Republic of Korea, Spain, Sri Lanka, and Vietnam) have claimed "sovereignty" over or "exclusive right" to the living marine resources of the zone itself or the utilization of these resources This scope of rights to the living resources in the 200-mile economic and fishing zones runs counter to the provisions of the 1982 Convention (Articles 56, 61, 62, 63, 64, 66, 69, 70). The Articles of the Convention provide the coastal state with sovereign rights only for the purposes of exploitation of the living marine resources as well as of managing these resources. At the same time, the coastal state must provide other states with a right to harvest that part of the fishing resources of its economic zone which has not been harvested from the total allowable catch and thereby, in accordance

with the Convention, promote the objective of optimum utilization of the living resources of the economic zone.

The 1982 Convention requires the coastal state to ensure, through proper conservation and management measures, that the maintenance of the bioresources in the zone is not endangered by over-exploitation. In order to achieve this goal, the Convention requires coastal states to cooperate with competent international organizations.

Many coastal states in contravention of the provisions of the 1982 Convention (Article 73) have established imprisonment as a penalty for the violation of fishing rules in their economic zones. These states are: Bangladesh, the Bahamas, Burma, Cape Verde, Ecuador, Gambia, Indonesia, Malta, Mauritius, Nigeria, Pakistan, People's Democratic Republic of Yemen, the Philippines, Portugal, Senegal, Sweden, and Vietnam.

Conclusion

The elaboration and adoption of the new UN Convention on the Law of the Sea opens up a new era in the development of the law of the sea. The legal regime of sea spaces, enshrined in the Convention, is well balanced since it takes into account the interests both of coastal states and the international community. In this context the problem of bringing the maritime legislation of coastal states into conformity with the 1982 Convention acquires paramount importance. At present this question is becoming increasingly timely and significant from a practical point of view, since, as has been indicated above, there are major departures from the provisions of the 1982 Convention in the legislative acts of many states.

It appears that the most radical solution of this problem is feasible only after the entry of the Convention into force. Therefore, life itself brings to the foreground the necessity of a speedy ratification of the Convention since after the ratification and the entry into force the States Parties to the Convention shall be obliged to bring their legislation into conformity with the provisions of the Convention. But in accordance with the 1969 Vienna Convention on the Law of Treaties, the states signatories to the Convention undertake an obligation to refrain from actions that would undermine the Convention before its entry into force. It follows, therefore, that having signed the Convention the states have thereby undertaken an obligation, among other things, not to adopt legislative acts that would contravene the provisions of the 1982 Convention. And, naturally, before the entry of the Convention into force states cannot lay claim to broader rights than the ones created by the Convention itself.

NOTES

1. *International Order: Political and Legal Aspects* ed. by G. Kh. Shakhnazarov. Moscow, 1986, p. 83 (in Russian).
2. *Op. cit.*, p. 4.
3. In the literature on the subject it is suggested that "international order" should be defined as a state of dynamic correspondence of the international relations and their organization to the qualitative properties and the balance of forces on the world arena. *Op. cit.*, p. 38.

4. Christopher C. Jones, "Normative Evolution and Policy Process in the Law of the Sea," in *Ocean Development and International Law* 15, no.1(1985) p. 68.
5. Shakhnazarov, *op. cit.*, p.27.
6. G. V. Ignatenko, "International and Soviet Law: the Problems of Interaction of Legal Systems." *Sovietskoye gosudarstvo i pravo* 1985, no. 1, p. 77 (in Russian).
7. A/40/923. p. 6.

THE 1982 UN CONVENTION ON THE LAW OF THE SEA AND THE INTERNATIONAL MARITIME ORGANIZATION

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The international legal significance of the UN Convention on the Law of the Sea is primarily determined by the fact that it is the first successful attempt at codification and progressive development of one of the branches of international law as a whole. The provisions of this Convention should become a basis for a universal international legal order for the utilization, development, and study the world ocean corresponding to the modern level of development of sea equipment and technology.

At the same time it appears that the significance of this comprehensive international agreement goes beyond international maritime law since its provisions have a direct bearing on other branches of international law, including the law of international organisations. Many articles of the 1982 Convention contain provisions that mention various legal contexts: world, regional, subregional, and competent international organizations.

This is not incidental and it reflects the growing role of international maritime organisations in establishing and developing cooperation among states in the fields of navigation, protection of the environment, development of marine natural resources, marine scientific research, and other fields of marine scientific activity. According to the ECOSOC data, over a period of only two years (1982-1983) seventeen specialized agencies and other UN bodies were engaged in carrying out 456 marine projects at the overall cost of $371,500,000.[1]

During the process of the elaboration of the Convention, opinions were voiced to the effect that "the future of the convention to a considerable degree shall depend on the correct distribution of duties among organizations, the efficiency with which they will carry out the functions attributed to them as well as on cooperation in solving questions of common interest."[2]

The majority of the provisions of the new Convention on the Law of the Sea dealing with the activities of international organizations are aimed at solving these very problems. Another group of norms of the 1982 Convention relates to establishing new international organizations and bodies in addition to the operational international maritime organizations, and to the legal prospects for the functioning of the existing international mechanisms of cooperation among states under the conditions of a new maritime legal order. This latter fact is directly linked with the future activities of the International Maritime Organization (IMO).

There is every reason to regard the provision of Article 305 of the Convention containing a possibility for its signature by international organizations as a further development of the status of maritime organizations as subjects of international law. In accordance with Article 4 of Annex IX, an international organization may become a party to the Convention if its member states have transferred to it competence on matters regulated by the Convention, including the right to conclude treaties. Therefore, the scope of rights and duties of international organizations shall be determined with reference to each

organization and shall depend on the scope of competence transferred to them and on the respective provisions of the Convention.

In a number of cases the Convention allows a broad and direct participation of international organizations in carrying out its provisions along with or in cooperation with member states through participation in the elaboration and adoption of international rules, regulations, standards, and procedures.

The 1982 Convention envisages an important role for international organizations as instruments for cooperation among states by providing the general provisions of the Convention with more detailed and concrete content. States are recommended to act through competent international organizations for the purpose of establishing global and regional rules, standards, etc. (Article 207, para. 4; Article 208, para. 5, Article 210, para. 4; Article 211, para. 1 and others.)

Another form of implementing the rules of the Convention through the mechanism of international organizations is by consultations held to adopt measures necessary to enforce international regulations elaborated with their participation. (Articles 213, 214; Article 216, para. 1, Article 217).

Therefore, the participation of the IMO in the system of the new legal order should be based on the provisions of the 1982 Convention enumerated above.

Speaking about the future activities of the organization, the Secretary General of the IMO noted that there is a need for a constant reconsideration of the methods of work, adapting and improving the structure which is a component of the process of the organizational development.[3] For its part the Legal Committee of the IMO has begun research to establish "the scale and the spheres of specific assistance to member States and other organizations in respect of the provisions of the Convention on the Law of the Sea relating to questions that fall under the terms of reference of the IMO."[4]

The joint opinion of the members of the Organization concerning its future activities is reflected in Resolution A XX/500 of 8 January 1982 entitled "The Goals of the Organizations for the 80's." The Resolution recommends a shift of emphasis in the activities -- refraining from introducing amendments to valid instruments and focusing attention primarily on the improvement of the mechanism for the implementation of the rules contained in them. It appears that efforts to improve the effectiveness of the conventions adopted by the IMO may find additional support in the respective provisions of the 1982 Convention.

In accordance with the Convention establishing the Organization, technical, environmental protection, and commercial questions important for maritime navigation fall under the terms of reference of the IMO. Within the terms of its mandate IMO elaborates draft conventions, agreements, or other specific instruments and recommends them to governments and international organizations, as well as convenes such conferences as may be necessary (Article 2, para. b).

Thus, the IMO's functions and powers make it an unchallenged candidate for the title "competent international organization" in the context of the UN Convention of the Law of the Sea. This is also evident in the IMO's being invited to directly participate in the work of the Third UN Conference on the Law of the Sea. Some authors[5] believe that this recognition follows from those articles of the 1982 Convention where the term "competent international organization" is used in the singular. We believe that this inference is justified. Indeed, the involvement of international organizations in the system of a new legal

regime for the utilization of seas and oceans is possible only by taking into account their actual involvement in maritime affairs and the positive experience accumulated in that respect. Of course, this statement is valid only with reference to those provisions of the Convention that deal primarily with navigation, a sphere in which the competence of the IMO is unchallenged.

Another question arises as to whether there are any obstacles of a legal nature to the IMO carrying out the functions that fall under its terms of reference in accordance with the 1982 Convention. The Convention on the International Maritime Organization envisages a flexible approach in this respect. The general rule in this context is that the IMO can perform functions and consider any questions relating to navigation and the influence of navigation on the marine environment which may be transferred to it by any body or any specialized agency of the United Nations or placed upon it in accordance with international instruments (Article 1, para. (d), Article 2, para. (d)). This general provision is elaborated in greater detail in the terms of reference of committees in Articles 28, 31, 33, 36, 38, 41, 43 and 46 of the Convention.

In accordance with these articles, the IMO committees may perform these functions and duties if a) they fall under the terms of reference of each respective committee and b) they are recognized by the Organization. At the same time, it should be noted that Article 38, para. (a) contains a different formulation. The committee for the protection of the marine environment performs functions given to the Organization as a whole and not the ones approved by it.

Moreover, the IMO has been known to carry out obligations in accordance with other international agreements and in respect of questions that are not directly envisaged by the Charter. Thus, it is known that at one time the IMO adopted some functions in accordance with the 1954 International Convention on the Prevention of Sea Pollution by Oil, even though these functions are not mentioned in the 1948 Convention establishing the Organization.

The Organization acted in accordance with Article 10 of the Geneva Convention on the High Seas in elaborating international legal norms aimed at ensuring the safety of navigation.

The 1982 Convention contains two groups of rules establishing various types of legal relations between states and the IMO. The first group of rules establishes actual rights and duties between states and the Organization. Rules regulating the order of designating sea lanes and traffic separation schemes in the territorial waters, straits used for international navigation, and archipelagic waters (Articles 22, 41, and 53 of the Convention); determining the breadth of safety zones around artificial islands, installations, and constructions (Article 60) fall under this category. The IMO has accumulated some experience in that field. Thus, in 1977, on the basis of the proposals submitted by Indonesia, Malaysia and Singapore, the Organization approved the rules for ships navigating through the Straits of Malacca and Singapore [6].

The other group of rules provides for the utilization of the mechanism of the competent international organization in the process of law-making aimed at making the general provisions of the Convention more detailed. Thus, for instance, Article 211 paragraph 1 says that states acting through the competent international organization shall establish international rules and standards to prevent, reduce, and control pollution of the marine environment from vessels.

These and other similar rules are addressed not to the international organizations themselves but to States Parties to the Convention. They create an obligation for them to utilize the mechanism of international bodies for law-making purposes. In cases like these, the IMO shall act on instructions from the States Parties to the Convention.

In connection with the functions performed under the new Convention, a question arises as to the legal effect of the international legal acts adopted by the IMO. It is known that the international rules and standards elaborated by the IMO are binding for its members. But in accordance with Article 94, paragraph 5, a state exercising its jurisdiction over ships flying its flags is required to conform to generally accepted international regulations, procedures, and practices and to take any steps which may be necessary to secure their observance. Evidently, the states that are not members of the IMO, but are parties to the Convention and have thereby assumed the obligations under this Article, should conform to the existing rules and regulations.

It appears that the IMO will fully retain its independent place under the conditions of the new international legal order. The growing pace of scientific and technological progress creates a permanent need for a constructive law-making activity of the Organization, particularly in the sphere of ensuring the safety of international merchant navigation.

NOTES

1. Doc. E/AC.51/1983, 2 March, Cross-organizational programme analysis of the activities of the United System in maritime affairs.
2. Doc. A/CONF.62/L.14, 10 August 1976, p.13 (in Russian).
3. Third UN Conference on the Law of the Sea. Official Records. Volume I. New York, 1985, p. 102.
4. The Law of the Sea. Report by the UN Secretary General. Doc. A/39/647, 17 November 1984, p. 16 (in Russian).
5. Lampe, W.H. "The 'New' International Maritime Organization And Its Place In Development of International Maritime Law," *Journal of Maritime Law and Commerce* 14, N3, (July 1983):329.
6. Doc. A/Res. 375 (XX), 18 January 1978.

BANQUET SPEECH

UNCERTAINTIES IN THE IMPLEMENTATION PROCESS: THE CASE FOR NAVIGATIONAL FREEDOMS

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Over the past twenty years the Law of the Sea Institute has experienced four topical phases -- that is, periods when most of the publications and discussions focused on a particular set of themes. First was the period of expectation, when attention was directed at the prospects of a Third Law of the Sea Conference, and the type of agenda that might be organized. Remember that the original LSI Conference was held more than a year prior to the introduction by Malta of the common heritage concept at the UN General Assembly.

A second phase was that of assessment, starting with the early work of the Seabeds Committee and continuing on through most of the LOS Conference. Consideration was focused on the negotiating process itself and the potential outcomes. Third was a period of speculation. Would the United States and other "like-minded" countries abstain from signing the Convention, and what would be the likely outcomes of this contingency?

The fourth -- and current -- period is that of implementation. It has been three and a half years since the signing ceremony at Montego Bay. What is happening in terms of state practice, and particularly of state actions as consistent or inconsistent with the Convention provisions? Implementation is an on-going process and at any point in time experts may differ widely in their interpretation of the record. Are the non-seabed portions of the Convention holding their own, with only a few inconsistencies appearing now and then largely for cosmetic purposes? Or is the system in danger of starting to unravel, particularly with respect to the finely-tuned edges of certain articles? In these remarks I would like to concentrate on the status of the Convention provisions relating to navigation and overflight, in part because of the importance here of carefully-drafted compromises, and also since these issues are of great concern to the United States and other maritime powers.

In a perfect world, all states would adhere to a strict interpretation of the approximately 100 articles of the Convention that deal directly or indirectly with freedoms of navigation and overflight (or, for abbreviation in this talk, simply "navigation.") Since there are some 140 coastal states of the world -- as well as thirty land-locks -- a great number of potential state decisions are involved in the formulation of rules and regulations respecting navigation issues. It should be remembered that all but about fifteen countries of the world signed the Convention and that at this count, nearly thirty of the countries have ratified or adhered to the Convention as well. The United States, as well as other non-signatories, considers the navigation-related articles as reflective of customary international law and therefore binding on all states, whether party or non-party.

Two jurisdictional components are important with respect to navigation: first, the geographic extent of offshore juridical zone claims, such as internal or territorial waters; and second, the competences states assert within these zones. Do these competences conform with the rights and responsibilities of coastal states as outlined in the Convention?

Categories of State Action

It seems to me there are three major types of actions states may adopt that are not in conformity with the letter or spirit of the Convention. They may adopt unacceptable interpretations of Convention articles. They may claim rights in their coastal waters that were never dealt with in the text. Or they may limit navigational freedoms in direct violation of the Convention. Let us consider each type briefly.

With respect to interpretations, the Convention lays down certain guidelines for the delimitation of straight baselines along rugged or island-fringed coasts, but gives no mathematical limitations. In 1982 Vietnam drew a series of straight baselines along its coast on the South China Sea using 160-mile long baselines (which are much longer than other states use) and connecting not with the outermost points of an island fringe, but with a single inlet eighty miles off the mainland. The coastline itself is hardly rugged or with an island fringe. But between this and the conservative baseline regimes of Denmark or Norway, where would the limits of acceptability lie? Another interpretive action involves historic bays. Under what conditions are claims to such bays, or to "historic" inter-island waters, justified? How about Article 121 on non-conforming rocks? How can a rock be deemed capable or incapable of sustaining human habitation or an economic life of its own? Clearly, some international standards should over time be established to distinguish what is reasonable in terms of the spirit of the Convention from what is excessive.

One interesting form of interpretation relates to international straits. The Convention lays down certain conditions under which the transit passage regime is replaced by one of non-suspendable innocent passage, the most notable of these being the so-called "Messina exception." But to which specific straits of the world would this exception apply? Or consider Article 36 which holds that if there is a belt of high seas or an EEZ running through the strait beyond territorial sea limits, the transit passage regime need not apply. But what is the minimum width the belt must have at its narrowest point in order to qualify as being a route "of similar convenience"? Half a mile, a mile, two miles? The Convention provides no clues.

Nor does the Convention define the phrase "used for international navigation." How many foreign-flag vessels must pass through a strait in order for the waterway to qualify as being "used"? One Canadian writer has cited the small number of foreign-flag vessels that have transited the Northwest Passage as proof that the waterway should not be considered as among those covered by Article 37.

From interpretation we turn to claims never explicitly condoned or forbidden in the Convention. Brazil, at the time of its signing of the Convention, declared that foreign warships in transit through its EEZ do not have the right to conduct military exercises, maneuvers, or weapons tests without the consent of the coastal state. A number of countries require prior notification and/or approval for the passage of foreign warships through their territorial sea. There are no specific restraints on such requirements in the Convention.

A third type of non-conformity is for states to make pronouncements or enact legislation that is clearly inconsistent with the Convention. The rules and regulations may have been on a country's books even before the Third LOS Conference began, or they may have followed the Montego Bay signing. Let us look at some examples.

Article 3 provides for a breadth of the territorial sea not to exceed twelve nautical miles. At last count twenty coastal states

claimed territorial sea breadths in excess of twelve miles, a dozen of these to 200 miles. Of the twenty coastal states, sixteen have signed the Convention and four have ratified it. But two related points should also be noted. One is that since December 1982 no new territorial sea claims in excess of twelve miles have been made, except for West Germany's sixteen-mile extension in the Helgoland Bight. Also, since the signing, five countries with claims greater than twelve miles have reduced their claims to that figure, at least so far as freedom of navigation is concerned.

In the case of archipelagic states it should be noted that in violation of the Convention archipelagic baselines have been drawn around six dependent groups of islands, among them the Azores, the Galapagos, the Faroes and Svalbard. Concerning the Galapagos, Ecuador has also established mandatory navigational routes that keep vessels at least 78 miles north and 145 miles south of the archipelago.

The designation of archipelagic sea lanes, particularly in such countries as Indonesia and the Philippines, has yet to be officially worked out, and here there is certainly the potential for controversy. The lanes suggested by the host state may not cover "all normal passage routes used . . . for international navigation or overflight," or the archipelagic state may seek to restrict the passage of warships or other vessels in certain sea lanes. How will disputes over sea lanes -- between the archipelagic and user states, such as the U.S. -- be handled? IMO, which has the responsibility for approving the sea lanes on technical grounds, is not a dispute settlement body, and the Convention's dispute settlement mechanism is intended for use by States Parties.

What about the exclusive economic zone? Here, I believe, may be the scene of some of the greatest contests involving exclusive and inclusive rights. The regime of the EEZ, as worked out in the Convention, represents a unique and delicate balance between coastal state and user state interests, but over time some of the user state prerogatives may come to suffer. One example are the claims by some fifteen countries (all but one of them signatories to the Convention) to extra-territorial security zones in the innermost part of the EEZ. Twelve states (all of them signatories) have legislation on environmental protection in the EEZ that appears to exceed the rights to vessel-source pollution control granted in the Convention. Nine states (again all signatories) have issued proclamations or enacted laws explicitly allowing the government to regulate the navigation of foreign vessels in the EEZ.

A special set of problems exists with respect to the Arctic. The Soviet Union and Canada (both of them signatories) have vague claims to special rights north of their mainland territories based on the "sector principle." The Soviet government has been particularly imprecise both as to the bases of its Arctic claims and the particular competences it feels it enjoys there. Most of the assertions to special status have been put forth by Soviet writers rather than in official documents. It is generally recognized, however, that the eastern part of the Northeast Passage is not open to the free transit of foreign military vessels. In 1967, two U.S. Coast Guard vessels, travelling eastward from the Barents Sea to study oceanographic conditions, were blocked by ice from transiting north around Severnaya Zemlya from the Kara to the Laptev Sea. Accordingly, they turned south and attempted to pass through Vil'kitsky Strait adjoining the Siberian mainland. The Soviets refused to permit the passage, without explaining their reasons, and

the vessels turned back. Since then no U.S. government-owned vessel is known to have attempted to challenge the Soviets by seeking passage through Vil'kitsky Strait or any of the straits to the east of it.

Canada's Northwest Passage has also been subject to special restrictions. In 1970 the Canadians enacted the Arctic Waters Pollution Prevention Act, asserting Canada's jurisdiction to regulate all shipping in an area up to 100 nautical miles off its Arctic coasts, in the interests of pollution control. Although the basic provisions of that Act were subsequently embodied in Article 234 of the Convention, Canada took a further step a few months ago by enclosing its Arctic archipelago within straight baselines and proclaiming that all the waters within the lines would henceforth be considered internal waters. Such a move would lead to strict Canadian supervision over the movement of all vessels and aircraft through the Northwest Passage.

Causes for Concern

But other than in parts of the Arctic are there really any serious problems now relating to navigation and overflight? Except for the Strait of Tiran over a thirty-two-year period, and Gibraltar for a brief time during the 1973 Arab-Israeli War, where have warships and other vessels been denied passage through international straits -- that is, straits used for international navigation as defined in Articles 37 and 45 of the Convention? Has the passage of foreign vessels been interfered with in any archipelagic sea lanes? Do Brazil, Peru, or Somalia seek to restrict "non-innocent" passage through their 200-mile territorial seas? If none of these things occur, why worry about a few inconsistencies?

One continuing cause for concern is precedence. If a number of countries make similar claims outside the framework of the Convention, might the disease spread, as happened in the case of extra-territorial security zones? Will the number of excessive straight baseline regimes increase? Will new claims be made to historic waters, following Canada's recent initiative?

Another cause for concern is what might loosely be termed "uniqueness." Some countries feel they deserve special rights because of their unique needs. Norway relied on the unusual configuration of its northwest coast when it first drew its straight baselines in 1935; twenty-three years later the Norwegian system became part of the 1958 Territorial Sea Convention. Following World War II, Iceland held that its people were uniquely dependent on the fisheries resources of its offshore waters; and some thirty-five years later the 200-mile exclusive fisheries or economic zone was enshrined in the 1982 Convention. A similar scenario might exist for archipelagic states. The uniqueness syndrome is with us still. Looking ahead, what are some of the issues coastal states face that might prompt appeals to uniqueness to justify restrictions that could affect navigational freedoms?

A primary issue concerns environmental protection. Although it is now eight years since the *Amoco Cadiz* released forty-nine million gallons of crude oil on the beaches of France, the fear still remains of future disasters from "potentially-polluting" vessels -- that is, tankers, LNG carriers, munitions ships, ships carrying noxious chemicals, and, of course, nuclear-powered vessels or those with nuclear cargoes or arms. The entry into force three years ago of IMO's MARPOL Convention and the gradual strengthening of international liability provisions should help to alleviate some fears, but a few major accidents at the Texas City scale could probably cause a considerable

tightening up of coastal state pollution control requirements both in the territorial sea and in at least the landward portions of the EEZ.

But beyond the threat of cataclysmic disasters lies the feeling by some countries that all or a portion of their coastal and marine environments are unique because of coral reefs and atolls, seagrass communities, or coastal mangrove swamps, or because much of the area's economy depends on the lure of its white, unspoiled beaches and offshore lagoons. Think what a massive oil spill might do to the fragile ecology of the Maldives, Kiribati, or Australia's Great Barrier Beach, as well as to the oceanfront resorts of Barbados or the Seychelles.

A second potential rationale for imposing restrictions not covered by the Convention involves national security, a particularly difficult factor to gauge because governments' perceptions of security needs can border on paranoia. Security issues appear to be an important factor in the Soviet restrictions north of Siberia, and for intermittent pressures for a "closed sea" status in such bordering water bodies as the Sea of Okhotsk and the Black Sea. Security restrictions are also invoked for varying lengths of time during military actions, as in the Falklands War or the various Arab-Israeli conflicts.

A third issue is what might be called political/ideological protests. Recently, a number of Pacific island countries concluded a South Pacific Nuclear Free Zone Treaty that recognizes each party's sovereign rights to decide for itself whether to allow visits of foreign ships and aircraft (which it suspects of being nuclear-powered or carrying nuclear devices) to its ports and airfields, and to permit navigation of such vessels in its territorial sea or archipelagic waters. Ideological protests were reflected some years ago in the sea blockade of the then white-dominated government of Southern Rhodesia and such actions can take on military connotations if non-belligerent states actively support one side or another in a "limited war" situation.

In addition to these issues there are other potential ones that might prompt countries to adopt restrictive measures in excess of the Convention's provisions. Terrorism at sea, as evidenced a few years ago by the sowing of mines at the southern approaches to the Suez Canal, could spark demands for stronger security measures than are authorized by the text. Conflicts between navigation and resource uses might be a problem in various offshore waters, with navigation losing some of its prerogatives. Pressures for regional action could also be a compelling force to reckon with. A possible candidate here is the Indian Ocean area, where concerted actions might develop toward strong pollution control measures. We live in a world where technological, economic, and political-ideological change can occur fairly rapidly, and where pressures may quickly arise for strong actions against real or perceived threats in offshore waters.

In conclusion, let us return to an earlier question, namely, what should we make of the various inconsistencies regarding navigational issues that now appear in state practice? Some predate the Conference itself, and may in time be abandoned. Both Turkey and the Soviet Union have recently changed their pre-Conference policies of insisting on prior notification of foreign warships for passage through their territorial sea.

A number of countries used the occasion of the signing of the LOS Convention to make declarations that are clearly not in conformity with the Convention itself. The Philippines, for example, stated that the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, ignoring the fact

that innocent passage of foreign vessels is guaranteed in archipelagic waters by the Convention. Are statements such as these largely rhetorical in nature, designed primarily for domestic consumption?

What of the future? Is a trend developing toward increasingly restrictive actions toward navigation and overflight? It is still too early to tell. One scenario is that, given a continuation of the current conditions of "stability" (that is, no global conflicts, no cataclysmic oil spills or other pollution disasters, and no regional wars that cannot be "contained" -- *e.g.*, do not interfere with passage through critical sea lanes) it seems not unreasonable to assume that the general framework of navigational freedoms we now enjoy will continue on into the 21st century. But there may be nibblings about the edges: a bay or gulf closed off here; a sea lane restricted there; a ban on "potentially-polluting" vessels in some country's offshore waters.

We are faced, I believe, with something of a dilemma. There are -- and presumably will continue to be -- a running series of official pronouncements, threats, and legislative enactments which are at variance with the letter or spirit of the LOS Convention. To dismiss these all as posturing is dangerous; to overreact to some of them may also be dangerous. Not all of these seeming inconsistencies are of equal threat to the public order of the oceans. Yet we seem to have evolved no guidelines for coping with these situations other than routine objections and occasionally a military challenge.

I would suggest two preliminary steps for the years ahead. One is to track these inconsistencies both as they become evident and as they are sustained or abandoned. This process of tracking should not be solely a government responsibility, nor one where the UN plays the dominant role. Private groups should also be involved in data-gathering operations, and information concerning the nature of these inconsistencies should be freely available to those concerned with such issues.

A second need is to develop some sort of hierarchy, or index, of the inconsistencies. One set of variables would involve whether a particular claim is primarily a misinterpretation of an existing Convention article: does it deal with an issue not covered in the text, or is it clearly in violation of Convention provisions? Another difference would be between rhetorical claims and those which are intended to be operational -- and in the latter case, whether the claim is actually being enforced, either selectively or comprehensively. One trend to watch for is whether a geographical pattern is developing for a certain category of restrictions, either regional or among states with particular characteristics. An eventual outcome of such assessments may be the realization that the principle of conformity has held up pretty well over the decade following Montego Bay, and that most inconsistencies that arose while the implementation process was still new have gradually been modified or have disappeared.

Since the era of implementation is upon us, we must learn to somehow handle it in a rational manner. And what will the next (or fifth) phase be for LSI to address? Perhaps it will be a period of reassessment as we begin preparations for the convening of UNCLOS IV. But we can't really reassess until we have some means for measuring the results of what was agreed to at UNCLOS III.

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