# Moscow Symposium on the Law of the Sea

**Proceedings of a workshop co-sponsored by**
**The Law of the Sea Institute**
**The Soviet Maritime Law Association**
**The Soviet Peace Fund**

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**Moscow, Union of Soviet Socialist Republics**

**Co-Chairmen:**
**Thomas A. Clingan, Jr.**
**Anatoly L. Kolodkin**

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## OPENING CEREMONIES

*Anatoly Kolodkin:* Ladies and gentlemen, dear friends, this is the first day of the first Soviet-American Symposium on the Law of the Sea. Since 1984 we have been speaking about the expediency of its convocation. We have held five similar symposia with our British colleagues, and at last we have gathered today with our American colleagues.

The American co-sponsor of this symposium is the Law of the Sea Institute with its headquarters in Honolulu, Hawaii. But the Law of the Sea Institute also represents scholars from other countries, and they have been invited to participate in this symposium, too. The Soviet co-sponsors are the Soviet Maritime Law Association and the Soviet Peace Fund.

I would like to express our gratitude to John Craven, director of the Institute, and to Thomas Clingan, president of its Executive Board and professor of law at the University of Miami, for the work they have done to organize this group.

Let me also cordially welcome:
Richard Palmer, president of the American Maritime Law Association;
Nancy Palmer, his wife;
Francis O'Brien, vice president of the American Maritime Law Association;
Ellen O'Brien, his wife;
Lee Kimball, executive director of the Council on Ocean Law;
Bernard Oxman, professor of law at the University of Miami,
Edward Miles, director of the Institute for Marine Studies at the University of Washington;
John Knauss, dean of the Graduate School of Oceanography, University of Rhode Island;
Jon Van Dyke, professor of law at the University of Hawaii;
Warren Wooster, professor from the Institute for Marine Studies at the University of Washington;
Philomene Verlaan, membership secretary of the Law of the Sea Institute;
Lee Anderson, professor in the College of Marine Studies, University of Delaware;
Carol Stimson, administrator/editor of the Law of the Sea Institute;
Edgar Gold, director of the Oceans Institute of Canada;
Renate Platzöder, senior research fellow from the Institute for International Affairs in Munich;

Alfred Soons, director of the Netherlands Institute for the Law of the Sea;
Choon-ho Park, professor of law at Korea University;
William Butler, director of the Centre for the Study of Socialist Legal Systems, University College London;
Professor Guralchik of Warsaw University;
Professor Leonard Lukaszuk from the Polish Institute of International Affairs;
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Barry Dubner, professor of law at the Thomas M. Cooley Law School;
Bonnie Dubner, his wife;
Dr. Box, senior lecturer from Rostock University in the German Democratic Republic.

On behalf of the Soviet Maritime Law Association, the Soviet Peace Fund, and myself allow me to welcome our foreign guests.

Our symposium is devoted to very urgent issues: the international legal regimes of navigation, fisheries, and marine scientific research. These subjects were proposed by our colleagues at the Law of the Sea Institute and we have accepted them. We are quite aware that at present the problems of the world ocean are of great importance for the fate of mankind. I would like to cite a document prepared by the UNESCO Intergovernmental Oceanographic Commission entitled *The Oceans: The Last Border of Our Planet.*

> The significance of the ocean for our life cannot be overestimated. Now new concerted efforts of the entire international community are needed for changes to take place in our world. At the present time mankind encounters deep changes in the environment and the ocean. The Convention on the Law of the Sea adopted by the Third UN Conference opens good prospects for the joint exploration and exploitation of the world ocean and its seabed. The resources of the world ocean are actually the last resources of our planet. And they are of immense importance for the whole of mankind.

In the twentieth century mankind will use such resources more and more actively for the benefit of individual states as well as for the

whole of mankind. Realizing this fact, we also take into account that the problems of the oceans affect the entire international community and the national interests of states, as well as bilateral interests of the Soviet Union and the United States.

It is quite understandable, therefore, that the objective of our symposium is to realize to the fullest possible extent the views and positions with respect to, first and foremost, the provisions of the UN Convention on the Law of the Sea, to bring to light contemporary approaches to the problems, to determine the provisions that unite us, are common to us, and those on which we have diverging views. We will also generalize the results, and through publications in our countries inform the public on the basis of *glasnost* and democracy. The results of the Symposium could be submitted to Mr. Nandan, UN Undersecretary General for Law of the Sea, and to the relevant specialized agencies in the UN system.

I would like to point out that there are good traditions in the relations betweens the United States and the USSR on the whole and, in particular, in the field of maritime relations. During the formation of the United States, Russia held progressive positions which were reflected in the famous Declaration of Armed Neutrality of 1780, which was given justice by such eminent Americans as Thomas Jefferson, John Adams, and James Madison. We cannot help but note our mutual efforts during World War II, nor can we disregard our common approach during the Third UN Conference on the Law of the Sea.

Today we cannot speak about regulating navigation, marine scientific research, and fishing without thinking at the same time about the safeguarding of peace and security on the seas and oceans. This is why the complex of initiatives and proposals put forward by Soviet leaders seem very urgent. Yesterday Professor Clingan and I exchanged views with respect to the proposals introduced by M.S. Gorbachev, General Secretary of the CPSU Central Committee, Chairman of the Presidium of the Supreme Soviet, in a number of his speeches: in Vladivostok, Delhi, Krasnoyarsk, Belgrade, Murmansk. The Foreign Minister of the USSR, Eduard Shevardnadze, in his speech in the United Nations proposed a whole system for the limitation of naval activities in the interests of mankind. These initiatives contain important provisions on the peaceful exploitation of the ocean, especially in the field of navigation, fisheries, and scientific research, and in particular on the non-conduct of naval exercises in the areas of intensive maritime traffic, on the establishment of confidence-building measures, etc. Today we can say frankly:

if we want peace on land, we must disarm at sea. Seventy-one percent of the earth is seas and oceans, and we all are interested in consolidating peace and security on these parts of the planet.

Dear comrades, ladies and gentlemen, the program of the Symposium includes both public legal questions and those of a private nature, such as the liability of shipowners for marine pollution, carriage of dangerous cargoes, etc. That is why the participants in the Symposium are not only specialists in public but also in private law of the sea. We could exchange views here in order to make initiatives, to fix such initiatives to enhance the influence of public opinion, people's diplomacy, on the positions of governments.

In conclusion, let me emphasize that we welcome the arrival in the USSR of our foreign guests. Allow me to declare the First Soviet-American Symposium on the Law of the Sea open.

I have the pleasure to give the floor to Professor Clingan.

*Thomas Clingan:* Dr. Kolodkin and very honored and distinguished guests, it is my great pleasure this morning to speak to you on behalf of the Law of the Sea Institute of which I am the president and on behalf of the colleagues who are here with me to attend this symposium this week. I wish to express the appreciation of all of us to Dr. Kolodkin, his institution, and his colleagues who have been such wonderful hosts to us so far. We look forward with great anticipation to this meeting.

As Dr. Kolodkin mentioned, this meeting has been in the planning stage for several years. The delay was not due to any lack of enthusiasm on the part of either institution; it simply took us a great deal of time to work out arrangements that were acceptable within the terms of our charters. This symposium has come to pass mostly because of the perseverance and the hard work of Dr. Kolodkin; it was his idea. He approached us several years ago, and he has worked diligently with us ever since. So we look forward to it with great anticipation and hope that a lot of work will be done and a lot of ideas will be expressed on the topics that we have selected for discussion.

I would like to say, for those of you who may not be familiar with it, just a few words about the Law of the Sea Institute. The Institute is a private, nonprofit organization that was founded in the United States twenty-two years ago. It has its headquarters at the University of Hawaii in Honolulu. Its policies are developed by an executive board which is international and contains representatives from a number of different countries. The Institute provides a forum for the exchange of ideas, on a selected theme, at an annual meeting that runs

for approximately one week and has moved around to various countries of the world so that we can obtain different viewpoints through that process. The Institute does not have conclusions; the Institute does not take opinions. We simply provide a forum where people can individually express themselves on whatever points of view they may hold. In addition, we have conducted a number of special workshops such as this one in conjunction with other institutions.

In this workshop we decided to minimize the issues to the three categories of fisheries, navigation, and marine scientific research to maximize the time for discussion. I look forward, Dr. Kolodkin, to an interesting and productive session here. Looking out in the audience I see many familiar faces from the days of the Law of the Sea Conference. I think we have a great deal of accumulated experience on the law of the sea in this room, so I'm sure that there will be no lack of discussion. I thank you again, Dr. Kolodkin, for inviting us, and we look forward to the next proceedings. Thank you.

***Anatoly Kolodkin:*** It seems to me that the American and the Soviet press made a mistake in assuming that it is only for the second time in the history of the United States that a vice-president has become president. I mean Thomas Jefferson and George Bush. I'd like to inform you that the president of the American Maritime Law Association, Richard Palmer, was elected directly from the post of vice president.

***Richard Palmer:*** Thank you, Dr. Kolodkin; good morning, distinguished guests. I would like to say on behalf of the Maritime Law Association of the United States of which I am president and on behalf of Francis O'Brien, the immediate past president who is also here with us, that we are very honored and privileged to join this distinguished group of maritime experts and students of the law of the sea and the problems of the sea on this very unusual occasion. This is the first opportunity for us, Dr. Kolodkin, to discuss with the Soviet Maritime Law Association the problems of the sea, and this discussion will undoubtedly bring us closer together in friendship. We thank you again for this great privilege and look forward to a very stimulating meeting this week.

***Anatoly Kolodkin:*** I call on a member of staff of the Law of the Sea Institute, Carol Stimson.

*Carol Stimson:* Dear colleagues, five years ago in Oslo, Professor Kolodkin first invited the Executive Board of the Law of the Sea Institute to co-sponsor a workshop in Moscow. This proposal was like launching a ship on the sea, and when the tide was right, the Executive Board members climbed on board.

In the following years the ship sailed on the sea, sometimes cutting through huge waves, sometimes almost becalmed in the doldrums, but always moving forward.

On deck the Executive Board set the course. Where shall we sail? The Black Sea? The Bering Strait? The South Pacific? Who will go with us? What shall we discuss? Handling the ropes were stalwart sailors: Valery Ivanovich (the swimmer), Viktor Fedorovich (the singer), and Viktor Aleksandrovich (the teller of jokes). Up in the rigging were Artemy Apetovich (in a cloud of cigar smoke) and Nikolai Grigorovich (with his chessboard under his arm). But at the helm was Anatoly Lazarovich, who always knew where the ship was going and who answered every question and agreed to every request with the same words: "No problem!"

I know my colleagues will join me in recognition of his foresight and perseverence. We are delighted to be here with you and we thank Professor Kolodkin and his crew for bringing us to Moscow.

*Anatoly Kolodkin:* As I have said, one of the major sponsors of the symposium is the Soviet Peace Fund. I would like to call on the Deputy Chairman of the Soviet Peace Fund, Director of the Peace Institute of the Academy of Sciences of the USSR, and Deputy Director of the Institute of World Economy and International Relations, Professor A. K. Kislov.

*A. K. Kislov:* Ladies and gentlemen, comrades, I would like to welcome all the participants in this symposium on the part of the Soviet Peace Fund, which is one of the major organizations of the Soviet Union. This organization provides material support for people-to-people diplomacy. Millions of Soviet people are actually involved in the work of the Fund; they are committed to the cause of peace in the world. The noble ideals of international cooperation underlie the work of this international symposium, and they are in keeping with the ideals of the Soviet Peace Fund. That is why the Soviet Peace Fund has wholeheartedly supported the idea of holding such a symposium. We think it will represent one more step toward strengthening peace on the high seas, which is a major element of the Soviet program of international security. Today, as never before, international scientific

contacts are important in strengthening international security, particularly when we speak about cooperation between scientists and members of the public representing the Soviet Union and the United States. Also, it gives me great pleasure to welcome participants from other countries of the world, who make this symposium a truly international event and whose presence guarantees that the international public will increasingly get involved in the discussions of the problems on the agenda of our symposium. Participation from broad scientific circles in our countries, as well as from the representatives of scientific institutions and non-governmental organizations, and from individual scientists of other countries in settling various problems of the exploration and exploitation of the world ocean and ensuring the safety of navigation and fisheries on the basis of the 1982 UN Convention on the Law of the Sea is of great importance for the future of our planet, whose major part is occupied by the world ocean.

Naturally, the international public will have to exert every effort to make our planet safer for human life. We are sure that the present Symposium will be a significant stage in this effort and, in particular, a stage for the preparation of the XVII Pacem in Maribus international conference which will allow us to proceed to a wider international discussion of the problems we face.

Allow me on behalf of the millions of Soviet Peace Fund participants to wish you all success in your work. Thank you.

*Anatoly Kolodkin*: I call on the next speaker, director of the Centre for the Study of Socialist Legal Systems at the University College London, William Butler.

*William Butler*: I feel on this occasion somewhat an elder statesman, not merely because it has been our privilege to hold five Anglo-Soviet symposia on this topic with your association, but also because in 1975 it was my privilege to take part in the Soviet-American Symposium on the Law of the Sea arranged by the American Society of International Law and Professor Tunkin's Soviet Association of International Law. Professor Oxman and I are the only American survivors of that particular occasion represented at this meeting.

As the Director of the Centre for the Study of Socialist Legal Systems, please allow me to mention the exceptional relationship that we have formed over the past six years with the legal systems of socialist countries. Since 1983, we have organized, either in London or co-organized in the socialist legal systems concerned, no less than twenty-four joint symposia, including one with the People's Republic

of China, five with Warsaw University in Poland, five with your own association, two with the Soviet Association of International Law headed by Professor Tunkin, and no less than eleven with the Institute of State and Law of the USSR Academy of Sciences.

In doing so, our object has been twofold: first, as best we can, to advance the cause of legal scholarship in East and West through the symposia discussions themselves, to broaden the base of East-West understanding in relation to the role that law plays in that process, and also to enable the legal communities on both sides to become personally acquainted with one another. Particularly with the Institute of State and Law of the Academy of Sciences, we have also an individual research relationship which enables research scholars to come back and forth and pursue their own research topics. In the course of these exchanges we have produced an entire cycle of published works that relate to the law of the sea, public international law, comparative law, labor law, public law and administration, criminal justice, environmental law, legal history, constitutional law, and international trade. Indeed most of our works have appeared both in the English language and in the Russian language.

Next year, in Great Britain, we will publish an encyclopedia that will contain articles written by prominent Soviet experts. Also, it will contain personalia, such as Bratus, Barabashev, Grabar, Kurilenko, Krylov, Kolodkin, Korovin, Kudriasev, Koretsky, Laptev, Lunts, Pashukanis, Piskotin, Strogovich, Stuchka, Topornin, Tunkin, Trainin, Sheremet, and others.

London University and its Center at University College for the Study of Socialist Legal Systems has played its own role in laying the base for meetings such as this one, in discussing proposals for maritime security on the oceans in all regions of the world, in working out a more viable legal framework for the law of the sea; and we wish this symposium every success.

***Anatoly Kolodkin:*** And now I call on the next speaker, Associated Member of the USSR Academy of Sciences, who is President of the Soviet Association of the Maritime Law, Professor G. I. Tunkin.

*G. I. Tunkin:* I would like to convey our greetings and best wishes to the participants in this symposium on behalf of the Soviet Association of International Law, of which I have the honor of being the president. I am not a stranger to international maritime law; I was head of the Soviet delegation at the First and Second International Conference of the United Nations on the Law of the Sea. The Geneva

Conventions formulated and adopted in 1958 were codifying conventions reflecting applicable customary international law. In my opinion, the Third UN Conference on the Law of the Sea carried out extensive work and, in fact, continued for almost ten years. The result of this work was the 1982 Convention on the Law of the Sea, which varies distinctly from the 1958 Geneva Conventions in that it contains many new elements. It is not just a codifying convention but a convention on the progressive development of the international law of the sea. This circumstance raises many problems for lawyers and specialists in international law of the sea. The 1982 Convention has partially settled certain problems, but perhaps still more problems have been raised. The fact is that this convention is still far from entering into force. A number of its provisions are already in force as rules of customary law, while others are in limbo, posing many problems for specialists in international law. Therefore, I wish every success to the participants in this symposium, and I hope that they will take a major step in clarifying many important points. Thank you.

*Anatoly Kolodkin:* Now I call on the next speaker, Professor O. N. Khlestov, president of the Soviet Association of Promotion of the United Nations.

*O. N. Khlestov:* Ladies and gentlemen, comrades, on behalf of the Soviet Association for the Promotion of the United Nations, I echo the words of welcome and greetings that were uttered at the beginning of this session. It is particularly gratifying to see major specialists on international maritime law in this hall who guarantee that the questions will be discussed at a high professional level. As a person who has participated in a number of international meetings, I am glad to see here my good acquaintances, my colleagues.

The world ocean covers three-fourths of the surface of the earth. This world of ours is increasingly interrelated; it is a shrinking world. I believe all the governments of the world must realize one basic truth: international cooperation is necessary to insure peace, to resolve the problem of disarmament, to protect the environment, and to resolve other problems facing humanity.

Also, it is important to expand international cooperation in the exploration and utilization of the world ocean, its living and mineral resources. Scientific progress poses new problems for scientists in this sphere. Twenty or thirty years ago, many states faced the problem of boundaries in the territorial sea. Today, a much more urgent problem is the delimitation of the exclusive economic zone and continental

shelf. In the past we tended to concentrate on the problems of living resources. Today, it is the problems of exploration and production of oil and the mining of mineral resources on the continental shelf and on the ocean floor that have emerged as the major concerns of the international community.

The United Nations has played an important role in the codification and progressive development of the law of the sea. Also very significant were the 1958 and 1960 conferences, and especially the Third UN Conference on the Law of the Sea, which worked out a convention and established a special instrument for its implementation.

The Soviet Association for the Promotion of the United Nations attaches great importance to the development of international cooperation as regards the effective utilization of the world ocean in the interests of all peoples, the whole of the international community. At present the role of non-governmental organizations, scientific circles, in the elaboration of diverse international problems, including those associated with activities on the seas, is growing.

Speaking about the activities of the Soviet Association, I would like to say that last week a seminar on human rights was held by the United Nations Organization and the Soviet Association. This seminar brought together experts from many countries in Eastern Europe and proved to be interesting and useful for all participants.

Allow me to express the hope that this symposium will make a substantial contribution to the development of international cooperation in the field of law of the sea. Thank you.

***Anatoly Kolodkin:*** In the light of what has just been said by Professor Khlestov about the growing role of international organizations, it is a pleasure and a privilege to call on the next speaker who represents a new non-governmental organization called Peace to the Oceans Commission of the Soviet Peace Committee. I call now on Piotr Barabolya.

***Piotr Barabolya:*** Ladies and gentlemen, colleagues, comrades, and friends, I am very pleased to welcome here at this symposium our foreign guests, among whom I see many familiar faces of active participants in the UN Conference on the Law of the Sea: Professor Clingan; Professor Oxman; Ambassador Djalal, the Deputy Minister of Foreign Affairs of Indonesia; Ambassador Kolosovsky, who actively headed the Soviet delegation; Professor Guralchik from Poland; Professor Movchan, and many other comrades and colleagues

who substantially contributed to the elaboration of the UN Convention of the Law of the Sea.

I represent here a new Soviet organization, the Peace to the Oceans Commission, which was established in November last year but which already counts more than 150 members in Moscow. A number of subsidiaries are being established in major Soviet ports. The commission was established as a body of people's diplomacy which will actively fight for peace, cooperation, security on the seas and oceans, and reduction of the naval arms race. Professor Kolodkin was absolutely right when he emphasized that if we want peace on our planet, we must disarm the seas. I'd rather say: we must disarm both on land and on sea. This is a very important argument and incentive for the work of our commission. We think that, in the near future, the Commission will take measures for consolidating peace and security on the seas and oceans.

A personal bank account is open now in this country for the building of a passenger liner, *Mir* (Peace). Our Commission is taking an active part in this arrangement. Millions of rubles have already been deposited in the account. This ship, with the representatives of people's diplomacy aboard, will be sailing in various regions of the world ocean and, first and foremost, it will make voyages between the Soviet Union and the United States. I believe that this arrangement is very important and I hope that when such a ship is built, we shall hold our next symposium, together with our American, British, Indonesian, and all other colleagues, aboard this ship.

The second arrangement scheduled for the next year is the international conference "For the Nuclear-Free and Ecologically Pure Baltic, for Peace and Disarmament on the Seas and Oceans." We intend to invite to this conference scientists, diplomats, representatives of people's diplomacy from Europe, America, and other regions of the world -- no less than 150 to 200 people altogether. For this purpose we will charter a ship that will make calls to the ports of Finland, Sweden, Denmark, the Federal Republic of Germany, and Poland, during which meetings with people's diplomacy activists will take place.

Our commission has prepared and is already publishing the first issue of the *Peace to the Oceans* Newsletter. We call upon everyone present to take part in the publishing of this newsletter. In the future we shall publish it twice a year. In volume it will contain about 120,000 typographical units.

Our commission plans to develop the broadest possible contacts with the representatives of people's diplomacy, with all people fighting for

peace, cooperation, and disarmament in all countries of our planet, and this is our very important task. I believe that we shall be able to establish broad contacts with our colleagues from the United States, Canada, Indonesia, and other countries.

I am sure that this seminar will serve the purpose of strengthening and extending further cooperation between the Soviet Union, the United States, and other countries whose delegates are present here, and will be a big step forward in overcoming the enemy image, on the way to cooperation, broad mutual understanding, and good relations between our countries. Thank you for your attention.

*Anatoly Kolodkin:* I now give the floor to Professor A. P. Movchan, Head of the Department of the International Maritime, Space, and Air Law, Institute of State and Law of the Academy of Sciences of the USSR.

*A. P. Movchan:* Ladies and gentlemen, dear co-chairmen Thomas Clingan and Anatoly Kolodkin, I have the pleasure to greet the participants of the seminar and all those present here on behalf of the lawyers of international law of the Institute of State and Law of the USSR Academy of Sciences. We have certain experience in organizing meetings devoted to the enhancement of universal legal order in the world. I recollect that many years ago our institute was a co-initiator of a meeting with American scientists. That first meeting, which took place here in Moscow, was devoted to various aspects of strengthening international law and lawfulness.

Today, when we meet at the First Soviet-American Symposium on the Law of the Sea, I would like to emphasize, first of all, that legal order in the world ocean constitutes an important element of the universal legal order. And it seems to me that all who are present here, and I know many of them for their practical contribution to the settlement of our common task, will take part in the discussion of the most interesting questions included in the agenda of the Soviet-American Symposium.

It seems to me that participation in this symposium of people who actively participated in the elaboration of the 1982 UN Convention on the Law of the Sea is of great importance. Although this process lasted ten years, as was noted by Professor Tunkin, respected president of our Soviet Association of International Law, the spirit of cooperation which reigned during those years and was supported by consensual approvement of the text, in my opinion, will remain for many years to come.

It would be fair to emphasize that the major part of the Convention is codification of the applicable law, which provided us with many traditional institutions concerning elementary cooperation on the seas and oceans, beginning with the generally-known principle of the freedoms of the seas. Also, one cannot help noticing that, taking into account the urgent needs of international relations and the idea that everything in this world is interrelated and must be settled with due account taken of scientific and technical progress, I think that many elements of this convention were elements which can be rightfully considered as progressive development of the law of the sea. I think we can agree with the General Secretary of the UN, who said that although the Convention is not yet ratified and is waiting for the signatures and ratifications by many states, it is already an acting document. First of all, the main element of this convention -- traditional law of the sea -- is in effect from time immemorial due to the customary legal order and to the codification of material formulated at the first and second UN Conferences on the Law of the Sea in Geneva. What is stipulated by the 1982 Convention, although it is not yet ratified, is living, acting, and complied with by the states, at least along those main directions which are needed to ensure the friendly cooperation of states in the world ocean. I believe that our scientists, our practical specialists, played an important role in this process, as did the practical scientists of the United States. Suffice it to say that Thomas Clingan, participating in the Second Committee of this Conference, played a vital role in this process. A no less important role was played by Bernard Oxman. It is difficult to say in what committee he worked, because actually he was the right hand for all leaders of the U.S. delegations. And it is still more pleasant for me to welcome them here in Moscow, because Moscow seems to play an important role in the confirmation of the idea long ago put forward by the great scientist Einstein, that the world is interrelated and that all major problems, specifically the problems of peace and security everywhere, including the seas, should be settled by a mutually agreed order. It seems to me that the results of our exchange of views at this symposium will be a good precursor for the forthcoming speech of M.S. Gorbachev, as a leader of our state, at the December session of the General Assembly.

So, let the results of our symposium be a success and a small, though important, contribution to the enhancement of legal order on the seas. And the role played by the great powers -- the Soviet Union and the United States -- in consolidating peace is common knowledge. Let us wish the symposium a good voyage. Thank you.

*Anatoly Kolodkin:* Ladies and gentlemen, comrades, on behalf of the Soviet Association of Maritime Law and the Soviet Peace Fund, I would like to say thank you to all the speakers in this opening session.

# LEGAL ISSUES OF NAVIGATION

# LEGAL ISSUES OF NAVIGATION

Thomas A. Clingan, Jr.
and
Bernard H. Oxman
Faculty of Law
University of Miami

*Thomas A. Clingan:* The legal issues related to navigation are extremely broad. In order to make them manageable, Professor Oxman and I have decided to address four particular issues. Those issues are

(1) the state of international law and the relationship to the United States Convention on the Law of the Sea;
(2) regulation of navigation safety and pollution from ships;
(3) historic bays or waters and straight baselines; and
(4) compulsory settlement of disputes.

I will address the first and third issues and then Professor Oxman will address the second and fourth. While this is called a formal presentation, I think we would prefer in a less formal way to simply raise a set of issues which we hope will stimulate discussion.

## The State of International Law and the Relationship to the United Nations Convention on the Law of the Sea

***To what extent should the Convention be regarded as declaratory of customary international law at present?***

This subject has been widely discussed among scholars. The answer, in part, depends on one's view of the process of formulation of customary international law. The traditional elements necessary for the creation of customary law, of course, are state practice and *opinio juris*. Commentators have disagreed as to the scope of state practice required and the amount of time that must elapse before the practice becomes obligatory. Indeed, some have even advocated a form of "instantaneous" customary law where the rule is universally accepted by the international community. Such a concept, however, is highly destabilizing to world order and therefore should be rejected. Commentators also have disagreed over the nature of the acts that would be required to demonstrate *opinio juris*. Given, however, that

these two elements, however viewed, must be present in some form, we can make at least a tentative conclusion with regard to the provisions in the 1982 treaty. It is clear to me that some, but by far not all, provisions of the treaty outside of Part XI and related provisions dealing with deep seabed mining can be considered as reflecting rules of customary international law. These are primarily traditional rules such as the concept of the freedom of the high seas. Others, such as rules concerning the nationality of vessels, piracy, slavery, innocent passage, and the like are so well settled into the jurisprudence as to survive even if not included in the new Convention. But there are many non-traditional rules in the Convention that should be viewed as more contractual in nature and not universal in their application. When one examines, for example, the provisions regarding straits and archipelagic waters in light of traditional requirements for the formulation of customary law, it is much more difficult to make a persuasive argument concerning their customary law status. When looking at the straits chapter, one is faced with a particularly complex problem. The status of the transit passage regime must be considered in the light of the fundamental right of international communication long established in international law, which those provisions were designed to preserve. This could lead one to the conclusion that the general principle of free passage is protected by customary international law even though the details of the straits chapter might be merely contractual. There was, of course, widespread agreement in the conference concerning the straits and archipelagic provisions, but that agreement was within the context of a broader package deal which was expected to achieve global acceptance. Still other provisions of the treaty, while new, arguably can be viewed as customary law. State practice would seem to support, for example, the conclusion that the principle of coastal state resource management within the exclusive economic zone is now so widely accepted as to be customary law. A case by case examination of the non-seabed provisions of the treaty would, I believe, lead to a general acceptance of many provisions as customary law, or emerging customary law, particularly those traditional concepts embodied in the 1958 Geneva Conventions. But there will remain serious disagreement on many others, and such disagreement could well lead to discord and disrupt the uniformity of state practice which is so much to be desired. All this leads to the conclusion that it is not possible to say with any certainty how much of the Convention reflects rules of customary international law.

*How do we stabilize international law in the future?*

*To what extent is a widely ratified Law of the Sea Convention an important element in such stabilization?*

I believe that it is a very important element. Diversity of state practice exists even when that practice is governed by the provisions of a treaty. But having an effective convention in place clearly places some restraint upon the conduct of states, particularly if the convention in question contains mandatory dispute settlement provisions. The 1982 Convention does provide for compulsory dispute settlement concerning disputes over the interpretation or application of the navigation provisions. In the absence of a widely accepted treaty, the temptation will be strong to be selective in the application or interpretation of various principles, and the "persistent objector" principle of international law will further erode uniformity of application of otherwise universal rules. It is true that there may be ways other than by convention to seek uniformity, but these ways may be utilized only at great effort and considerable costs in terms of time and money.

*How can one achieve a widely ratified Convention?*

First, there must be a genuine revival of political will to salvage the 1982 Convention. I pause here to emphasize that I do not see that attitude persisting at present. This is particularly so in the case of the United States, where there has been no change in the position of the government that the treaty is fundamentally flawed to the extent that it cannot be repaired. But assuming, for the sake of discussion, that there could be such a revival, there are many ways one could proceed with a corrective process designed to achieve universal acceptance. The answer involves a consideration of two sub-issues: (1) What forum would be appropriate to begin the process? and (2) How would any changes arising from the process be incorporated?

I diverge here from my discussion of the navigation provisions because the present state of affairs in which we find ourselves is a result primarily of disagreement over seabed-related provisions of the treaty. In considering where a dialogue might begin to correct the situation, it is important to take an approach which is most likely to protect the non-seabed provisions from being re-examined and renegotiated. If that should occur, the effort would be doomed from the start. It seems apparent to me that before taking any steps to begin discussions in an appropriate forum, preliminary consultations should take place on a bilateral or limited multilateral basis between interest-

ed and affected parties. This would be necessary so that varied positions are well known beforehand, and so that preliminary agreement could be reached on as many issues as possible. Primarily, such consultations should be directed at seeking principled preliminary agreement on the minimal changes that would be required in order to attract states which at present feel compelled to reject the treaty. Broad outlines of a compromise should be sought that would be most likely to assure universal acceptance and to achieve workability of the seabeds regime, taking into account the circumstances which have fundamentally changed since the negotiation of Part XI.

Following on such consultations among states, an appropriate forum should be created, or an existing one utilized, in order to broaden consensus. It would be appropriate that the initial forum be small, with membership selected on the basis of the impact the forum might have on the larger community. Expansion can be considered at a later stage. A number of such mechanisms were utilized during the conference itself with considerable success. Examples include the Evensen and Castaneda groups. This pattern could be utilized again. However, a more attractive alternative exists. The Prepcom's mandate is limited to seabed-related matters. This makes it attractive in the sense of avoiding discussion of matters outside of that limited mandate. The precise way that Prepcom could be utilized would need further study. Clearly, Prepcom has no power to modify the treaty, thus the formal mechanisms of the commission should not be utilized for such discussions. However, an informal mechanism related to the commission could be utilized for these consultations. I find this alternative to be attractive because those involved would have knowledge of the difficulties that have been addressed since the commission began its work. Attention must, however, be paid to assuring an appropriate level of participation in order to assure that each participant has adequate authority to speak for his government.

Assuming that such a forum could be created, and assuming further that agreement could be reached that might command consensus, then the means would have to be found to incorporate agreed changes. Here again, there are a variety of alternatives available. Some changes could be achieved in Prepcom through agreed interpretations of some provisions or by a rule incorporating agreement not to implement, or delay implementation, of certain rules. But clearly some changes might require modification of the treaty itself. This could be accomplished before the treaty goes into force by means of a protocol, or afterward by presenting changes to the Authority on its first day of operation to be adopted through procedures provided for the amendment of Part XI contained in the treaty.

*What if a widely ratified Convention cannot be achieved?*

Obviously, this would not be a desirable outcome. But if faced with the possibility, other steps would have to be taken to protect navigation-related rules developed during the conference and included in the text. I have often been asked about the viability of spinning off the mining provisions and incorporating the rest into a separate treaty. Because this would require the Group of 77 to abandon the principle of the common heritage of mankind, this approach would not be feasible. Regional solutions might also be possible, but, again, such an approach might not produce uniform results, or might even be disruptive of uniformity. Clearly, states having strong navigation interests would need to create and utilize a strong consultative mechanism in order to identify common areas of interest and to develop common navigation policies. These states should seek to agree on common rules of practice to be followed by their own vessels, and they should seek to agree on a common policy regarding the frequency and appropriate level of responses to be taken by them in the event of perceived excesses by coastal states that threaten freedom of communication. These states, furthermore, should take steps to assure that they engage in no acts themselves as coastal states that might encourage other states to exceed the principles contained in the treaty. It should be obvious that a well-coordinated effort would far exceed scattered responses from individual countries.

*Protests, exercise of rights, and other reactions to contested claims.*

The filing of protests and the exercise of rights are closely related to the question of how to stabilize international law of the sea in the absence of a treaty. Protests, to be effective, must be uniformly and universally used to encourage positive conduct on the part of nonconforming states and to discourage unacceptable deviations from treaty rules. It would be important, particularly, for the states having strong maritime interests to coordinate and take unified actions for maximum impact. It would therefore be necessary to adopt uniform policy with regard to the kinds of coastal state acts that would trigger protests. Selectivity among protests would increase the impact more than if every claim, no matter how small, were to be targeted. If it becomes necessary to exercise rights in claimed areas, coordination would also be desirable for the same reasons. Maritime states must share a clear and unambiguous understanding of responses each might undertake and the conditions upon which they might act. Each should clearly understand the circumstances that would trigger responses and seek to find common interpretations of treaty provisions that might

trigger exercises of rights among themselves unless differences are resolved.

**Historic Bays or Waters and Straight Baselines.**

Because claims of historic waters and the application of straight baselines have the potential for vastly reducing areas subject to the freedom of navigation, all such claims must be carefully scrutinized. Response to excessive claims by the maritime powers should be quick and uniform. The criteria for historic claims and the drawing of straight baselines have been reasonably well described in international law. Claims to historic waters must be demonstrated by long usage by the claiming nation, and by the acquiescence of the international community. Strong and persistent objection by some to an historical claim should be sufficient to prevent it from becoming international law. The criteria for drawing straight baselines as set forth in the treaty are, however, rather vague. Many questions are unanswered by the texts. How long a baseline is too long? What, precisely, is meant by the "general direction of the coastline"? What is meant by "deeply indented"? When are areas of the sea "closely related to the land domain"? Article 7 of the treaty provides only broad criteria but contains sufficient guidance to identify the most obvious violations. There have been several examples of such violations. Extreme claims have been rejected by most states. The danger in Article 7 is that it may be used improperly by a state to solve problems that should more appropriately be addressed by other devices. A state may be tempted to adopt the baseline system to achieve otherwise legitimate national objectives when a different way might be sought that does not impinge so directly on navigational rights as might occur by the application of straight baselines. Clearly there are situations in areas so unique as to require such unique solutions. Take the Canadian Arctic, for example. This area is environmentally sensitive. There is no dissent to the need for adequate protection of the fragile ecosystem. Indeed, the ice-covered areas article of the treaty addressed this very problem by creating new concepts. It is that kind of solution to which I refer. Where a circumstance exists, a unique rule must be structured so that the integrity of the general baseline system is not destroyed or that normal navigation rights are not undercut. It must be remembered that the baseline system itself was the result of a highly unique situation involving the western Norwegian coast. That solution became generalized for use elsewhere when similar circumstances were found. But the baseline system is not adequate to deal with circumstances

other than that for which it was designed, and its misuse must be avoided.

*Effect on the underlying stability of the law of the sea.*

From what I have said, I think you will understand the danger of misusing historical claims or straight baselines as solutions to very real and legitimate problems. Large areas could become subject to territorial sovereignty or its equivalent with resulting disruption of navigation. In addition, such claims are of the kind that tempt other coastal states to make excessive claims of other kinds, and thus are not to be utilized. Excessive claims will exist even if there is a widely ratified treaty. It is even more important to think creatively if there is no such treaty. International organizations, such as IMO, could be helpful in terms of exchanges of information, but there is no substitute for restraint on the part of all nations in the application of these rules. That restraint must be constantly encouraged and nurtured.

*Anatoly Kolodkin:* Thank you very much. Now I call on Professor Oxman.

*Bernard Oxman:* This is my first visit to Moscow in a private academic capacity. It is a great pleasure to see so many old friends and colleagues in the room. I very much value the opportunity to work with them.

The classic law of the sea that we inherited at the turn of the century approached the problem of a balance between coastal state and maritime interests in a rather simplistic geographic way. The coastal interests were to be protected by a narrow territorial sea in which coastal state powers were quite broad, subject to the right of innocent passage. Beyond that narrow territorial sea the navigation interests of all states were protected by a regime of freedom of the high seas. That system proved to be unstable and perhaps too simple.

What we have today is a very different approach to accommodating those underlying interests. We have agreement on a maximum permissible breadth of the territorial sea which is broader than the traditional three-mile limit. The agreement in the Convention is twelve miles, and as of today -- if not so, shortly -- the United States will have finally followed the Soviet Union and declared a twelve-mile territorial sea. Moreover, and in many respects more importantly, we have agreement on an exclusive economic zone of 200 miles in which there are extensive coastal state powers and at the same time an accommodation of maritime and navigation interests.

In looking at this system, it is convenient but unduly simple to refer to coastal states and maritime states. Most coastal states have maritime interests in trade and communication with the rest of the world. Most maritime states are coastal states and share coastal interests. Therefore, we must bear in mind that we are talking about interests and not just about states. At a certain time on certain issues a single state may emphasize its maritime interests or its coastal interests but, in fact, it has both.

**Regulation of Navigation Safety and Pollution from Ships**

The first question that arises in the new system set up by the Convention concerns the regulatory competences of the coastal state in its territorial sea, outside of straits. The coastal state has sovereignty over the territorial sea. Except for the right of innocent passage, it can regulate the use of the territorial sea generally as it wishes.

That raises a preliminary question: when is a foreign ship in innocent passage? If it is not in innocent passage, then there is no question regarding the regulatory competence of the coastal state. The new Convention contains an elaborate list of activities that do not constitute innocent passage. In my opinion it is an exhaustive list in part because the very last item in the list refers to "any other activity not related to navigation."

But then the question arises: what if the ship is in innocent passage? What can the coastal state do? The new Convention is much more explicit on this question than the 1958 Convention. It spells out the regulatory competences of the coastal state in Article 21 and the articles immediately following it. But that is not all it does. Article 24 makes it quite clear that where the coastal state has a power to regulate innocent passage, it has a simultaneous duty not to hamper innocent passage. Under Article 24, for example, while the coastal state has the authority to establish sea lanes and traffic separation schemes on its own, the way in which that authority is exercised must not have the practical effect of denying or impairing the right of innocent passage.

Another question then arises: how do you harmonize the extensive regulatory powers of the coastal state with its duty not to hamper innocent passage? The only specific prohibition within this duty is that the coastal state cannot control the construction, manning, equipment, or design of a foreign ship.

In this regard, I think that the text on sea lanes and traffic separation schemes suggests a possible guide. It points out that the coastal state should take into account the recommendations of the competent international organization. It seems to me that one way to achieve a

balance between the coastal states' sovereign power to regulate and its duty not to hamper innocent passage is by procedure. Consulting the competent international organization, from a procedural point of view, gives the affected maritime countries the chance to comment on the proposed regulations.

The regimes applicable in straits, in archipelagic sea lanes, and in the exclusive economic zone are much more critical from the perspective of international navigation, and the Convention reflects this. First, it uses different words to describe the right of navigation in those areas. In straits it refers to a right of "transit passage;" in archipelagic sealanes it uses the term "archipelagic sea lanes passage," a regime very similar to the regime of transit passage of straits; and in the exclusive economic zone it refers to freedom of navigation and overflight. The difference is not only in terminology. The coastal state cannot unilaterally regulate the activities of a ship in transit passage, in archipelagic sealanes passage, or in the exercise of freedom of navigation in the exclusive economic zone.

The ship is under a flag state duty to respect international standards regarding navigation safety and pollution. The coastal state is given the authority under certain circumstances to enforce generally accepted international anti-pollution standards in the event of certain types of discharge in the economic zone. I have reached the conclusion -- the text of the Convention is not as clear on this -- that to the extent the coastal state has the authority to enforce international discharge standards in its exclusive economic zone, it has similar authority in straits and in archipelagic sealanes. My reason is quite simple. If the coastal state can arrest the ship for an unlawful discharge at thirteen miles from its coast, it seems to me a bit anomalous that it cannot take the same action for exactly the same purposes at eleven miles from its coast.

A question arises, as it arose in the negotation of the Convention, as to whether this system is stable. Professor Clingan referred to problems of uniqueness or special situations, and they exist everywhere in the world. How do you deal with them? Do you really want to tell the coastal state that to deal with a peculiar problem of navigation safety or pollution in a strait, archipelagic sea lane, or exclusive economic zone off its coast it must have worldwide agreement on separate general international standards for pollution from ships? I think the answer is, "No."

The Convention establishes a procedure for the coastal state to deal with special environmental and safety problems. These procedures can be found in Article 41 with respect to straits, in Article 53 with respect to archipelagic sealanes, and in Article 211, paragraph 6, with

respect to economic zones. These provisions establish a mixed procedural system which is partially coastal state authority and partially international. Take, for example, the system for traffic separation schemes and sealanes in straits in Article 41. The coastal state makes a proposal to the competent international organization, which I think we can assume is the International Maritime Organization in London. If the competent international organization agrees, the coastal state designates the sealanes and traffic separations.

Notice the difference between this procedure and a requirement that every flag state whose ships pass through the area must agree to the application of a particular restriction to its ships. The Convention system is easier for the coastal state, or, you could argue, it is more pro-environment. The coastal state proposes, the organization in accordance with its own rules and procedures approves, and that ends the matter. Once approved by the organization, the coastal state itself then has the legal authority to impose the regulations. There is clear precedent that what is meant in Article 41 by traffic separation schemes and sealanes is to be interpreted broadly. As many of you know, this procedure was used for the Straits of Malacca and Singapore even before the Convention was signed, and the regulations which were approved by IMO included underkeel clearance requirements because of the shallowness of those particular straits.

The coastal state could utilize the same procedure in the exclusive economic zone with respect to pollution and even routing systems by virtue of a cross reference to Article 211, Paragraph 1. It would propose, IMO would consider. If IMO approves, there would be no need for treaties, no need for ratification, no need to worry about the dissenting state. The coastal state then has the authority on its own to implement those measures in the exclusive economic zone.

I think it is in the interests of all states, both coastal and maritime, to make this system work. It is a balance of a novel kind between coastal state pressures to avoid pollution off their coasts and international interests in navigation. It is a middle ground between the coastal state position: "We have the power to do it ourselves, but don't worry, we'll take care of your interests," and the maritime state position: "You can't apply any regulations to us unless we explicitly agree, but don't worry, we'll be nice in the treaty negotiation." It shows some hope of stabilizing the inevitable tension between coastal and maritime interests that has continuously destabilized the law of the sea in the twentieth century.

It would be well worthwhile for both coastal states and maritime states, even before the Convention enters into force, to strengthen procedures by which IMO approves these special measures. I would

urge more scholarly work on this procedure and more efforts to make sure that this procedure works properly and works ambitiously. I would ask everyone to interpret broadly what the coastal state can propose and what IMO can approve, because the key protection is the procedure itself. The system is responsive to particular problems in particular areas; IMO may say, "In Area X we will approve this kind of regulation and in Area Y we will approve a different kind of regulation because the areas are different." The alternative is either unilateral coastal state regulation, which would be bad for maritime interests, or insistence on treaties which every flag state concerned must ratify, which would complicate the protection of coastal interests in the short term and encourage unilateral assertions of coastal state authority as a response.

A related and sometimes misunderstood question is the function of regional organizations. Most, though not all, regional organizations are concerned with navigation and pollution in areas the Convention refers to as enclosed and semi-enclosed seas. There is no doubt that states can entrust to a regional organization the exercise of powers that those states already have. Thus, for example, the coastal states have the plenary authority to regulate pollution from oil rigs on the continental shelf subject to their duty to respect minimum international standards, but they can go higher. If the coastal states wish, they can delegate to or share that authority with a regional organization.

The authority of regional organizations to deal with pollution from ships becomes complicated because the authority of the coastal states themselves is limited. If five coastal states get together to adopt an antipollution system for an enclosed or semi-enclosed sea, none of those five states can confer on the resultant organization powers that it does not have acting alone. In principle, there is no difference between the rules applicable in the exclusive economic zone in a semi-enclosed sea that is bordered by five states and those applicable in the exclusive economic zone in a semi-enclosed sea that is bordered by one state. In both cases, there is a territorial sea up to a maximum of twelve miles, an exclusive economic zone beyond, and perhaps even high seas outside the exclusive economic zone.

States cannot use regional organizations to impose regulations regarding pollution from ships on outside states without their consent. They can, as Article 123 of the Convention itself indicates, invite the outside states to cooperate with them and expect a proper spirit of cooperation. But when it comes to the regulation of operational discharges and certainly matters of construction design and navigation routing, the regional organization approach in itself will not lead to a solution which is consistent with the maritime interest in freedom of

navigation, because the flag states have not necessarily consented to that system.

To the extent that the coastal states identify special pollution problems in enclosed and semi-enclosed seas in their exclusive economic zones, they can use the regional organization as the vehicle to make the relevant proposal to the International Maritime Organization regarding the designation of a special area. That is what happened in the Persian Gulf, where some special area regulations were approved by IMO. There is no harm in using the regional organization as a first step to formulate the underlying ideas. There was a great deal of consultation among the three states bordering the Strait of Malacca before that proposal was presented to IMO with respect to underkeel clearance. That is a natural and logical way in which to proceed.

**Compulsory Settlement of Disputes**

A final matter that I want to touch on relating to the balance of coastal and maritime interests is the matter of compulsory dispute settlement. The regime in the exclusive economic zone, for example, is not a regime of complete freedom of navigation. There are certain coastal state enforcement competences with respect to pollution from ships and even potential regulatory competences with respect to regulations approved by IMO. There is a very delicate question of how you maintain the underlying balance in the exclusive economic zone and in straits, archipelagoes, and elsewhere.

The 1982 Convention tries to maintain that balance by requiring compulsory arbitration or adjudication of disputes regarding navigation matters in these areas. In my opinion, that was an essential part of the overall structure. Without compulsory dispute settlement the control on overextending regulatory competences becomes much more difficult and, conversely, the coastal state runs the risk that some maritime states will start taking too limited a view of the extent of the regulatory competences. I therefore regard the existence of compulsory arbitration as a substantive part of the arrangement, particularly with respect to coastal state controls over pollution from ships. If there is no agreement to compulsory arbitration, there should be no coastal state competences with respect to pollution from ships. That certainly is the result under the Convention.

What then do we do pending the universal entry into force of the Convention? I would urge the states concerned to agree to arbitrate navigation-pollution disputes to the extent the Convention requires it, to set an example and try to keep the underlying system working until the full system of the Convention can come into force.

# SIGNIFICANCE OF THE UN CONVENTION ON THE LAW OF THE SEA FOR INTERNATIONAL NAVIGATION: GENERAL ASSESSMENT AND PROSPECTS

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Over six years have passed since the adoption of the UN Convention on the Law of the Sea, but it remains the center of attention for scientists and practical specialists and even today bears divergent, sometimes contradictory, judgments and assessments. The divergence of views on the Convention and the singular difficulty in making such assessments are explicitly confirmed by the fact that the Convention, having received an unprecedented number of signatures -- over 150 (excluding constituent acts of certain national organizations) -- has been ratified up to now by only thirty-five states. To a considerable degree this is conditioned by the Convention's unique nature, as international law does not know any other such comprehensive (with regard to the subject of regulation) treaty as the 1982 Convention, which regulates and forms the legal basis for all kinds of activities in the world ocean.

The authors of the Convention faced an immense task -- to find and coordinate in a single "package" rules of conduct that would be mutually acceptable for all states despite essential differences in national priorities and interests in the field of sea space and marine resources development. Such differences are predetermined by differences in the social and political structures, systems of economy, geographical situations, and levels of economic development of the states in the contemporary world, as well as by differences in their historical backgrounds, cultural and every-day traditions. But in spite of these and other differences, all peoples who have inherited our common earth's home are interrelated and, therefore, interested in the establishment and maintenance of a stable legal order in the world ocean, which would be a token of peaceful and mutually beneficial cooperation in exploring and using its spaces and resources, a reliable

safeguard against ensuring the priority of law in the sphere of international relations. The basic foundations of the legal order in the world ocean complying with the major interests of mankind have been formulated in the UN Convention on the Law of the Sea, which predetermines its indeed historical significance. But the Convention's positive potential can be entirely realized only in the context of the conditions for the universal participation therein of all or, at least, the majority of the world's states.

Moreover, due account should be taken of the fact that no state can be fully, absolutely satisfied with each of the Convention's provisions: any state, gaining advantage in certain major questions, should inevitably compromise in others. Actually, it is such attitudes that made it possible to coordinate the text of the Convention and, it is to be hoped, will help to make it an effective universal international legal instrument. The merits of the Convention lie in the fact that it is (perhaps, with the exception of Part XI) a thoroughly checked balance between the freedom of spatial uses of the world ocean and the ensurance of sovereignty and sovereign rights with regard to the natural resources of coastal sea zones, between the interests of coastal states and the international community, between the needs of developing and industrially-developed countries.

In particular, this can be illustrated by the example of the exclusive economic zone. Providing the coastal states with sovereign rights for the purpose of exploring, developing, preserving, and managing such zones' natural resources, the Convention undoubtedly limits the access of foreign ships to the harvesting areas rich in bioresources. However, consideration should be made of the fact that already, before the Convention is in force, the overwhelming majority of coastal states have established their exclusive economic or fishery zones. But the Convention's provisions on the EEZ limit national expansion with respect to sea areas, stipulate the freedom of navigation in such zones, and reduce the jurisdiction of coastal states. Regulation by the Convention of marine scientific research is another example. Reflecting the ongoing practice, the Convention essentially limits the activities of scientific research vessels within the zones of coastal state jurisdiction. At the same time the Convention for the first time codifies the freedom of marine scientific research in the principle of freedom of the high seas and provides for international legal safeguards against the ungrounded refusal of the coastal states to grant consent for other states and international organizations to conduct marine scientific research projects within the limits of the exclusive economic zone and continental shelf.

Especially important is the positive influence of the Convention's "package" of interrelated compromise agreements from the viewpoint of ensuring favorable conditions for international navigation and its further development.

The 1982 Convention establishes fixed and compulsory limits for all on the breadth of territorial seas, contiguous and exclusive economic zones, and the continental shelf and thus obstructs the extension of states' ungrounded claims for the areas of the high seas and sea-bed. In other words, its provisions legally prevent the division of the world ocean. Already, before its entry into force, the Convention limits the ongoing tendency towards the growth of maritime nationalism which manifests itself, in particular, in striving to extend the zones of national jurisdiction and increase the volume of the coastal state's rights in such zones. For example, according to the available data, in the present period 119 out of 136 coastal states have territorial seas with a breadth of from three to twelve nautical miles. These states include Ghana, Senegal, and Madagascar, which recently reduced the breadth of their territorial seas to twelve miles.

Simultaneously the Convention stipulates freedom of navigation in the high seas, including the exclusive economic zones, and makes unlawful the attempts of certain states to unilaterally determine the regime of international naval and merchant navigation, to limit it in the areas under national jurisdiction. The Convention also establishes uniform regulations with regard to the conditions of international navigation.

Thus, the global compromise between the need to preserve the freedom of the spatial uses of the world ocean and to protect the states' sovereign rights to the resources of marine coastal areas is realized in the Convention's effective legal safeguards against the unrestricted performance of international navigation. In its turn, the conventional regulation of international navigation is the result of combining the interests of coastal states and the international community. To implement this compromise, the Convention not only stipulates a number of absolutely new provisions, preserving at the same time the basic principles and rules of the law of the sea verified by practice, but also specifies and supplements the legal regulation of the traditional uses of the sea, including international navigation.

The majority of the Convention's innovations are also predetermined by the changes in navigation that have resulted from scientific and technological progress. For example, proceeding from the growing intensity of marine navigation, the Convention provides for the possibility for the coastal states to establish sea lanes and traffic separation schemes in their territorial seas (Article 22), straits (Article

41), and archipelagic waters (Article 53), and does not prevent their establishment in other sea areas. It is important to emphasize here that, according to the Convention, sea lanes and traffic separation schemes should be agreed upon with competent international organizations and cannot be established by the coastal states arbitrarily to the prejudice of the interests of international navigation. The Convention introduces such notions as "sea routes" or "international sea lanes" (Articles 36, 38, 60, 80, 147, 261, etc.). The same reasons caused the incorporation in the Convention of many other new provisions which, for example, deal with the role of competent international organizations in maintaining navigation, the order of the construction and removal of artificial islands and installations, and structures with due account taken of the interests of international navigation, the prevention of pollution from ships, nuclear-powered ships, submarine transport vehicles, etc.

Many Convention provisions determining the regime of international navigation in specific sea areas are new with regard to the applicable law of the sea. For example, the section concerning innocent passage in the territorial sea contains such important specifications as the continuity and expediency of such passage and regards it as ordinary navigation for the purpose of traversing the territorial sea or calling at a roadstead, during which any activities not directly pertaining to passage are not allowed. Para. 2, Article 19 enumerates the kinds of activities on the part of foreign ships that give the coastal state the right, in compliance with para. 1, Article 25, to take measures to prevent such passage. Article 21 on the laws and regulations of the coastal state incorporates a provision saying that they may relate to "the safety of navigation and the regulation of marine traffic," and Article 22 reads that for such regulation the coastal state may require that innocent passage is exercised through sea lanes and traffic separation schemes designated by this state. For the first time an important provision is stipulated regarding the international responsibility of the flag state for damage to the coastal state caused by a warship or government ship operated for non-commercial purposes as the result of non-compliance with the laws and regulations of the coastal state concerning passage through the territorial sea, as well as with the relevant rules of international law (Article 31).

Ensuring the protection of the rights and interests of the coastal states, the Convention simultaneously makes a precise reservation with regard to the spheres in which such states may adopt laws and regulations, as well as to the questions on which the coastal states may not exercise regulation. In particular, of great practical importance are the provisions stipulating that international rules and standards for the

design, construction, manning, and equipment of ships have priority over corresponding national requirements (para. 2, Article 21; Article 211). Moreover, the coastal state must not unlawfully hamper the innocent passage of foreign ships through the territorial sea. In particular, in the application of the Convention and of the laws and regulations adopted under the Convention, the coastal state must not impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage, or discriminate in any form against foreign ships (Article 24).

Of great interest are the new provisions establishing a regime of navigation in international straits. They are particularly important because, as a result of the extension of the territorial sea, many straits intensively used for international navigation became entirely or partially included in the territories of the coastal states.

It is stipulated that, in straits used for international navigation between two areas of the high seas or an exclusive economic zone, any ships or aircraft of any state of the world enjoy the right of innocent passage. which is defined as "the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait" (para. 2, Article 38). Submarines may navigate submerged. There must be no hampering of transit passage (Article 44), and it must not be impeded (para. 1, Art. 38). The activity, which is an exercise of the right of transit passage, is not subject to the Convention's provisions that are not directly applicable to such activity (para. 3, Article 38), and the sovereignty of the states bordering the straits in the territorial waters of such straits is exercised subject to the Convention and to other rules of international law relating to the regime of passage through straits (para. 2, Article 34). The laws and regulations of the states bordering the straits that concern transit passage may regulate only questions directly stipulated by the Convention and must not result in denying or in any way impairing the right of transit passage.

According to the Convention, the regime of innocent passage in a number of international straits cannot be suspended. Such straits include straits used for international navigation and: (a) formed by the mainland of a state and an island owned by this state if a high sea route or a route in the exclusive economic zone of similar convenience exists seaward of the island (para. 1, Art. 38, para. 1(a), Art. 45) -- Messina, Elba (Italy), Bel Isle (Canada), Elaphonisos (Greece), Abu-Ali (Yemen), Pentland Firth (Great Britain), and others; or (b) used for international navigation betweens the high seas (economic zone) and the territorial sea of a foreign state (para. 1(b), Art. 45 -- Corfu

(Greece-Albania), Pemba (Kenya-Tanzania), Tiran (Egypt-Saudi Arabia), Grand Manan (U.S.-Canada), and others.

The conditions of such passage are similar to those with respect to innocent passage through the territorial sea, including the right of the coastal state to prevent the passage that is not innocent. Moreover, an important difference consists of the fact that if a state bordering a strait has no grounds to ascertain that the passage of a foreign ship is not innocent, it cannot suspend it in the above-mentioned straits in any circumstances. The right of such passage is enjoyed by all ships and vessels, including warships, but unlike transit passage, submarines should navigate on the surface and fly their flag, and foreign aircraft have no right of overflight in such straits.

Taking account of the practice of certain archipelagic states aimed at limiting foreign navigation in the areas under their jurisdiction, the Convention's provisions are important safeguards against the interests of international navigation. They provide that all ships and aircraft exercise in archipelagic waters the right of passage in sea lanes designated by an archipelagic state or in routes ordinarily used for international navigation if sea lanes are not established. In the rest of the archipelagic water areas and in the territorial seas of an archipelagic state, foreign ships enjoy the right of innocent passage. The regime of archipelagic passage is actually entirely similar to the regime of transit passage in straits. In particular, the Convention restricts the limits of the archipelagic state's jurisdictional competence and contains safeguards against unrestricted archipelagic passage (Arts. 53, 54). Archipelagic passage can be exercised not only in straits but also in the archipelagic state's seas, and the breadth of sea lanes for such passage is up to fifty miles, while in practice the breadth of straits in which the regime of transit passage is established does not exceed twenty-four miles.

The 1982 Convention reproduces practically all provisions of the Geneva Convention on the High Seas regarding the freedom of international navigation. At the same time, rather essential amendments and additions are introduced to certain articles. For example, the responsibility of a flag state for the safety of navigation and for the ensurance of a genuine link betweens the flag state and the ship has been considerably extended (Art. 94). The Convention incorporates provisions concerning the suppression of illicit traffic in narcotic drugs and unauthorized broadcasting from the high seas and correspondingly specifies the rule on the right of visit (Article 110). The right of hot pursuit (Article 111) is extended to violations committed in the economic zone and on the continental shelf of the coastal state, including safety zones around off-shore installations.

It goes without saying that of the greatest importance are precise and unambiguous provisions stating that, in the exclusive economic zone, all states enjoy, subject to the relevant provisions of the Convention, the freedom of navigation stipulated by the Convention (Art. 58). At the same time, prescription is made to take due account of the rights and duties of the coastal state and comply with its laws and regulations if they are in line with the Convention and other compatible rules of international law. Simultaneously, as it follows from a number of the Convention's articles (60, 78, 80, 147, etc.), the implementation of the rights of the coastal state with regard to the natural resources of the economic zone and continental shelf, as well as the activities on developing the mineral resources of the sea-bed beyond the limits of national jurisdiction, must not impair the freedom of international navigation or result in any unjustified interference.

Analysing the provisions of the Convention, it is deemed necessary to deal with certain specific features of naval navigation. The Convention proceeds from the fact that it is an integral part of international navigation and is exercised mainly on the same conditions as all other kinds of navigation with due account taken of specific features ensuing from the principle of peaceful uses of the seas and the legal status of a warship based on its entire immunity. The need to take into account the specific features of naval navigation resulted in a number of provisions specially referring to warships and to peaceful uses of the seas and naval activities. The regulating impact of the principles and rules of both international law and, in appropriate cases, of national legislation determining the legal regime of the seas with regard to warship activities is greater than with regard to other types of ships. Correspondingly, the rights of warships as compared with other vessels are to a certain extent extended, and from this extension ensues, in a number of cases, their additional duties.

Thus, from a legal viewpoint naval navigation can be defined as a specific and integral part of international navigation regulated by international legal principles and rules, taking into account provisions directly concerning warships. Naval navigation in the proper sense of this notion corresponds to such terms used by the Convention as "customary navigation," and "normal navigation." Quite often, in a wider sense, "naval navigation" means military and political activity of states in the world ocean with the aim of securing their international policy interests by means of purposeful use of war- and support ships. It is important to emphasize, however, that such an approach with regard to a specific sea area means that only such kinds of activities that comply with this area's regime are thus lawful.

Account should be taken of the fact that a warship as a subject of marine activities and an object of legal regulation has a very complicated nature. Being a means of navigation, a warship at the same time is considered as a specific body of its state authorized to act on its behalf in its relations with foreign warships and authorities. Simultaneously, it is a means of armed struggle and in this respect its role and importance due to its equipment with nuclear missiles have lately greatly increased.

Thus, depending on a specific situation, these or those qualities of a warship are pushed into the foreground. However, in all situations a warship is a carrier of the whole complex of the above-mentioned characteristics and, therefore, an element of naval presence is always, to this or that extent, inherent to naval navigation. It would be wrong, therefore, discounting this indisputable fact, to assess warships' activities only on the basis of restricted interpretation of these or those provisions of the law of the sea. Such approach is most often used with regard to innocent passage. The fact that innocent passage of warships has essential peculiarities is sometimes disregarded. In fact, neither the 1958 Convention nor the 1982 Convention on the Law of the Sea contain rules that directly establish differences between innocent passage of warships and merchant vessels. But the 1982 Convention incorporates a provision directly concerning such cases and stipulates that questions not regulated by the Convention are subject to customary international law. For example, there is a generally accepted custom according to which foreign warships visit internal waters and ports of coastal states only with the coastal state's consent and, therefore, they can exercise innocent passage only after such consent is granted.

According to the 1982 Convention, notification or authorization is not required if the sole purpose of a warship is transit passage through the territorial sea. In this case the Convention bases itself on the presumption of the coastal state's knowledge of the innocent nature of the warship's passage. Naturally, the only source of such information can be a warship itself, or, to be more exact, its conduct. It should confirm its peaceful purposes by its actions and follow the shortest traditional lanes of international navigation or routes established by a coastal state without engaging in unauthorized activities. Otherwise, a coastal state has the right to assume that the presence of the warship in its territorial waters is unlawful and forcible. This empowers the coastal state to apply Articles 25 and 26 of the Convention on the inadmissibility of a passage which is not innocent.

It should be emphasized that peaceful passage of foreign warships in the routes customarily used for international navigation complies

both with the interests of the coastal state's security and the needs of international navigation allowing indiscriminatory passage of warships through the territorial sea in a common transport flow. Meanwhile, the attempts to send warships to the territorial seas of other states with the aim of asserting their alleged rights by means of navigating there in any areas and in any directions and especially with the purpose of exercising their naval presence on a standing basis have nothing to do with innocent passage or with the interests of international navigation. This is a challenge to the security of coastal states, expressing itself in claims for uncontrolled military activities in sea areas under the sovereignty of other states. These uncontrolled military activities run counter to the basic provisions of the UN Charter, to the principle of peaceful uses of the seas stipulated by the Convention, and are directly prohibited by its provisions, in particular, by para. 2, Art.19 concerning criteria for qualifying a passage as innocent. Such activities are fraught with the potential for grave international conflicts and incidents.

The 1982 Convention on the Law of the Sea, as well as other international treaties adopted in this field, do not contain decisions concerning war at sea; after the adoption of the UN Charter war has ceased to be regarded as a legal means of regulating intergovernmental relations. Agressive war is considered an offence laden with international responsibility. But, as long as war is still a reality in contemporary society, the question of the legal regulation of international navigation in time of war remains urgent. This problem, however, including the question of international navigation in the areas of international conflicts, especially armed ones, deserves special attention.

Thus the above-mentioned provisions in the Convention, together with a large number of others which could not be tackled here because of the limited extent of this paper, establish stable legal safeguards for the freedom of navigation in the high seas, exclusive economic zones included, and sufficiently precisely determine the allowable limits of interference with foreign navigation on the part of the coastal state in areas under its jurisdiction and control. It is easy to see that this system of safeguards is based on such principles and rules, incorporated by the Convention, as the principle of the freedom of the high seas, the right of innocent passage, and other principles and rules generally accepted by the existing law of the sea, both treaty and customary. It is also quite evident that the Convention's numerous new provisions, some of which were considered above, ensure organizational legal conditions and instruments for the implementation of the traditional postulates of the international law of the sea. These postulates are thus

developed and made specific, having taken into account the new trends in international navigation and economic and political conditions.

Naturally, compliance or, accordingly, non-compliance with these or those new provisions in international practice cannot by itself affect the general acceptance of traditional principles and rules of international law of the sea or, vice versa, deny them of such quality. But states' disregard of the new Convention's provisions under consideration and their arbitrary interpretation or selective application of such provisions substantially weakens the effectiveness of the generally accepted rules, prevents them from safeguarding the interests of international navigation, and limits the sphere of their application. In this connection a question arises: should those Conventional provisions that contain specific safeguards against unrestricted international navigation be qualified as customary rules of international law? It is often said that the Convention, with the exception of Part XI, is or soon will be generally accepted as an international legal custom.

The problem of customary rules of international law is one of the most important and, at the same time, one of the most complicated doctrinal problems of international law. It is quite understandable that in this paper we cannot go into details regarding the whole diversity of doctrinal concepts in this field. But, proceeding from Article 38 of the Statute of the International Court of Justice, we can formulate two major elements of an international legal custom: the substantive element: the repeatedly occurring actions of states, uniform practice establishing usage; and the subjective, psychological element: conviction, acknowledgement by the states of the fact that the behavior in question is lawful or legally necessary (*opinio juris sive necessitatis*).

Let us see, first of all, whether there is a substantive element of an international legal custom in the new provisions of the 1982 Convention which develop and specify the generally accepted principles and rules of international law of the sea as well as establish in their aggregate a harmonious system of international navigation regulation. Even a brief survey of the coastal states' legislation allows us to conclude that in this respect international usage resulting from repeatedly occurring actions and uniform practice of states has not taken or is not taking shape. Suffice it to give a few examples.

The number of states not recognizing the twelve-mile limit of the territorial sea is still great; more than ten states have extended their sovereignty to 200 nautical miles. The maritime legislation of many states disregards the right of innocent passage and establishes an

authorization procedure for the access of foreign ships used for non-commercial purposes to territorial seas; there are cases when passage of foreign warships through territorial seas is subject to prior authorization by the government of the coastal state. There are examples of still stricter limitations. To call at the territorial sea of Ecuador for scientific, cultural, or tourist purposes any ship must get the written consent of the Ministry of Defense to an inquiry submitted not later than thirty days prior to the call. Substantial deviation from the Convention's provisions takes place in the legislation of a number of countries (Malta, Fiji, Peru) concerning passage of nuclear-powered ships and ships carrying nuclear or other dangerous substances. (In compliance with Article 23 they are subject to general conditions of the right of innocent passage if they carry relevant documents and observe special precautionary measures established for such ships by international agreements.) There is discord between national legislation and the requirements stipulated by the 1982 Convention with regard to innocent passage, in particular concerning recommendations of competent international organizations and the interests of international navigation which must be taken into account while designating sea lanes and traffic separation schemes, as well as strict limitation of the grounds for penalty measures and arrest of ships due to their non-compliance with the laws and regulations of the coastal state.

The legislation of a number of countries provides for their broader competence in contiguous zones than is established by the Convention. The most frequent deviation is appropriation by the coastal state of the right to exercise control in the coastal zone with regard to security and conservation of the marine environment (according to Art.33, in a contiguous zone control may be exercised only to prevent infringement of customs, fiscal, immigration or sanitary laws and regulations).

A grave threat to the interests of international navigation is posed by the rules of certain archipelagic states extending the status of internal waters to their archipelagic waters (Philippines, Indonesia, Fiji). On the other hand, in violation of conditions stipulated by the Convention, certain states (Iran, Spain, Sao Tome and Principe, Portugal) have established in specific sea areas the regime of archipelagic waters, as if they had the legal status of archipelagic states in the sense stipulated by the Convention.

Many states substantially deviate from the Convention's provisions regarding the legal regime of the exclusive economic zone. First and foremost, it concerns the grounds and conditions of foreign harvesting vessels' access to the surplus of the allowable catch which is subject to separate consideration. But there are deviations that directly affect

international navigation. For example, certain coastal states declare that "entire control", "exclusive rights" and "jurisdiction", "exclusive jurisdiction", or some "exclusive competence" of the coastal state is established with respect to the conservation of marine environment. And other states have even extended the territorial rights to the exclusive economic zone. All this obviously contradicts the Convention's provisions that distinctly limit coastal state jurisdiction in the economic zones. Among the most frequent deviations from the Convention there is legislation providing for imprisonment as a penalty for the violation of any rules and regulations concerning the prevention of pollution from ships, which runs counter to Article 230 of the Convention whereby only monetary penalties may be imposed.

Worth mentioning are deviations in national legislation from the provisions of the Convention on the continental shelf affecting the interests of international navigation. For example, certain states in this or that form declared their territorial rights to the continental shelf, others arbitrarily established its outer limits. The legislation of a number of countries provides for the possibility of declaring "special areas" on the continental shelf whereas the Convention allows the establishment of "clearly defined areas" only within the limits of the exclusive economic zones for the purpose of prevention, reduction, and control of pollution from ships and on the condition of compliance with mandatory requirements (Article 211).

Finally, obvious and numerous deviations from the Convention take place in legislation regulating the conduct of marine scientific research.

This list could be extended, but it is clear in any case that the practice of states in regulating international navigation, as well as of other activities in the world ocean, is far from being uniform. National legislation contains numerous and diverse deviations from the provisions of the 1982 Convention, strict compliance with which is of exclusive importance for international navigation and equitable mutually beneficial cooperation between states in the development of the world ocean on the whole. An analysis of national legislation and practice also shows the absence of the second element of customary rule formation -- recognition (*opinio juris*) -- which is always a conscious act on the part of those who recognize the legally binding force of the spontaneously emerged usage, the more so as many states have made statements to the effect that they will provide these or those privileges ensuing from the Convention only to states parties. It seems that one cannot deny the fact that the Convention, irrespective of its entry into force, formulates many rules of conduct, to which

there is a rather high level of consent on the part of states, and may play an important role in the establishment in the future of generally accepted rules on this basis. However, this prospect should not be assessed too optimistically; in any case, at the present moment there are no grounds for making a conclusion based on the presence of corresponding international legal customs.

All these considerations lead us to conclude that the efforts to bring the Convention into force and to ensure conditions for the universal participation of states therein is in the interests of each state in the international community and, in particular, in the interests of maritime powers. There are grounds to assume that if such efforts fail, the interests of international navigation will be seriously impaired. Even normal and efficient implementation of traditional rights and freedoms of navigation will be greatly limited in the context of a new outbreak of maritime nationalism and manifestation of the elements of chaos in the regulation of the sea areas regime. It goes without saying that the possibility of using the rights and privileges stipulated by the Convention is still more limited, as such possibility almost wholly depends on the Convention's entry into force and participation therein of these or those states. Adoption by the states parties of the duties stipulated by the Convention will eliminate or substantially limit the pluralism of regimes in similar sea areas, and the resultant uniformity is of great significance for international navigation. Moreover, states parties to the Convention would be able to use all privileges provided by the Convention for settling disputes concerning interpretation and implementation of the Convention's provisions. Merchant navigation could resort to the special arbitration procedure for settling disputes relating to detention of vessels and could exercise the right to demand prompt release of a vessel and its crew after posting a bond or other financial security within the framework of international judicial bodies or arbitration stipulated by the Convention.

It is known, however, that the biggest obstacles to the universal participation of states in the Convention and its earliest entry into force are the still existing contradictions with respect to Part XI which regulates the activities on the exploration and development of the mineral resources of the international sea-bed area. It should be acknowledged that the provisions of Part XI do not exclude interpretation, which until now has been typical of the Group of 77 developing countries and which runs counter both to objectively determined economic and political factors, and accordingly, to the lawful interests of industrially developed states, i.e., states which have already made substantive investments and efforts in the field of exploration of sea-

bed resources and development of technology for their exploitation and which will have to bear the main burden of responsibility on ensuring the activities of the future International Sea-Bed Authority. In our opinion, Part XI will remain an insurmountable obstacle for the Convention to become a universal and effective international legal instrument unless the danger of the afore-mentioned unrealistic and unbalanced construction of the provisions of Part XI is removed.

Presumably, a most constructive way to achieve this goal is coordination within the framework of the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea of concrete regulations that would eliminate the possibility of contradictory interpretation of the Convention's provisions and bring about a large-scale, realistic regime of activities in the Area based on the principles of the Convention, a compromise regime that would be acceptable to all groups of states. The work in the Preparatory Commission goes slowly and with difficulties, but despite all complications the disputes on the delimitation of sea-bed areas have been settled and the registration of applications for initial activities of the pioneer applicants has been carried out. The spirit of constructive cooperation in search of compromise outcomes ripening in the Preparatory Commission, raises certain, although cautious, optimism. One should not be too hopeful or think that this process will be quick and easy; it will require realism and political resoluteness in implementing new and non-typical attitudes from all states concerned, including those that are beyond the framework of the Preparatory Commission. However, the community of vital interests of states in ensuring the best stable conditions for cooperation in the exploration and exploitation of spaces and resources of the world ocean on the basis of an effective universal international treaty may become a token of successful settlement of all existing complicated problems.

The extension of international cooperation among scientists may play an important role in this process.

# ON THE PROSPECTS OF THE ENTRY INTO FORCE OF THE UN CONVENTION ON THE LAW OF THE SEA

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Our American colleagues have raised a number of interesting questions on which I would like to comment.

I don't mean the question of to what extent the Convention can be regarded as a mechanical compilation of customary rules of international law. To my mind, the overwhelming majority, if not all, of the Soviet lawyers point out that the Convention contains too many absolutely new provisions of major importance for specialists in international law to merely equate the Convention with a compilation of rules of customary law.

I mean other questions advanced by the U.S. representatives: how to stabilize international law in the future; to what extent the broad ratification of the Convention is a component of such stabilization; how to achieve the broad ratification of the Convention; what is to be done if the Convention is not broadly ratified.

First and foremost, taking into consideration the significance of questions regulated by the Convention, the presumption is quite justified that the entry of the Convention into force is needed not only for the further development of international law of the sea but also for international law in general.

Second, I am aware of the request of the American representatives not to include in the agenda of this symposium the issue concerning Part XI of the Convention (i.e., the regime of the International Area of the Sea-bed). Nevertheless, I'd like to emphasize that it is impossible to look for answers to the questions put by the American side without tackling the question of Part XI of the Convention.

So, let us try to answer these questions.

***To what extent is the broad ratification of the Convention a component of the stabilization of international law?***

In my opinion, the consolidation of the international legal order on three-fourths of the Earth's surface and, therefore, the consolidation of the international order on the Earth in general is impossible without

the Convention's entry into force. But there is one pronounced condition in this respect -- this Convention must be *generally accepted*; i.e., it must enter into force because and after it becomes acceptable for all major groups of states, and not as a result of its mechanical ratification by only one or two groups of countries, no matter how numerous or developed they are. This question is so important that there should be no tactical games on either side.

***How do we achieve the broad ratification of the Convention?***

Actually, I have partially answered this question. Today there are thirty-five instruments of ratification out of the sixty required. Thirty-four of them have been received from the developing countries, but this does not constitute *broad* ratification, which presupposes ratification by *all major groups* of states. Otherwise, the nominal entry of the Convention into force will only hamper its becoming a really effective instrument of international law or even make this impossible.

How do we achieve the ratification of the Convention by all major groups of countries? Here the issue of Part XI of the Convention emerges, because a condition for such ratification is the adjustment of a number of provisions to the economic situation that has arisen during the last eight to ten years, while understanding that in this case it will be possible to preserve untouched such basic principles of Part XI as the "common heritage of mankind" concept, the establishment of the International Sea-Bed Authority and its Enterprise, the principle of joint regulation of the activities in the International Sea-Bed Area instead of the national appropriation of its areas, etc.

The present official attitudes of the Group of 77 concerning Part XI are still determined by the countries opposing any amendments to Part XI and proceed from the presumption that the speedy ratification of the Convention by sixty developing countries and its entry into force will make the developed countries accede to the Convention in its present form. However, a considerable number of "moderately minded" members of the Group of 77 doubt the expediency of the speedy entry into force of the Convention to which socialist and Western countries would not be parties. Of interest is the dynamics of the Convention's ratification -- 1982: one country; 1983: seven countries; 1984: five countries; 1985: thirteen countries; 1987: three countries -- altogether thirty-five instruments of ratification out of the sixty required. Since November 1987 (i.e., during the last twelve months) the Convention has not been ratified by a single country.

Correspondingly, an understanding is growing among the developing countries of the need to ensure the participation of the developed countries in the Convention and, therefore, of the need to compromise with regard to the amendment of the key provisions of Part XI. Nevertheless, these countries don't yet display openly any activities concerning this question.

Certain moderately-minded members of the Group of 77 have begun unofficial discussions with the aim of finding concrete ways to make such amendments. However, in their opinion, two questions should be made absolutely clear before such amendments are introduced:

1. The agenda of the consultations on the amendment of Part XI should be strictly limited to the specific issues of Part XI;
2. The USSR and the U.S. should declare that if these issues of Part XI are settled to their satisfaction they will become contracting parties to the Convention.

In our opinion, these are absolutely logical questions and provide a basis from which the possibility can be thoroughly examined.

We are convinced that such corrections, which will preserve the major principles of Part XI and which are of special importance for the developing countries, will also meet their interests because the thirty-five countries that have already ratified the Convention account for only 2.71 percent of the future International Authority budget; and it is quite possible, in principle, that the Convention will enter into force after having been ratified by sixty countries, whose aggregate contribution to the Authority's budget will not exceed 5.5-6 percent. Such situations will hardly meet the interests of the developing countries or promote the consolidation of the uniform understanding of the "common heritage of mankind" concept or the new world economic order.

However, according to the opinion of a number of countries, this process of Part XI's correction can be started no earlier than in the autumn of 1989, i.e., after the negotiations on the obligations of the pioneer applicants and with the maturing of a favorable situation with regard to such changes in the Group of 77 and an evolution of the official U.S. attitudes towards the Convention in the context of the new administration.

The position of the "Convention's friends," in our assessment, is undergoing a certain positive evolution. They believe it untimely to ratify the Convention until the fate of Part XI and therefore its financial-economic consequences are known. The majority of the

friends" are inclined to introduce factual amendments to Part XI by means of elaborating realistic rules, regulations, and procedures for the Sea-Bed Authority and do not regard the idea of the revision of Part XI as implementable.

Probably the most expedient way to introduce changes into Part XI would be the formulation by the Preparatory Commission of practicable rules, regulations, and procedures for the Authority which, on the decision of the Preparatory Commission, could also act as an interim regime of activities in deep sea-bed areas after the entry of the Convention into force and up to the Revision Conference, which will deal with Part XI and the relevant Appendices to the Convention and which will convene fifteen years after the first industrial mining in accordance with the adopted plan of work (Art. 155). It is assumed that at this Conference the factual amendments to Part XI, previously approved by the Preparatory Committee, would be formally introduced into Part XI and the Appendices to the Convention.

We are sure that if there is good will, the Preparatory Commission, which has already managed to successfully settle a number of major problems, will be able to create conditions for the participation of all countries in the Convention, although the task is not easy. We regret that the United States does not take part in this work today and presume that its participation would promote this process. The broader understanding of such work experience on the part of the Group of 77 would also be of great importance.

***What should be done if broad ratification of the Convention is not achieved?***

To my mind, such a possibility should be excluded from the very beginning. All should first strive for the generally accepted correction of certain provisions of Part XI and then for the ratification of the Convention. This is the only reasonable way, the alternative for which is chaos, inevitable conflicts, and confrontation on three-fourths of the Earth's surface, which is extremely dangerous in the epoch of nuclear weapons.

There is, however, another obligatory condition for the broad ratification of the *generally accepted Convention* (I underline these words) to promote the consolidation of the international legal order. This is the compulsory bringing of national legislation into line with the Convention's provisions. Evidently, if this is not done, the Convention will become a mere paper monument.

Meanwhile, the situation is rather worrisome. It is far-fetched to say that the times of "creeping jurisdiction" are over and that there is no danger for the Convention, including its sections concerning navigation. Although a number of countries, especially African ones, for instance, have already brough their legislation into line with the conventional provision on the twelve-mile limit of territorial seas, the territorial waters of twenty-four states exceed this limit, and the territorial waters of thirteen states exceed the limit of 300 miles. Next, the declarations by Brazil and Uruguay made at the signing of the Convention and providing that the regime of the economic zone, stipulated by the Convention, is allegedly compatible with their legislation on 200-mile territorial waters, are still in force. And Brazil has started the process of Convention ratification! One can mention next the Villa del Mar Declaration by Colombia and Chile, 1989, which also signed the Convention, and by Peru and Ecuador, which did not sign the Convention. The Declaration reaffirms "the exclusive sovereignty and jurisdiction of each country in the 200-mile adjacent sea area" -- true, without prejudice to international communications.

Finally, one can mention the Declaration by the Philippines, made at the ratification of the Convention in 1984 and stating that "the notion of archipelagic waters is similar to the notion of internal waters and deprives foreign vessels of the right of transit passage with the purpose of international navigation through straits connecting such waters with the economic zone or the high seas."

It should be mentioned that sometimes worrisome information, which comes from Indonesia and reveals the tendency to interpret restrictively the most important provisions of the Convention regarding the passage through straits used for international navigation, and also archipelagic passage, causes concern. It would probably be useful if Mr. Djalal, a widely-known Indonesian specialist in international law who enjoys great authority and who is present here, would explain the position of Indonesia on this issue, which affects the interests of a large group of countries.

These are my ideas, which have arisen in connection with the questions put by our American colleagues and which I wished to share with all those present.

## COMMENTARY

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Mr. Chairman, Professor Kolodkin, I would like to thank you very much for inviting me to come to this Soviet-American Symposium. I'm neither Soviet nor American but from a far distant country in Southeast Asia, Indonesia. Ocean affairs are not merely the efforts of the Soviets or the Americans but of all of us, including the developing countries and, for that matter, Indonesia. The subjects under discussion -- navigation, fisheries, and scientific research -- touch on Indonesia as a maritime country. But there is another reason why I have come here for this symposium. I think it is important to reminisce a little.

You will recall that some twenty years ago, before the Law of the Sea Conference started, the United States and the Soviet Union were emphasizing three topics that needed to be settled internationally: navigation through straits, the right of the coastal state over fisheries resources, and the outer limit of the continental shelf. Most of these issues apparently have remained unsolved, from the point of view of the maritime powers, although from our point of view a great deal of them were solved in the Law of the Sea Conference. Therefore I would like to argue the need for us to ratify the Law of the Sea Convention.

I certainly share the feeling that if the Law of the Sea Convention is not ratified and does not enter into force, many of the agreements that have been reached may simply unravel. Neither Indonesia nor the Soviet Union nor the United States, in my mind, will benefit from the unraveling of the law of the sea agreements. Therefore, it is important to ratify, and for states who have not signed to accede, to that convention. Before I came here I attended a four day meeting in Thailand between the ASEAN countries and the European Community. All of us also felt the need to ratify the Convention as soon as possible.

It is difficult for me to think what would happen if the Convention does not enter into force. The Convention has been signed by 159 countries, reflecting the general will of mankind as a whole. Of the thirty-six ratifications, thirty-five of them are by developing countries. It is therefore essential for the developed countries to live up to the expectations of the developing countries, which were formed

during more than ten years of negotiation. We understand the delay in ratification but we cannot understand not ratifying it at all.

In the past the Soviet Union has been a friend to the developing countries on many issues, including Part XI. I would hate to see the Soviet Union become an adversary of the developing countries. I don't think it would be to the benefit of either. Some speakers today have mentioned the difficulty in the Prepcom of dealing with the implementation of Part XI. The developing countries have spent a great deal of time trying to accommodate the interests of the industrial countries. They have taken very strong measures to register the claims and the applications of some countries, including the Soviet Union, for seabed mining. It is our feeling that having been registered, the Soviet Union would somehow see the need and the necessity to ratify the Convention. If that is not the case, I ask you to consider the possible alienation of the developing countries on this issue of Part XI.

I would also like to comment on customary international law with regard to navigation. It is extremely difficult to define which part of the Convention's regime of navigation has become part of customary international law. To tell you the truth, even to speak of customary international law is, for the developing countries, at least Indonesia, somewhat unpleasant, somewhat uncomfortable. Many parts of the Convention have been negotiated because of our dissatisfaction with certain rules of customary international law and our uncertainty about them on specific points. You talk about state practice, *opinio juris*, about all kinds of criteria, but in reality it will take you months and months to decide what the rules are on certain specific points. Not to mention that some of those rules have nothing to do with developing countries and have been developed beyond the knowledge and participation of the developing countries. We put every effort into agreeing to the Law of the Sea Convention; we can abide by these rules because we participated in their making. They are not rules made by somebody else which we simply have to abide by. It is therefore essential for us to see that the Law of the Sea Convention is broadly acceptable so that we can also implement it.

It is difficult for me to say which are the rules of customary international law on straits, on archipelagic waters, on sea lanes and so forth. Most of them are the rules that we have agreed upon through our negotiations for all those ten or twelve years. Now this raises a very fundamental question in our minds. What are the ratifiers, such as Indonesia, going to do with the countries that are not parties to the Convention? Can a country claim rights under a Convention that it has not signed or ratified? It will require an enormous effort to

convince the ratifying state that the nonratifying state will have equal rights in all those law of the sea provisions without the corresponding obligations. Resorting to customary international law simply means a free right for the nonratifying state to gain benefit from the Law of the Sea Convention by arguing that those provisions are already part of customary international law and therefore should benefit every state in the world whether or not it ratifies the Convention. Therefore, I would have to come to the same conclusion: let's all ratify the Convention and clarify all the rights and obligations that we have in it.

I would like to reply to Mr. Kotlyar's question. I didn't quite understand when he said that something the Indonesian government has done causes him concern. So during the coffee break I asked him what he meant. He said that it had been announced that the Indonesians appointed their former Foreign Minister Kusuma-Atmadja to head a committee for the development of the law of the sea in Indonesia, and he was concerned that the Indonesians may follow the Philippine pattern. I would assure Mr. Kotlyar that he is thinking too much; there's nothing along that line in the Indonesian government's opinion. In fact, we have persuaded the Filipinos that in many ways it is not appropriate for them to submit a declaration as they did when ratifying the Convention. The Filipinos may have changed their minds now to accept the Convention without any further declaration.

Indonesia now feels that, having ratified the Convention, it should implement the Convention as far as it can, knowing precisely that it has not entered into force. Whatever provisions that it feels are within the limits of implementation should be implemented. Therefore, a committee has been formed under the chairmanship of former Foreign Minister Kusuma-Atmadja to develop the law regarding the archipelagic states principle that will be consonant with the Indonesian development program. For instance, how are we going to benefit from the fisheries resources, the continental shelf resources? How are we going to amend our laws -- there are a lot of them -- that need to be adjusted to the law of the sea provisions? How are we going to draw the baselines according to the provisions? The whole purpose of this committee is to implement the Law of the Sea Convention.

I would like to raise one other point, and I think we will have to be very careful about it. It is so clear in your mind but it is not clear in the mind of others. This is the question of navigation of warships through territorial and economic zones, through the territorial sea in innocent passage. We know that we have discussed it for a very long time, that there are conflicting views on it in the Convention, that it did not go into the Convention one way or another and therefore states

have different interpretations on it. Are the issues of authorization, notification, and other rules regarding the foreign warship in the territorial sea solved or unsolved? I think that one has to be watchful in the days ahead about how to handle these questions.

# INNOCENT PASSAGE OR INNOCENT NAVIGATION?

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Why have I entitled my presentation in such a way? Because the question proper demonstrates the substance of arguments, as of late, between the USSR and the U.S. around interpretation and application of the right of innocent passage through the territorial sea. It is precisely the question that underlies emerging differences of approaches to relevant provisions of the 1982 Convention. Some states, with the USSR among them, proceed from a literal understanding of the substance of Articles 17-19 of the Convention as guaranteeing the right of innocent passage through the territorial sea for the purpose of traversing that sea or proceeding to or from internal waters; others, including the U.S., understand the right of passage as in fact the right to navigation in the territorial sea.

Historically, ships of non-coastal states used sea lanes along the coasts of other states long before the establishment in the international law of the sea of the institution of the territorial sea. It is only since the end of the nineteenth century, when the territorial sea began to be considered an inalienable part of the state territory, i.e., of the territory over which the sovereignty of a coastal state extends, that the need emerged to develop specific international legal guarantees that would protect the interests of international navigation.

As Ian Brownlie correctly notes, "innocent passage is a reasonable form of harmonizing the needs of navigation of the sea and the interests of a coastal state".[1]

So the right of innocent passage through the territorial sea is, in essence, an exclusion of the coastal state's sovereignty by virtue of the interests of the international community. "This interest is a result of

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[1]I. Brownlie, *International Law*, Volume 1, Moscow, 1977, p. 308.

common understanding of the needs of the development of trade and economy. It was enhanced with the increase of these needs."[2]

The needs of international intercourse by themselves could not, though, be a sufficient basis for limiting the sovereignty of a coastal state. Unanimous approval of the principle of innocent passage by the majority of the world's states was necessary for the adoption of this principle. Despite the fact that the international legal practice of the post-war period did not always demonstrate absolutely positive treatment of the right of innocent passage in the national legislations of coastal states, the inclusion of the provisions to that effect in the 1958 and 1982 Conventions can justifiably be considered the final adoption thereof as a major principle of the active international law of the sea.

Of course, the 1982 Convention, as distinct from the 1958 Convention, does not distinguish between military and non-military ships with respect to the exercise of the right of innocent passage through the territorial sea. By virtue of the scale of military navigation and the role of naval forces within modern military strategy and tactics, such an approach is deemed to be the only realistic and reasonable one. Denial of the exercise of the right of innocent passage to military ships could most seriously aggravate, both regionally and globally, the military-political situation.

It is the military aspect, though, of the right of innocent passage that causes, and quite understandably so, the most difficulties regarding unified interpretation and application of the principle in the practice of international relations.

In accordance with Article 18 of the 1982 Convention, passage means navigation through the territorial sea for the purpose of:
a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
b) proceeding to or from internal waters or a call at such roadstead or port facility.

Obviously, the provisions of paragraph (b) of that article fully apply to non-military ships. As concerns military ships, the provisions are applicable with due consideration to special procedures established by the law of the coastal state. There is no contradiction here because a coastal state has the right to regulate the procedure of access of the military ships of foreign states to its internal waters or port facilities.

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[2]C. Hyde, *International Law and the Understanding and Treatment Thereof by the United States*, Volume 2, Moscow, 1951, p. 248.

The legislation of the USSR has corresponding provisions to this effect.

As to the interpretation of paragraph (a) of Article 18, it is obviously of a universal nature and applies equally and in full scope to both non-military and military ships. Military ships of all states without exception must enjoy the right of guaranteed, unimpeded, and non-discriminatory access to the exercise of passage through the territorial sea of a coastal state. Such a right may not be conditioned either by prior notification or, what is totally inadmissible, by an authorization by a coastal state.

We are now approaching perhaps the most important question, from the viewpoint of feasibility of the institution under consideration as a whole: whether the exercise of the right of innocent passage in accordance with Article 18 (a) is spatially unlimited or has to have some limits.

One has to state with regret that neither the 1982 Convention nor the 1958 Convention give a clear answer to this question. Also, in Soviet law there is no clear enough description of it.

While offering a wide list of the modalities of innocent passage, the 1982 Convention does not provide an exhaustive answer to the question of what is to be meant by "passage" in accordance with Article 18 (a). In my opinion, many problems could be avoided -- incidentally, those problems have already surfaced -- should the Convention contain a more explicit definition of such a passage.

It appears obvious, if not undeniable, that the notion of passage proper is predetermined by its purpose. The meaning of passage according to Article 18 (b) is to insure access of foreign commercial ships and, as necessary, military and other ships used for noncommercial purposes, into internal waters or port facilities. Everything is clear in this case. And what is the objective, the purpose of passage according to Article 18 (a)? Is it really that any incursion into and subsequent departure from a territorial sea (which formally can always be considered as traversing a territorial sea) shall fall under the category of passage? Evidently not. Otherwise, passage would turn, *de facto*, into navigation (qualified by a number of requirements) in territorial waters of a coastal state. That would distort the notion of passage.

The exercise of the right of innocent passage in accordance with Article 18 (a) should be qualified by the necessity of use by foreign ships of the shortest and the most convenient route of traversing the territorial sea of a coastal state for the purpose of proceeding to internal waters and ports of neighboring states, proceeding from them

into the high seas or from one part of the high seas to another. The institution of innocent passage was called to life by the necessity for an internationally binding guarantee of the interests of international navigation in the instances where these conflict with the interests of coastal states in the territorial waters. Limitation of sovereignty of a coastal state in favor of non-coastal ones was not necessitated simply by the need to navigate in territorial waters, but by the need to navigate for the purpose of traversing it and of passage by the shortest and the most convenient route from a given part of the world ocean to another.

It would be appropriate to recall in this connection that at the time when the question of the right of innocent passage of military ships of non-coastal states through territorial waters was argued against (most categorically both in the theory and in the practical law of the sea), many outstanding Western legal scientists were of the opinion that such a right should be recognized in the cases when "territorial waters are situated in such a way so that traversing thereof is necessary for international communication."[3] Consequently, objective determination was the most important argument in favor of the rightfulness of innocent passage through territorial waters. Taking due account of the continuing unpopularity of the very notion of innocent passage among many states, argument in its favor might be provided specifically by addressing its functional determination. Politically, it must be noted, this is a realistic and maximally sensible compromise between naval powers and coastal states.

As you certainly know, differences of interpretation of the notion of passage surfaced during two Black Sea incidents in connection with intrusion into the USSR's territorial waters in 1985 and 1988 of two U.S. warships *Caron* and *Yorktown*. In short, the essence of a conflict that led to a very dangerous aggravation of bilateral U.S.-Soviet relations was the different interpretation of the term "passage." The official U.S. view is based on a very wide, practically unlimited understanding of passage without the necessary direct and real link between practical exercise of a passage and its purpose. The Soviet position, though, is based on the existence of such a link. In other words, passage of military ships through the territorial sea of the USSR must imperatively be based on clear and obvious necessity. The

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[3]Oppenheim, quoted from I. Brownlie, *International Law*, Volume I, Moscow, 1977, p. 310; Colombos, Jidel and others shared this view for all practical purposes.

Soviet legislation (*The Law on the State Borders and The Regulations for Navigation...*) is based on this understanding of the right of innocent passage of military ships through the territorial sea. It is more than evident that by virtue of specificity of the geographical position and configuration of the seacoast of the USSR, the necessity of traversing Soviet territorial waters by military ships of foreign states for strictly navigational, communicational purposes is limited to a number of specific coastal areas. Precisely these areas are mentioned in the *Regulations for Navigation*. Let me remind you of the contents of its first paragraph:

> Article 12: There are certain corridors set for such passage in the Baltic Sea, next to the Sakhalin, and in the Sea of Japan.

Concluding my very brief presentation on the subject I would stress once more that precisely such interpretation of the right of innocent passage of military ships is the only sensible harmonization of the interests of a coastal state to ensure its own security and of the needs of military navigation. No matter what are the arguments in support of a wide interpretation of the term "passage," those would lead to substitution of the right of uncontrollable navigation in the territorial sea for the right of innocent passage of military ships through it. Innocent passage of military ships through territorial waters should be exercised there, then and in so far as where, when, and so far as recognized international sea lanes of communications traverse them.

# CONTEMPORARY PROBLEMS OF THE SUPPRESSION OF PIRACY AT SEA

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Piracy appeared in ancient times in the form of acts of violence against merchant vessels on the high seas committed by private or government vessels or ships. Usually piracy expressed itself in the detention, seizure, or depredation of merchant and other civil vessels. On the whole, piracy is directed against the major attribute of the high seas, the freedom of navigation.

From ancient times piracy was regarded as an international offense and all pirates were considered "the enemies of the human race" (*hostis humani generis*)[1].

The first English law that warranted the right to prosecute piracy was the Admiralty Law on Jurisdiction of 1391.[2]

The English scholar Jenkins wrote as far back as 1668 that all pirates and sea-robbers are outlaws for all peoples, i.e., they are not subject to the protection of governors and laws. All must be competent and armed to fight against them as insurgents and traitors in order to suppress and eradicate them.[3]

However, the attempts to eradicate piracy during the whole of human history, including its contemporary stage, in spite of desperate struggles, failed. In the Middle Ages piracy grew to such a threatening scale that many states, cities, and ports had to pay annual tribute to pirates.

Pirates seized vast territories, established their republics there, issued laws, tried to alter the existing public relations. It is known, for example, that in the late seventeenth century pirates seized the

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[1]"Piracy" comes from the Greek word *peirates* which means a robber, a brigand, the one who robs at sea.

[2]A. L. Kolodkin, *The World Ocean*. Moscow: Mezhdunarodnye Otnoshenija Publishers, 1973, p. 83.

[3]A. Colombos. *International Law of the Sea*. Translated from English. Moscow: Progress, 1975, p. 386.

northern part of Madagascar and under the leadership of the Frenchman Misson and Italian utopian philosopher Caraccioli established there their republic, which was named Libertalia.[4] The republic was governed by an elective council, did not recognize private ownership, had a common treasury, and maintained a mighty fleet that collected tribute and robbed merchant vessels.

The European states often resorted to the assistance of pirates in their struggle against enemies. In wartime they issued certificates for privateering aimed at the seizure and destruction of vessels, etc.

The British crown, for example, in the sixteenth century not only patronized pirates who helped it in its struggle for the Spanish colonies, but also elevated to the title of knight such notorious pirates as F. Drake, D. Hawkins, and D. Clifford. Moreover, in 1577-1580 F. Drake aboard the ship *Golden Hind* made the second round-the-world voyage in history and Drake Passage is named after him.

In many regions of the world ocean pirates terrorized the maritime trade up to the middle of the nineteenth century. It is not by chance that such cities and states as the Kingdom of both Sicilies, Toscana, Portugal, Denmark, Sweden, Hanover, and Bremen up to the early nineteenth century paid tribute to pirates on the condition that the pirates would not attack their vessels.[5]

Great economic damage to the sea trade caused by piracy made maritime powers adopt a number of international agreements on suppressing piracy. First and foremost, these are the 1823 Monroe Doctrine and the 1856 Declaration of Paris on War at Sea, which adopted a decision on the unlawfulness of privateering.

The organized struggle against piracy on the part of the navies of large maritime powers resulted in its substantial reduction in many areas of the seas and oceans by the early twentieth century.

At the same time, the emergence of new technical means and fast motorboats and ships resulted in the modification of piracy into new forms of activity. There emerged various kinds of maritime terrorism, hijacking, and even radio piracy. All this resulted in the need to elaborate precise international regulations and rules on the suppression of contemporary piracy.

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[4] From the Italian word "liberta" -- freedom.

[5] Makovsky, *The History of Maritime Piracy*. Moscow: Nauka, 1972 (transl. from Polish); Maritime Encyclopaedic Reference-Book Leningrad: Sudostrojenije, 1986, p. 80-81.

Such rules were elaborated at the First UN Geneva Conference on the Law of the Sea and also at the Third UN Conference on the Law of the Sea.

The 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea adopted by these Conferences appeal to all states to cooperate to a maximum degree in suppressing piracy on the high seas or in any other place outside the jurisdiction of any state.

For the first time the Conventions define piracy as any illegal act of violence, detention, or depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed on the high seas against another ship or aircraft or against persons or property on board such ship or aircraft.

Piratical acts are also any acts of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.[6] Any act of inciting or of intentionally facilitating any act of piracy is also regarded as piracy.

Article 105 of the 1982 Convention on the Law of the Sea provides that on the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, arrest the persons, and seize the property on board. The courts of the state that carried out the seizure decide upon the penalties to be imposed on the persons involved in piracy.

An important provision of the Convention establishes that a seizure on account of piracy may also be carried out by warships or military aircraft. Other ships or aircraft clearly marked and identifiable as being on government service and duly authorized may be used for repressing piracy.

Analysis of the provisions of the 1982 UN Convention on the Law of the Sea shows that warships and military aircraft may seize pirate vessels in any area of the world ocean beyond the limits of the territorial sea of the coastal state. This follows from para. 2, Art. 58 according to which Articles 88 to 115 pertinent to the regime of the high seas apply to the exclusive economic zone insofar as they are not incompatible with the part of the Convention determining the regime of the exclusive economic zone beyond the limits of the territorial sea. Therefore, Articles 100 to 107 of the 1982 UN Convention on the Law of the Sea, regulating the cooperation between states in suppressing

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[6] For more details see: Tsarev, V.F., Korolyova, N.D., *The International Legal Regime of Navigation in the High Seas*. Moscow: Transport, 1988. p. 48-49 (in Russian).

piracy, are entirely applicable to the area of the 200-mile exclusive economic zone which is beyond the limits of the territorial sea.

Unfortunately, the 1982 Convention did not deal with one of the most complicated problems of contemporary international maritime piracy, the problem of the unlawfulness of state piracy.

According to Professor S.V. Molodtsov, the First UN Convention on the Law of the Sea paid "too much attention to the elaboration of rules on repressing piracy on the part of private vessels and nothing has been done with regard to dangerous acts of violence on the high seas committed against innocent navigation by warships and military aircraft which, as is known, are all without exception in the government service."[7]

Meanwhile, international law has never recognized the lawfulness of any government-sanctioned acts of piracy or attacks on commercial vessels in peacetime.

C. Hyde, well-known American specialist in international law, in his six-volume monograph on international law paid special attention to the problem of state piracy. He is of the opinion that "government sanctions for the commitment of acts of piracy should not exonerate pirates from the liability for their illegal, in terms of international law, acts."[8]

The issue of state piracy was also discussed at the 1922 Washington Conference on Disarmament in connection with the actions of German submarines during World War I. The resolution adopted by the Conference noted that any person who violates the rules of international law, even if this person acts on the order of the higher authorities, may be prosecuted in the courts of any state for acts of piracy.

A most important international act directed against state piracy was the 1937 Nyon Agreement on the measures for repressing pirate submarines in the Mediterranean. This Agreement was signed in September 1937 in Nyon, Switzerland, by the representatives of the USSR, Great Britain, France, Turkey, Yugoslavia, Rumania, Bulgaria, and Egypt in view of the need to protect, with the naval forces of the

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[7] S.V. Molodtsov, *International Law of the Sea.* Moscow, 1987. p. 99 (in Russian).

[8] C. Hyde. *International Law, Its Understanding and Application by the United States of America.* Volume 3. Moscow, 1953. p. 68-69 (in Russian).

states parties, merchant vessels from the attacks of fascist submarines. The British and the French navies had to ensure the safety of navigation in the Mediterranean from Gibraltar to the Dardanelles. The implementation of this Agreement resulted in the cessation of submarine attacks against both Soviet ships and ships of other countries.

It was noted at the Mediterranean Conference in Nyon that all such acts should be justly considered as acts of piracy. M.M. Litvinov, People's Commissar for Foreign Affairs of the USSR, stated: "We deal with typical state piracy."[9]

Unfortunately, the experience of 1937, when naval forces were used for suppressing piracy on the part of submarines, was not taken into account at the height of the piratical acts of the Kuomintang fleet, and although the vessels of many countries were bombarded and seized, no united efforts on the part of such countries were undertaken.

It is well known that the numerous acts of state piracy committed by the Kuomintang warships during 1953-1955 against Soviet, Polish, Danish, and British vessels, as well as against the vessels of other countries, were a flagrant defiance of international law, a violation of the generally accepted principles of the freedoms of the high seas and of the Charter of the United Nations.

Well-known Soviet scholars S.V. Molodtsov, A.L. Kolodkin, G.G. Ivanov, and M.I. Lazarev continue to hold the opinion that it is necessary to formulate rules condemning and prohibiting any forms of state piracy.

At present the situation on the seas and oceans and ensurance of the safety of navigation are complicated by the fact that side by side with piracy, the attacks against oil wells and their depredation and even the attempts to seize warships on the part of large terroristic organizations are widespread.[10]

The International Maritime Organization (IMO), acutely facing the above problems, had to instruct an ad hoc group to carry out a comprehensive examination of ways and means for the prevention and

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[9] *Foreign Policy of the USSR*. Volume IV. Moscow, 1946. p. 297 (in Russian).

[10] S. Gurchenko. "Attention: Pirates." *Krasnaya Zvezda*, 22 October 1988.

suppression of the acts of barratry[11], illegal seizure of vessels and their cargo, and other forms of maritime piracy and fraud.

The twelfth session of the IMO Assembly which was held in November, 1981, adopted the resolution A-504 (XII) on barratry, illegal seizure of ships and their cargo, and other forms of maritime fraud. The resolution calls upon all states to take all possible measures for the expansion of cooperation between states and related intergovernmental organizations with the purpose of implementing the agreed measures on the suppression of piracy.

An appeal to intensify the suppression of piracy and to take more effective measures towards its eradication is also contained in the IMCO resolution adopted at the thirteenth session of this organization.[12] Resolutions and appeals were adopted but piracy did not cease. In the 1980s the greatest number of attacks against commercial vessels fell on Western Africa and the approaches to the Straits of Singapore and Malacca. The situation was especially grave in the waters and ports of Nigeria where the authorities had to establish a special anti-piracy committee, organize joint patrolling by the forces of the fleets, police, and customs at the approaches to the ports.[13] However, in a number of cases the detached ships cannot get the upper hand over the speedy pirate motorboats which usually attack their victims at night. Many captains raise the question of providing their vessels with fire-arms.

Soviet commercial vessels many times have undergone pirate attacks, especially on the approaches to Singapore. For example, in March, 1986, in the Strait of Malacca pirates secretly climbed the deck of the motorship *Vystokogorsk* and robbed the captain's cabin. Similar attacks were made in the Strait of Singapore against the motorships *Jeanne Labourbe* (June, 1987) and *Painter Romash* (July, 1987).[14] Similar cases took place in 1988.

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[11] Barratry: premeditated actions of the captain or the crew causing damage to the vessel or its cargo.

[12] Resolution A. 545 (13) 17 November 1983. A. 13/RES 545 29 February 1984.

[13] *Pravda*, 2 February 1986 (in Russian).

[14] *Krasnaya Zvezda*, 22 November 1988.

Often pirates attack fishing boats. In this connection the Soviet Union has to send its warships to the areas of fisheries. But no country can afford to convoy all its vessels by warships.

The only way out for the present are recommendations for the crew: firstly, to traverse in the daytime the areas where piracy is expected and, if possible, in groups of vessels; secondly, to reinforce the night watch, patrolling on board, to illuminate the surroundings with searchlights, to notify the shore authorities with signal rockets, etc.; thirdly, to have ready at hand powerful firehoses and by means of water spurts to prevent pirates from boarding the vessel, etc. Evidently, such measures are ineffective in fighting armed pirates.

Maritime terrorism is a no less formidable phenomenon for navigation and the safety of passengers. It has included the demolition of the Greek ship *Sanja* with 250 passengers on board in the port of Beirut in March, 1973, and the attack of terrorists in a Puerto Rican port in 1975 against the Soviet passenger liner *Maxim Gorky*. In 1978 in the port of New London, Connecticut, terrorists attempted to seize the American submarine *Trepang* equipped with ballistic missiles with nuclear warheads.[15] In 1985 the Italian vessel *Achille Lauro* was seized by terrorists off the Egyptian coast. The seizure was accompanied by the death of passengers.

Such cases, as well as the increase in hijacking, resulted in the need to formulate concrete conventional rules and to adopt a number of resolutions within the UN and IMO. The United Nations General Assembly in its resolution 40/61 of 9 December 1985 invited all states to promote the removal of the causes underlying international terrorism.

The efforts of the UN and IMO with regard to the suppression of maritime terrorism resulted in the formulation and adoption in Rome on 10 March 1988 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

The international diplomatic conference was held in Rome from 1 to 10 March 1988. Seventy-six states, including the USSR, participated in the Conference.

The Convention adopted by the Conference expresses deep concern "about the worldwide escalation of acts of terrorism in all its forms, which endanger or take innocent lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings."

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[15] *Krasnaya Zvezda*, 22 November 1988.

Article 3 gives a detailed list of acts committed by any person which are regarded as offenses. The list comprises seizure of a ship, acts of violence against persons on board a ship, destroyal of ships or causing damage to a ship or to its cargo, commitment of acts aimed at placing on a ship devices which may destroy that ship, etc.

The Convention does not determine the measures to be taken with regard to the offenders; it grants this right to its contracting parties. According to Article 5, "each State Party shall make the offenses set forth in Article 3 punishable by the appropriate penalties which take into account the grave nature of those offenses."

The Convention is open for signature from 14 March 1988 to 9 March 1989 at the Headquarters of the Organization.

The Conference also adopted the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.[16]

It may be expected that the entry into force of the Convention and the Protocol thereto will result in the enforcement of the suppression of maritime terrorism and piracy.

In this regard joint efforts of all states are needed and, first and foremost, within the framework of the United Nations and IMO. The leading role could be played by the UN naval forces. A proposal on the establishment of such forces was many times put forward by the Soviet Union and supported by a number of other states-members of the United Nations Organization.

Practice shows that without the joint and resolute efforts of all states and international organizations it is practically impossible to eradicate such acts of vandalism as piracy and maritime terrorism.

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[16] See A. L. Kolodkin. "On the Results of the International Diplomatic Conference on the Suppression of Terrorism at Sea. Rome, March 1988." *Morskoi Transport*, Issue 5 (89). p. 2-5.

## COMMENTARY

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I would like to share my impressions concerning today's discussions, which, it seems to me, have been conducted with a creative, consultative approach.

Firstly, Professor Oxman touched upon the assumption according to which the traditional law of the sea combines the balance of interests of coastal and all other states. Indeed, such an approach is fair with regard to both traditional law and to the 1982 Convention. This is why I would like to agree with Professor Oxman subject to one condition. Let us broaden our approach and recognize that the entire contemporary law of the sea is based on the balance of interests of the coastal states and the international community as a whole. In terms of this broader approach, the concern expressed here by Mr. Djalal is reduced, because during the Third UN Conference on the Law of the Sea there were bilateral consultations between the major groups of states, and all these consultations were permeated by the understanding that the 1982 Convention must reflect an agreed combination of interests of separate states, separate kinds of states (archipelagic states, coastal states), and the entire community as a whole.

In this connection, today's Soviet-U.S. Symposium is also a bilateral consultation between scholars with the participation of practical specialists who express concern about the future of the 1982 Convention and, therefore, it is another step to make the elementary legal order stipulated by the Convention not only operative but also one that all states can comply with. The Soviet-U.S. Symposium, as well as the meetings of Europeans and Asians in Thailand conducted by Mr. Djalal -- all these are elements of global cooperation with the view of solving global problems. This is why all these joint efforts aimed at constructive cooperation in the field of settling global problems should not cause concern among the participants of the seminar.

I would also like to draw the specialists on the law of the sea away from the narrow approach that the principle of the freedom of the high seas is but a principle of the law of the sea. Let us recollect the process of this principle's emergence. Hugo Grotius advanced it not as a principle of the law of the sea, which practically did not exist then. He advanced it as a principle to confront the patrimonial approaches

of the feudal states which assumed that there was sovereignty on sea as well as land. According to Brownlie and Hyde, in those centuries Europe claimed all seas surrounding it. In the light of this claim, it is clear that the freedom of the high seas was advanced as a basic principle for the cooperation of the entire international community, side by side with the principle of sovereignty on land. And in this way their development continued. This is why both sovereignty and the freedom of the high seas are basic principles of international cooperation and international relations. It was only later that the principle of the freedom of the high seas became a keystone in the establishment of rules which were subsequently amalgamated under the title of the law of the sea. If we consider the major principles of the international law of the sea as proceeding from this fact, it will be easier for us to solve problems and remove bilateral and regional concerns. Let bilateral, tripartite, regional seminars convene more often. The main thing is that they reflect the interests of the entire international community.

Secondly, many speakers have expressed today their concern to have our Convention ratified at the earliest possible date. This thread ran through all speeches, beginning with the communication of Professor Clingan, who emphasized that ratification is of essential importance for the legal order in the world ocean. He stated his opinion on what could be done to this effect, and this idea was developed in the speeches of Professor Oxman and Dr. Kotlyar, who spoke on how we can achieve such understanding, especially concerning Part XI, which would enable us to have the Convention ratified at the earliest date by all major groups of states, i.e., by the entire international community. It seems to me that this idea, this concern can only be actively supported.

The arguments for implementing or amending the Convention are most deeply felt by the developing countries. They and their representatives in Prepcom understand perfectly well that their expectations for raising their standard of living through exploitation of sea-bed resources are delayed by the unfavorable market rather than by the positions of states. At present, sea-bed mining of non-ferrous metals is not cost-effective because the market is satisfied for the time being by the major suppliers of such metals. Furthermore, there is a tendency now to substitute plastics for metals. Therefore, this concern which underlies the adaptation of Part XI to the requirements of the Third World is related to the ratification of this document by the United States, the West European countries, the Soviet Union, and other socialist countries. Such concern can only be

welcomed. It is too early to decide what forms of cooperation, what kind of adaptation can be used; this is for the future to decide.

But the exchange of views that has begun here must be continued. This symposium is the first step by Soviet and U.S. scholars, taking into account the opinions of scholars and diplomats of the developing countries. This is what we shall have in the future when the discussions will be transferred to a diplomatic level, and meanwhile scientists can promote this process, consider and discuss various variants without imposing either forms or methods for official negotations, express their opinions, and elucidate points in those deadlocks that are sometimes reached by diplomats.

Let me mention still another thing. The approach to the question of whether the provisions of the 1982 UN Convention on the Law of the Sea can be assessed from the viewpoint of customary law has been challenged here. The Institute of State and Law of the USSR Academy of Sciences has already issued three books with the participation of the scholars of the socialist countries who are devoted to the legal order of the world ocean. A very small section of the first book reads that although the ratification of the Convention by all states is being delayed, its "package" provisions agreed at the level of the international community by consensus have already been applied. Is this really bad? People living in non-coastal states and having no geographical economic zone are concerned with "creeping jurisdiction" in such zone. But if the major conceptual idea of the economic zone becomes customary law before the ratification of the Convention, it will be a barrier to "creeping jurisdiction." And if the provisions agreed upon and adopted by coastal, strait, and archipelagic states become customary law, that would be excellent, that would be a guarantee against what was mentioned here with regard to innocent passage of warships.

Let us examine the question of the customary application of the 1982 Convention provisions in terms of the future. The Convention will hardly be ratified by all states. I cannot recollect such an ideal situation. Even the Vienna Convention on Diplomatic Relations, which is acceptable to all, is not ratified by all existing states. However, its provisions are compulsory for all, thanks to the customary legal operation of the Convention. This is an axiom of the Law of Treaties and of common international law. And I cannot understand the concern expressed here today that the 1982 Convention will be allegedly weakened if its rules are recognized as common; according to certain opinions, they should be recognized only as conventional. But we are referring to the post-ratification period. There is no undermining of the Convention.

I quite agree with Thomas Clingan: universal practice plus *opinio juris* are the two elements which, according to the Statute of the International Court of Justice, are needed to regard certain rules as customary. But today Thomas Clingan, as well as certain lawyers in Soviet publications, note that time is also required for the recognition of customary law. But how much time is needed: two, three, five years? And why not seven? The time factor does not exist. This is confirmed both by the history of international law and by the Statute of the International Court of Justice. What is needed? You are quite right to say: general practice and the acknowledgement of a rule as legal, compulsory, i.e., *opinio juris*. This is all. And this may take three years, or ten years. The time factor accrues just from life. Allow me to emphasize that Thomas Clingan is right when he says that the concept of jurisdictional rights of the coastal state over the economic zone is already a customary legal moment in our contemporary international law which is bound to go on existing.

As far as details are concerned, I agree here with Bernard Oxman. Practice shows that there is a tendency toward "creeping jurisdiction," and Dr. Kotlyar was right in saying that national legislation of certain countries disregards conventional provisions concerning the economic zone. This is why ratification is needed as a legal barrier. The appetite should be decreased. Professor Oxman was right to say that the whole history of the law of the sea is the urge of the coastal states to extend their sovereignty or jurisdiction to parts of the high seas. By the way, the United States has played its role here. President Truman cleared the way to claims by coastal states to the continental shelf. And then we had to consider 200-mile territorial waters and a fishery (economic) zone at the Conference.

I am glad to hear today that the United States is going to recognize a twelve-mile zone in the near future, and I hope that the United States will recognize another important point on innocent passage which was dealt with in the speeches of Professor Kolodkin and Dr. Saguiryan. Professor Kolodkin and Professor Oxman dealt with the list of actions prohibited during innocent passage. Professor Oxman said that this list was not exhaustive. I fully agree. But there is another thing that we should agree upon in our interpretations. The Convention deals with *passage*, and when the provisions on passage were extended to straits and archipelagic waters, the word *transit* was added. Either you follow the traditionally established sea lanes from one country to another, leaving aside or traversing the territorial waters of a certain state, or you, in transit, traverse the territorial waters of some state to a port within this state. But if your purpose is

to enter the territorial waters, to stay there for some time and then leave them, then it is not a transit, it is not a passage. Unfortunately, the Convention does not clearly specify this. But what is the essence, the meaning of the provisions on innocent passage, on passage through straits which directly includes the word "transit" as an adjective? How was the compromise on transit passage achieved? You are supposed to remember this because we worked together on it in the Second Committee. We applied all points of innocent passage to straits, meaning not the freedom of navigation but an unhindered passage. So, I am sorry, but you scientists of the United States of America cannot argue that the 1982 Convention deals only with transit passage through the territorial sea.

To sum up, I'd like to say that I am greatly impressed by today's discussions.

## COMMENTARY

V. Guralchic
Poland

Thank you, comrade chairman. Comrade chairman, ladies and gentlemen, first of all, I would like to thank the Soviet Maritime Law Association and you, Mr. Kolodkin, for the invitation to participate in this Soviet-U.S. symposium. This is a great honor for me to be able to participate in this meeting. I did not intend to take the floor; I came to Moscow to follow your deliberations, to learn but not to speak. However, the reports represented yesterday were so inspiring that I dare to make certain short comments. Generally speaking, I agree with the ideas developed by the speakers. I would like to make only short observations along the lines of their reasoning.

Professor Clingan at the beginning of his report raised the question of the state of international law in relation to the Convention on the Law of the Sea. That means, what is the status of different provisions of the Convention before its entry into force? Which are declaratory of customary rules and which are the new treaty rules? That problem was also taken up in the discussion. Sometimes it is difficult to ascertain the exact status of certain provisions. Such difficulties arise, for instance, with respect to the rights of transit passage through international straits and to archipelagic sealanes passage. Of course, the entry into force of the Convention would facilitate the solution of those problems. However, not entirely.

Certain states may not become parties to the Convention. For instance, Turkey and Venezuela are among the nonsignatories of the Convention, and in such a situation, the problem remains. One may say even more. The entry into force of the Convention does not mean that customary rules codified in the Convention cease to be binding upon states in a situation in which for one reason or another the conventional rules are not applied. In other words, it always would be important to verify which provisions included in the Convention constitute the reflection of customary rules and thus are obligatory *ergo omnes*.

Saying that, I have no intention to minimize the role of the Convention in the clarification of many controversial issues of the law of the sea and of its role in the strengthening of rule of law on the seas and oceans. The Convention may also play another role even before its entry into force. It may influence state practice, it may contribute to the uniformity of that practice, and thus it may contribute to the

formation of new customary rules. In many internal acts adopted in recent years, we may observe that states followed the provisions of the Convention and sometimes even included them verbatim in those acts. I may say that in Poland we are working now on the new law on the Polish coastal areas which would consolidate three acts now in force, namely, the law on the territorial sea, on the fishing zone, and on the continental shelf. The working assumption in that work has been to draft a law in strict conformity with the relevant provisions of the Convention on the Law of the Sea.

Professor Clingan also raised in his report another very important issue, namely, the issue of how to stabilize the international law of the sea in the future. He rightly pointed out that the best way to achieve that aim would be by ratification and entry into force of the Convention on the Law of the Sea. However, I share his opinion, as I understood it, that it is necessary to have ratifications by all groups of states and by all states playing important roles in international relations, including of course, both the United States and the Soviet Union. I agree with him that the first step should be the revival of political will to ratify the Convention. And the second, to find an appropriate forum for dialogue, consultation, and negotiations leading to the resolution of certain problems connected with Part XI of the Convention.

Yesterday, Minister Djalal made an appeal to big powers and other industrialized states to ratify the Convention. I have great sympathy for that appeal. However, I doubt whether any appeal made by the Group of 77 would induce the United States to ratify the Convention. And without the participation of the United States, the Convention would not stabilize the law of the sea and would not guarantee the proper implementation of the principle that the International Sea-bed Area and its resources constitute the common heritage of mankind.

What we really need is the Convention universally agreed upon and universally implemented. How to achieve that aim? In this respect, I would like to associate myself with the ideas presented yesterday by Dr. Kotlyar. It seems to me that certain new understanding concerning Part XI of the Convention and Annexes to that part is necessary. Its legal form may be discussed, but the need for such a new understanding, in my opinion, is obvious. It seems to me that the Preparatory Commission, at least at a certain stage, could constitute a proper forum for consultation and negotiations. It is true that the Preparatory Commission has no power to modify the Convention. But it may formulate proposals, and states proceeding from the basis of consensus may modify any international document.

And now I would like to add one observation to the report of Professor Oxman. He stressed the importance of the compulsory dispute settlement system, entailing binding third party decisions. That means, in principle, arbitration or adjudication. He connected his observations with the freedom of navigation in the exclusive economic zone and the necessity to secure the proper balance between the interests of coastal states and maritime interests. I agree with Professor Oxman. I remember that twenty or thirty years ago, the Soviet Union and other socialist states, including Poland, in principle were against any compulsory system of settlement of disputes, arguing that it would constitute a limitation of their sovereignty. However, that position step by step became less rigid, and finally was changed. Unfortunately, the evolution in the position of the United States has developed in the opposite direction. The United States withdrew its acceptance of the jurisdiction of the International Court of Justice and challenged its jurisdiction in the dispute with Nicaragua. Let us hope that the present position of socialist states will remain unchanged and that the United States will have no objections to the provisions of the Convention on the Law of the Sea dealing with settlement of disputes.

Finally, I would like to say that I was very impressed by the words of Professor Kolodkin on the strengthening of the role of international law in international maritime relations. I share his opinion that every state has an obligation to harmonize its internal law with its obligations under international law, and that treaty obligations should prevail over internal law. At this juncture, I would like once more to refer to the drafting of the new Polish law concerning coastal areas. To secure the conformity of that law with treaty obligations, a general clause was included in the draft stating that when a provision of the law is not in conformity with a treaty to which Poland is a party, treaty provisions should prevail and should be applied. Thank you very much, Mr. Chairman.

# MILITARY EXCLUSION AND WARNING ZONES ON THE HIGH SEAS

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## Introduction

It has been almost axiomatic since the days of Grotius that navigation and fishing on the high seas should be free and unimpeded.[1] Nonetheless, several major maritime nations have claimed the right to declare exclusionary or warning zones on the high seas in recent years to serve their military purposes.[2] This paper examines these claims and then analyzes their legitimacy in light of the norms that now

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1*See* H. Grotius, *Mare Liberum* (Magoffin trans. 1916); R.P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (1983); United Nations Convention on the Law of the Sea, art. 87(1)(a), *done* Dec. 10, 1982, Montego Bay, U.N. Sales No. E.83.V.5 (1983), reprinted in 21 I.L.M. 1261 (1982) (hereinafter cited as LOS Convention). *See infra* notes 64-77 and accompanying text.

2*See infra* notes 3-63 and accompanying text.

govern the high seas, which have developed from treaties, the practices of nations, and the views of modern jurists on this topic. The conclusion reached is that claims to exclude or limit free navigation can be sustained only if they have no appreciable effect on navigation and no significant effect on the environment or resources of the region. Furthermore, a vessel entering such a zone could not be forcibly removed from the area except by the nation whose flag it flies. If a vessel operating with the support of its flag government is damaged by the military activities of another nation, its owner would be entitled to compensation from the nation causing the damage.

*The Soviet Missile Tests*

The Soviet Union's first announced broad ocean area missile tests were between January 15 and February 15, 1960.[3] These missiles were launched from the east-central Soviet mainland into a broad area of the central Pacific Ocean (see map 1). The Soviet Union requested other countries to avoid an area of the high seas of approximately 100,000 square miles for a period of one month.[4]

The Soviet Union has three land-based launch sites for testing their intercontinental ballistic missiles (ICBMs), along with a fleet of sub-

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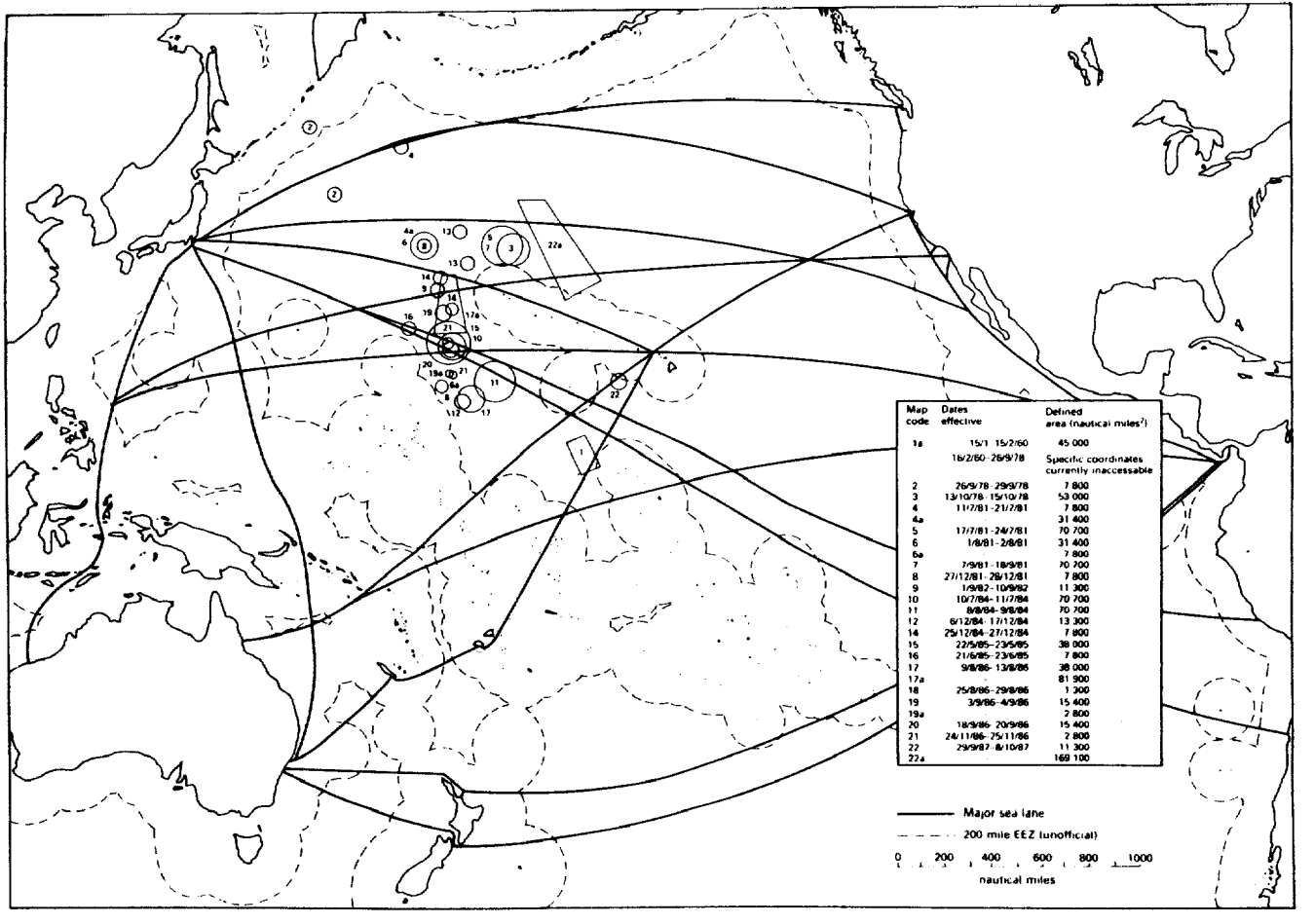
[3]*N.Y. Times*, Jan. 8, 1960, at 1, col. 5. By this date, the United States had already launched 15 Atlas intercontinental ballistic missiles (ICBMs) from Cape Canaveral, Florida, to broad ocean areas in the Atlantic. *Id.* at 1, col. 6.

[4]The Tass announcement referring to the exclusion read as:

> To insure the safety of navigation and air traffic during the launching of rockets into the Central Pacific, Tass is authorized to announce that the Government of the Soviet Union asks the governments of the nations whose ships or aircraft may find themselves during this period in the vicinity of the area where the rockets might fall to see that the authorities concerned instruct the ships masters and aircraft captains to refrain from entering the aquatorium (water) area and airspace of the Pacific defined by the above mentioned coordinates.

*Id.* at 2, col. 3.




**Map 1:** Soviet Union missile impact warning zones. Prepared by Thomas Feeney. Source: FBIS, 1978-87.

marines for testing sea-launched ballistic missiles (SLBMs) and sea-launched cruise missiles (SLCMs).[5] The usual impact area for the land-based launch sites is just east of the Kamchatka Peninsula (see map 1). The Soviets also, but less frequently, utilize broad ocean areas in the central Pacific Ocean as impact zones. These large impact areas are almost exclusively west of the International Date Line (180 degrees longitude) and north of the equator (see map 1). Between May 1985 and November 1987, for instance, the Soviets launched 14 ballistic missiles in the central Pacific Ocean, warning ships and aircraft to avoid areas as large as 200,000 square nautical miles. (The United States launched 40 such missiles in the same time period to areas of the Pacific.)[6]

The Soviets have an extensive arsenal of long-range missiles,[7] and have been regularly developing larger, faster, and more accurate missiles in competition with similar U.S. initiatives. The research and development phase of most missile systems usually includes about 20 to 30 test flights of each new system.[8] Most missiles tested are,

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[5]The Soviets currently operate 62 ballistic-missile-capable submarines, which is the limit set by the 1972 ABM Treaty. U.S. Department of Defense, *Soviet Military Power - 1987* at 62 (1987).

[6]Telephone interview with the spokesperson of the CINCPAC Public Affairs Office, Honolulu, Hawaii (July 1, 1988).

[7]*See, e.g.*, 1986 *SIPRI Yearbook* 52.

[8]Tsipis, "The Operational Characteristics of Ballistic Missiles," 1986 *SIPRI Yearbook* 404.

however, from the store of existing systems,[9] or in some cases, from the phasing out of old ones.[10]

Before each test the Soviet Union announces its intention to test in broad ocean areas and issues a statement, usually through its news agency TASS, asking other nations to alert their respective mariners and pilots of the need to keep the area clear.[11] Afterwards, notices to mariners (HYDROPACs)[12] and pilots (NOTAMs) are issued by the U.S. government, warning those concerned to take appropriate precautions. Although formal protests concerning the Soviet claims to use areas of the high seas for missile testing purposes have been limited, these claims have caused increasing concern. After the Soviet Union's first missile test in the Pacific, portions of the American public called for President Eisenhower to issue a protest on grounds that the tests violated international law. President Eisenhower responded that such tests are not against international law and that it

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[9]"Despite extensive subsystem tests, continued full-system flight testing remains necessary throughout the life cycle of an ICBM, to monitor any changes in the accuracy or reliability of the full system that may result from prolonged operation and storage and to maintain confidence in initial estimates of system accuracy and reliability. The U.S.A. typically conducts 5-10 such tests of a given type of ICBM each year. The USSR conducts a substantially larger number of total operational tests." *Id.* at 404-05.

[10]In 1974, when SS-11 silos were to be rebuilt to hold the first SS-19s, the Soviet Union conducted more than 70 test flights as operational 'disposals' of the SS-11s. *Id.* at 407.

[11]See *supra* note 4 and accompanying text. In the early 1980s, the United States and the Soviet Union entered into an agreement requiring each nation to notify the other not less than 24 hours in advance of any missile test launching.

[12]HYDROPACs cover the Pacific Ocean, and the U.S. testing in the Atlantic and Indian Oceans is announced via HYDROPLANTs. Defense Mapping Agency Hydrographic/Topographic Center, *Notice to Mariners* (1988).

would be inappropriate to issue a protest because the United States utilizes the oceans for exactly the same purpose.[13]

In October 1987, however, the Soviets' missile tests that came within 500 miles of Oahu, Hawaii, and were planned to land on either side of the island chain (a standard method of targeting), drew a formal protest from the U.S. Government.[14] In August 1989, the Soviet Union again announced that it would be launching missiles to a target area 1,200 miles south of Hawaii, to a location Hawaii's Governor John Waihee called "dangerously close" to Hawaii, which "could prove disruptive to our fishing industry and maritime commerce."[15] The U.S. State Department issued a formal diplomatic note protesting these tests on August 8. The Soviet Union responded by stating that these tests would not fly over any land territory and would involve only international waters and airspace. The United States then issued a second diplomatic protest stating that the U.S. concern was not "solely a legal issue" but one "involving political and safety considerations."[16] Because the Soviet Union does not have access to islands in the central or southern portion of the Pacific Ocean, its use of broad ocean areas may increase, especially as the range of their missiles increases.

***The U.S. Missile Tests***

The United States announced its first missile test on July 8, 1950.[17] These missiles were launched to a point near the Bahama Islands from

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[13]*N.Y. Times*, Jan. 8, 1960, at 1.

[14]Honolulu Star Bull. & Advertiser, Nov. 1, 1987, at 1, col. 2.

[15]Stu Glauberman, "Waihee Protests Soviet Tests," *Honolulu Advertiser*, Aug. 11, 1989, at A-1, col. 2; Rod Ohira and Helen Altonn, "Hawaii Protests Soviet Test," *Honolulu Star-Bulletin*, Aug. 11, 1989, at A-1, col. 2 and A-8, col. 3.

[16]Stu Glauberman, "Soviet Missile Tests Provoke U.S. Protest," *Honolulu Advertiser*, Aug. 12, 1989, at A-1, col. 2 and A-4, col. 3; "Soviets Halt Isle Missile Tests," *Honolulu Advertiser*, Aug. 16, 1989, at A-3, col. 4 (quoting State Department spokesperson Richard Boucher).

[17]*N.Y. Times*, July 8, 1950, at 27, col. 5.

Cape Canaveral, Florida.[18] In 1959, launchings to Kwajalein Atoll in the Marshall Islands in the mid-Pacific began from the Vandenberg Air Force and Point Mugu Naval Bases in California.[19] Each test was preceded by public notices requesting mariners and pilots to avoid designated areas for a period of time.[20] Some areas, like the 200-nautical-mile zone around Kwajalein Atoll, are considered permanent warning areas in effect 24 hours a day, 365 days of the year.[21]

Currently, Cape Canaveral has launchings to Ascension Island and beyond into broad areas of the Indian Ocean. The California bases (mostly Vandenberg) continue to launch into Kwajalein and also into broad ocean areas further south into the Pacific (see map 2). In addition, the U.S. fleet of missile-capable submarines has test launchings usually from international waters adjacent to either the California

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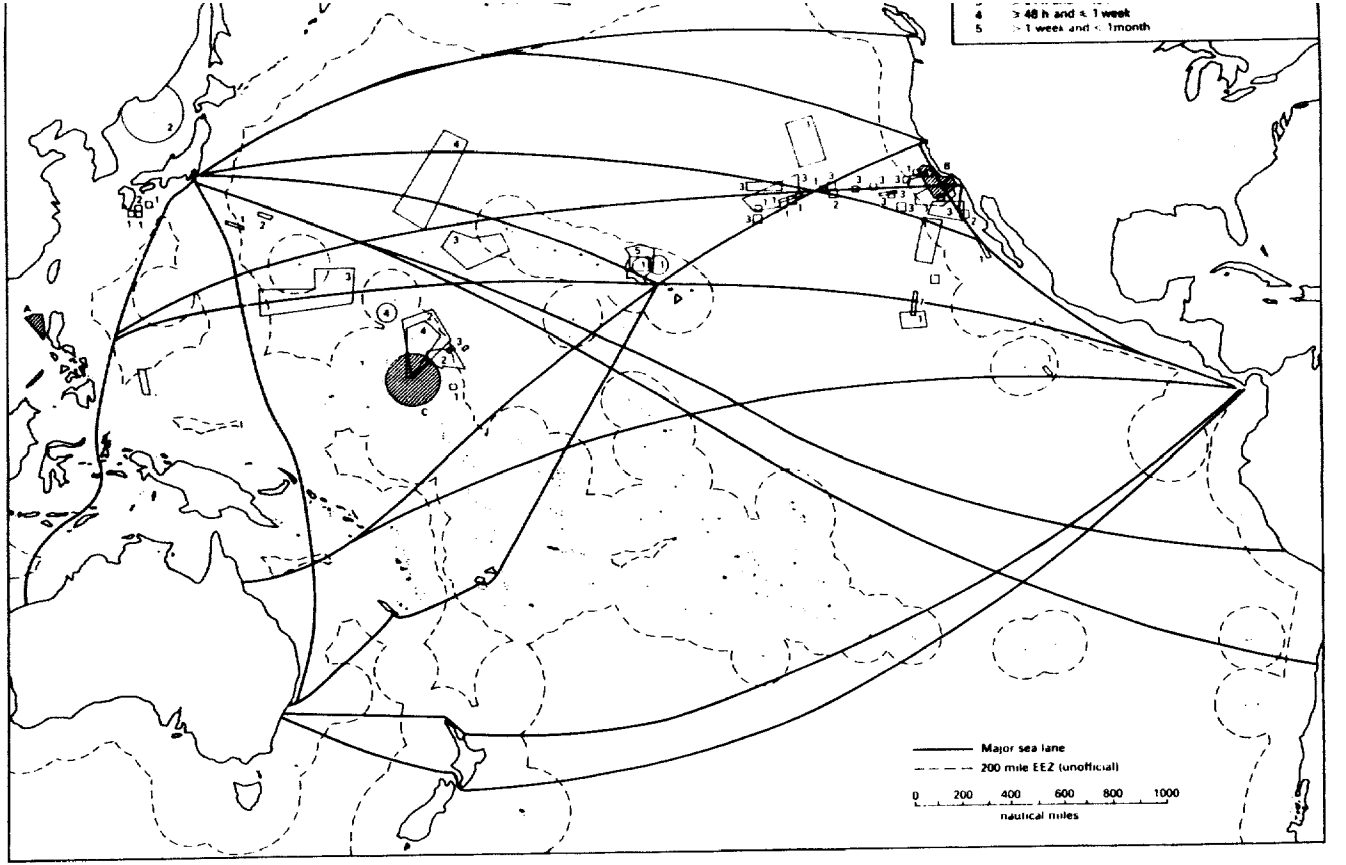
[18]The impact area was utilized through a treaty with Britain in 1950. "This agreement established a flight testing area, referred to as 'The Bahamas Long Range Proving Ground', extending approximately 675 miles from the launching site located at Cape Canaveral, Florida, to a point north of the Calcos Islands." 4 M. Whiteman, *Digest of International Law* 619 (1965). A similar agreement was made with the Dominican Republic.

[19]P. Hayes, L. Zaarsky, & W. Bello, *American Lake: Nuclear Peril in the Pacific* 240 (1986).

[20]*See* Tsipis, *supra* note 8, at 406. *See also Notice to Mariners*, *supra* note 12.

[21]A permanent "warning area" has been declared around Kwajalein Atoll with a radius of 200 nautical miles; "all ships are advised to contact Kwajalein Control ... before entering the area." Note, "Weapons Testing Zones," 99 *Harvard Law Review* 1040, 1048 (1986) [hereafter cited as "Weapons Testing Zones"]. The exact language on the nautical charts reads as: "Caution -- intermittent hazardous missile operations will be conducted within the area 24 hours daily, on a permanent basis." Omega, Map, Marshall Islands Northern Portion, Defense Mapping Agency Hydrographic/Topographic Center.




**Map 2:** USA missile warning zones, 1987. Prepared by Thomas Feeney.
Source: US Defense Mapping Agency, *1987 Daily Memorandum -- Pacific Edition*, Hydrographic/Topographic Center.

or Florida coast, with consequent warning areas around the submarines and the subsequent destinations of the launched missiles.[22] The United States tests for research and development purposes, like the Soviet Union, but tends to test its existing arsenal less often.

Kwajalein Atoll receives the bulk of the U.S. testing because of the extensive tracking facilities located on this atoll. Consequently, "Kwajalein typically supports about six separate programs at a time and 25 missile 'missions' launched from the American mainland each year."[23] The current crop of new missiles have ranges that go beyond Kwajalein, however, so the United States is now making increasing use of ocean areas heading south towards Australia and New Zealand.[24]

The use of broad ocean areas by the United States (and perhaps by the Soviet Union as well) utilizes a technology that requires fairly shallow areas (less than 1000 meters) for missile impact measurement. The surface ships that track the incoming missiles work in tandem with sonar buoys on the surface and transponders implanted on the ocean floor of the shallow areas (see figure 1). This technology is significant because it utilizes another dimension of the oceans and raises legal issues arising out of the Seabed Treaty (1971).[25]

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[22]As of 1987, the United States had 34 operational submarines that were capable of launching ballistic missiles. *Soviet Military Power--1987*, *supra*note 5, at 62.

[23]P. Hayes, L. Zaarsky, & W. Bello, *supra* note 19, at 245 n. 3.

[24]"... a recently declassified report on the future of the Pacific Missile Range indicated that the Pentagon was looking for new test sites in the west and the south Pacific." *Id.*

[25]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, *done* at Washington, London, and Moscow, Feb. 11, 1972, 23 U.S.T. 701, T.I.A.S. No. 7337 (hereafter cited as Seabed Treaty). *See* generally *International Navigation: Rocks and Shoals Ahead*? 352-64 (J. Van Dyke, L. Alexander, & J. Morgan eds. 1988). For discussion of the legal issues, *see infra* notes 146-47 and accompanying text.

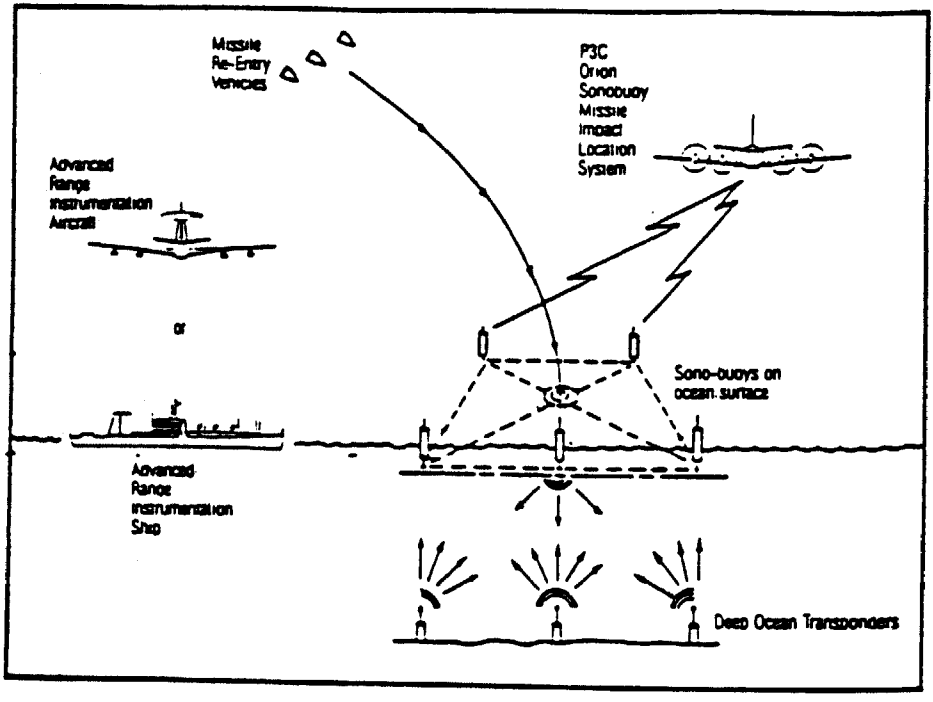


**Figure 1**: Broad Ocean Area Splashdown Monitoring System. Source: SRI International, *Strategic Systems Test Support Study*, report to Ballistic Missile Defense Systems Command. Volume II, 1981, p. 80. Reproduced with permission.

*The U.S. Nuclear Bomb Testing Program*

The weapons testing program that has had the most significant effect on the free use of the high seas has been the tests of nuclear bombs (see map 3). Nuclear testing in the Pacific began on July 1, 1946, when the United States exploded an atom bomb in the middle of Bikini Atoll in the Marshall Islands.[26] The United States established "Danger Zones" for all of its Pacific nuclear bomb tests. Approximately 150,000 square nautical miles were included in the danger zone declared for the first nuclear bomb tests. This zone was in effect from the end of June to mid-August 1946.[27]

The next series of tests began in 1948 with a smaller warning area of 30,000 nautical square miles in effect, at first for the calendar year, and then "until further notice."[28] In May 1953, the danger area was extended 135 nautical miles eastward, the area being "dangerous to all ships, aircraft and personnel entering it."[29] Another extension of the danger zone occurred on March 22, 1954, encompassing approximately 400,000 square nautical miles of open sea.[30] On June 5, 1954, the high seas danger zone around Bikini and Enewetok was terminated, but it was announced again on April 20, 1956 when a 375,000 square nautical mile zone was delineated for four months.[31] This same 375,000 square nautical mile zone was re-established on April 5, 1958 until October 11, 1958.[32]

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[26]4 M. Whiteman, *supra* note 18, at 553. *See generally* Van Dyke, Smith, and Siwatibau, "Nuclear Activities and the Pacific Islanders," 9 *Energy* 733 (1984).

[27]The *Notice to Mariners* stated: "All vessels are warned of the hazards to ships and personnel and are cautioned against the danger entailed in entering this area." 4 M. Whiteman, *supra* note 18, at 558.

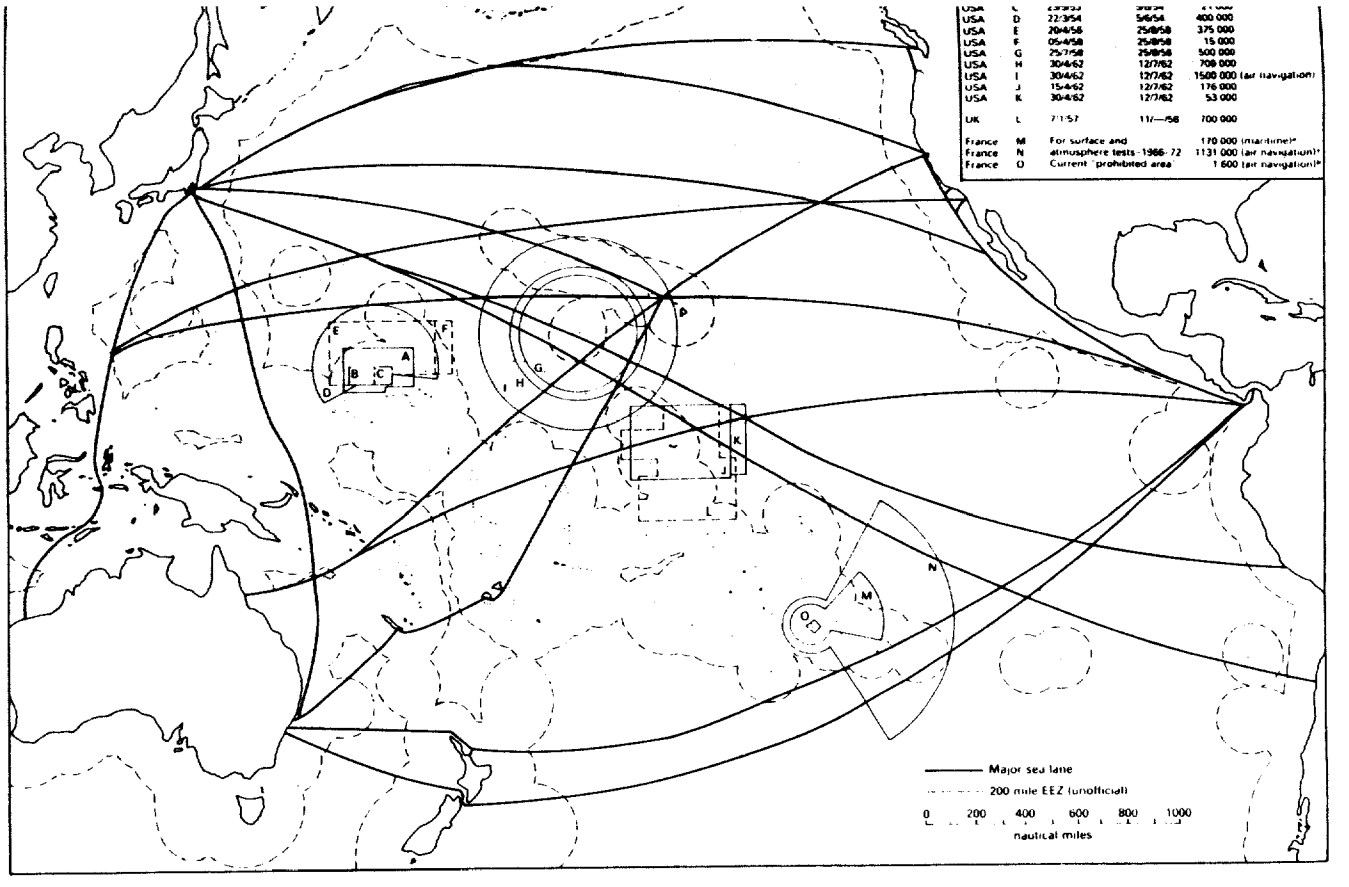
[28]*Id.* at 557-58.

[29]*Notice to Mariners Bulletin, quoted in id.* at 560.

[30]*Id.* at 662.

[31]*Id.* at 572.

[32]*Id.* at 579.




**Map 3**: Pacific Ocean nuclear blast warning zones. Prepared by Thomas Feeney.
Source: Whiteman, 1965.

[a]12 *International Legal Materials* 763, 1973.

[b]Operational navigation chart.

During this time, Johnston Atoll (about 700 miles southwest of Honolulu) was also being used for atomic tests. A danger zone with a radius of 400 nautical miles around the island was established on July 25, 1958 for a month.[33]

The final series of tests occurred in 1962 at Johnston and Christmas Atolls. Christmas Atoll (now part of the Republic of Kiribati) was surrounded by a rectangular danger zone of approximately 230,000 square nautical miles while Johnston's zone extended out to sea for 470 nautical miles.[34] The United States also established during this period an aircraft warning zone extending 700 nautical miles around Johnston at 30,000 feet and above.[35] Both of these zones became effective on April 15, 1962.[36] On July 12, the zone around Christmas Island was terminated and the zone around Johnston Island was reduced.[37] The last test on Johnston Island took place on November 4, 1962.[38]

***The British Nuclear Bomb Testing Program***

Australia declared a danger zone of 6,000 square nautical miles around the Monte Bello Islands for Britain's first nuclear tests in 1952.[39] Britain's first H-bomb tests occurred on Malden and Christmas islands in the spring of 1957, and it announced at that time a 700,000 square nautical mile warning zone to be in effect from March 1 to August 1, 1957[40] (see map 3). This notice was a "public warning"

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[33]*Id.* at 593-94.

[34]*Id.* at 603.

[35]*Id.*

[36]*Id.*

[37]*Id.*

[38]S. Firth, *Nuclear Playground* 23 (1986).

[39]"Weapons Testing Zones," *supra* note 21, at 1050 n. 70, citing H. Reiff, *The United States and the Treaty Law of the Sea* 364-65 (1959).

[40]4 M. Whiteman, *supra* note 18, at 597.

that the area was "dangerous to shipping and aircraft."[41] British Prime Minister Harold MacMillan said "... we do not consider that we are in any breach of international law and, as I say, the temporary use of outside territorial waters for gunnery and bombing practice has never been considered a violation of the principle of the freedom of navigation on the high seas."[42] The British vacated Johnston Island and ended their Pacific Ocean testing in December 1958.[43]

*The French Nuclear Bomb Testing Program*

The French atmospheric nuclear tests in French Polynesia occurred between 1966 and 1974 -- a total of 41 tests.[44] The maritime danger zone extended 150 miles from Moruroa Atoll with a 500 nautical mile easterly downwind corridor (see map 3). The zone for aircraft extended 200 miles beyond the island with a corridor fanning out for 1000 miles to the east.[45]

The current French testing program is conducted underground. A permanent "Prohibited Area" exists for aircraft encompassing 1650 square nautical miles and is indicated on the Operational Navigational Charts of the area. A surface warning zone is also declared for each test of limited range (approximately 30 miles in radius) and duration.[46]

*Other Claims Related to Military Activities*

Other military uses of the high seas that limit its free use include Air Defense Identification Zones (ADIZs) extending outward from

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[41]*Id.*

[42]*Quoted in* id. at 600.

[43]*Id.* at 598.

[44]*See* Van Dyke, Smith, and Siwatibau, *supra* note 26, at 739.

[45]*See* 12 I.L.M. 773 (1973).

[46]Greenpeace New Zealand, *French Polynesia Nuclear Tests: A Chronology* (1982). Between 1980 and 1985, France averaged 7-8 underground tests per year at their Moruroa test site in the Pacific. 1981-86 *SIPRI Yearbooks*. These tests are continuing at the present time.

some coastal nations, identification zones around naval vessels in transit, military maneuvers on the high seas, and warning areas for shore-based conventional weapons testing. Although warning and identification zones are not explicitly exclusionary and do not constitute a claim for jurisdiction, they can limit the freedom of other nations and their citizens, particularly if these zones are established for active military weapons testing. In addition, some countries claim complete jurisdiction, based on national security concerns, over areas beyond the 12-mile territorial sea limit set by the 1982 Convention on the Law of the Sea.[47]

Regional and national security zones extending into the high seas have been established in a number of locations during times of armed conflict, including in recent years a 25-mile naval and air security zone claimed by Nicaragua in 1983, zones claimed by the Persian Gulf nations during the Iran-Iraq conflict, and a 200 nautical mile exclusion zone declared by the United Kingdom around the Falklands (Malvinas) Islands in 1982.[48] North Korea declared a 50-mile security zone off its coasts in 1977 and South Korea declared a 150 mile zone into the Sea of Japan and a 100 mile-zone into the Yellow Sea in the 1970s.[49] In 1973, Libya claimed the 100 miles of coastal waters in the Gulf of Sidra (or Sirte) as a maritime security zone or "restricted area," but later changed this claim to one of historic waters.[50]

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[47]"Security zones" claimed by coastal states are qualitatively different in that the nations making such claims consider the waters in these zones to be like internal waters for the purposes of navigation, denying to other nations even the right of innocent passage: "[C]ivilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval." Choon-ho Park, "The 50-mile Boundary Zone of North Korea," 72 *Am. J. Int'l L.* 826, 867 (1978).

[48]*See* Louis B. Sohn, "International Navigation: Interests Related to National Security" in *International Navigation: Rocks and Shoals Ahead?* 312-15 (J. Van Dyke, L. Alexander, & J. Morgan eds. 1988).

[49]*Id.* at 313, *citing* Park, *supra* note 47, at 866-75.

[50]*Id.*

The United States first claimed an ADIZ in September 1950 extending 300 miles off its coasts.[51] This type of zone is defined as an area in which the ready identification, location, and control of civil aircraft are required in the interest of national security.[52] Although the zones do not restrict overflight officially, if an airplane chooses to ignore the identification requirements, it faces the possibility of being escorted to a military air base or shot down by a fighter plane of the host country.[53] These zones were originally designed as an early warning system giving the coastal nation roughly one hour before the plane could reach the coast.[54]

Warning zones extending into the oceans from shore line artillery batteries are sometimes permanent, extending to the limit of the territorial sea, and even beyond the coastal nation's territorial waters during specified periods of time. Gunnery practice occurs on a regular basis into the Sea of Japan from Japan, into the South China Sea from the Philippines, into the Pacific and Atlantic Oceans from U.S. bases, into the Mediterranean from islands such as Crete and Sardinia, and everywhere else coastal military installments with fire power exist.[55]

When nations conduct naval maneuvers, they typically establish warning or prohibited zones and these activities can interfere with commercial navigation. An example that illustrates these dangers occurred on December 12, 1988, about 80 miles northwest of the island of Kauai in the Hawaiian chain.

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[51]Cuadra, "Air Defense Identification Zones: Creeping Jurisdiction in the Airspace," 78 *Va. Int'l L.J.* 485, 492 (1978). This article states that Burma, Canada, Iceland, India, Japan, Korea, Oman, the Philippines, Sweden, Taiwan, the United States, and Vietnam had claimed ADIZs as of 1977. *See id.*, appendix, table 1.

[52]*Id.* at 493.

[53]*Id.* at 507.

[54]Given the advances in flight technology and the advent of cruise missiles, which from a few thousand miles away, can reach a target in less than 30 minutes, these zones may be a bit of an anachronism today.

[55]*See, e.g., Notice to Mariners, supra* note 12.

A U.S. Navy FA-18 jet fighter participating in training maneuvers from the carrier U.S.S. *Constellation* shot a nonexplosive Harpoon anti-ship missile[56] seeking to hit a "hulk" target vessel, but the heat-seeking missile instead slammed into the radio room of an Indian merchant vessel -- the *Jag Vivek* -- opening a gaping hole in the vessel and killing a radio operator.[57] The ship was transporting wheat from Vancouver, Canada, to India.[58] The Navy stated that the vessel was in a "warning zone ... in violation of a Notice to Mariners alerting non-exercise ships to remain outside the target area."[59] The Navy also acknowledged, however, that it had misplaced its target vessel by 30 miles and failed to instruct the merchant vessel properly when it sought guidance.[60] The Navy paid $575,000 to the family of the deceased crew member and $405,000 to the owner of the vessel.[61]

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[56]The Harpoon missile is more than 12 feet in length, weighs more than 1,000 pounds and flies at supersonic speed. It is guided by an imaging infrared seeker that locks onto its target. Tim Ryan and Mary Adamski, "Ship Arrives with Gaping Hole," *Honolulu Star-Bulletin*, Dec. 13, 1988, at A-8, col. 3, quoting *Jane's All The World Aircraft*.

[57]*Id.*; Joan Conrow and Jan TenBruggencate, "Freighter Hit by Navy Missile," *Honolulu Advertiser*, Dec. 13, 1988, at A-1, col. 2; Tim Ryan and Harold Morse, "Captain Says Military Was Guiding Him," *Honolulu Star-Bulletin*, Dec. 14, 1988, at A-1, col. 5.

[58]Phil Mayer, "Navy Recommends Disciplinary Action in Freighter Accident," *Honolulu Star-Bulletin*, Feb. 22, 1990, at A-14, col. 2.

[59]*Id.* All the Navy's announcements regarding this incident referred to the several thousand square mile area in which these maneuvers occurred (an area 150-nautical-miles off of Kauai's west coast) as a "closed" area "off limits" to civilian vessels. See *id.*; Ryan and Adamski, *supra* note 56, at A-8, col. 3. These official statements thus dropped the pretense that this zone was simply a "warning zone" rather than an "exclusionary zone." *See infra* notes 96-104 and accompanying text.

[60]Jim Borg, "Series of Errors Blamed in Kauai Missile Incident," *Honolulu Advertiser*, July 18, 1990, at A4, col. 1.

[61]Mayer, *supra* note 58.

This incident is not the first of its kind in Hawaiian waters. A Navy attack aircraft from the U.S.S. *Kittyhawk* dropped several 20 pound practice bombs, just missing a Kauai fishing boat, in May 1975. The pilots mistook the boat, which authorities said was "right in the middle of the prohibited zone," for a target craft.[62]

Another incident that occurred in 1988 involved a U.S. Navy destroyer which fired a series of shells that narrowly missed a Japanese patrol boat near the Japanese coast. On November 11, 1988, Japan filed a strong protest against the U.S. crew of the destroyer, the U.S.S. *Towers*, for being reckless and violating international law by firing its guns inside Japanese territorial waters. Japanese officials said the site of the incident was more than 35 miles from the designated zone where all test firing is supposed to take place. A U.S. Navy spokesperson said "the *Towers* observed and tracked other vessels in the area to insure that they were clear of the direction of fire," but added that the firing occurred in "a location not specifically designated for gunnery tests."[63]

## The Governing Legal Principles

### *The Freedom of the High Seas*

The community of nations has accepted the concept of "Freedom of the Seas" for most of the last 400 years.[64] Agreement was reached on this principle largely because none of the maritime powers were able to place the high seas under their sovereignty and they all thus saw that it was in their best economic interests to ensure freedom of

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[62]Ryan and Adamski, *supra* note 56, at A-8, col. 4; Conrow and TenBruggencate, *supra* note 57, at A-4, col. 4.

[63]David E. Sanger, "Japan Says U.S. Salvos Almost Hit Ship," *New York Times*, Nov. 12, 1988, at L3. The incident was announced more than 30 hours after it occurred. Unidentified officials in Japan's Transportation Ministry said the Foreign Ministry tried to hush up the incident so as not to strain relations with the United States. A Foreign Ministry spokesperson denied these reports.

[64]*See, e.g.*, Grotius, *supra* note 1; 2 D. O'Connell, *The International Law of the Sea* 793 (1984); R.P. Anand, *supra* note 1, at 129.

navigation for all.[65] When the Dutch diplomat Hugo Grotius wrote his famous work on freedom of the seas in 1609,[66] it was in response to the efforts of other countries, particularly the Portuguese, to exclude the Netherlands from the East Indies trading routes.

Grotius wrote that the seas should be free for navigation and fishing because natural law forbids the ownership of resources that seem "to have been created by nature for common use."[67] This category includes those resources that "can be used without loss to anyone else."[68] The use of the sea for navigation, for instance, does not diminish the potential for the same use by others, and at the time Grotius was writing the living resources of the seas must have seemed limitless.

Writers such as Grotius argued that the seas are free because they are *res communis*, *res nullius*, *res publicata*, *res condominata*, or a combination of two or more of these principles.[69] Regardless of which theory is the most accurate or most persuasive, the interests of the various nations and their ability to further those interests will be the determining factor for how "free" the seas remain.

The area considered to be "high seas" in the classic sense has been steadily shrinking over the past 50 years and with the 1982 Law of the Sea Convention it has been reduced by 40 percent because of the recognition of 200-nautical-mile exclusive economic zones (EEZs).[70] The navigational rights within EEZs are meant to be essentially the same as those that exist on the high seas, however, because the EEZ

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[65]*See* 2 D. O'Connell, *supra* note 64, at 792-93.

[66]Grotius, *supra* note 1. This work was first translated into English by Magoffin in 1916 with the title "The Freedom of the Seas (or, The Right Which Belongs to the Dutch to Take Part in the East India Trade)." See Margolis, "The Hydrogen Bomb Experiments and International Law," 64 *Yale L.J.* 629, 632 n. 25 (1955).

[67]Grotius, *supra* note 1, at 28.

[68]*Id.* at 27.

[69]2 D. O'Connell, *supra* note 64, at 792-96.

[70]*See*, e.g., Booth, "Naval Strategy and the Spread of Psycho-legal Boundaries at Sea," 38 *Int'l L.J.* 373, 380 (1983).

is designed to be solely a "resource zone."[71] Some nations may not, however, respect this careful balance over the long haul. Elliott Richardson, former head of the U.S. delegation for the Conference on the Law of the Sea, has said:

> If this vast area (the 40% of the oceans covered by EEZs) ever comes to be regarded by coastal states as subject to their sovereignty for purposes of regulating navigation and overflight and related activities, the result would be to curtail drastically what Professor Bernard H. Oxman has aptly called 'the sovereign right of communication.'[72]

Brazil has, in fact, acted to protect its EEZ from military activities, and in November 1990 a Brazilian judge ordered a U.S. submarine out of Brazil's EEZ, saying that it poses environmental danger because it is nuclear powered.[73]

All nations appear to agree upon six basic freedoms of the "high seas":[74] freedom of navigation, freedom of overflight, freedom to lay submarine cables, freedom to construct artificial islands and other

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[71]*See* art. 58(1) of the LOS Convention, *supra* note 1; and *see* statement of Tommy T.B. Koh (president of the Third U.N. Law of the Sea Conference) on the rights of military activities in the exclusive economic zones in *Consensus and Confrontation: The United States and the Law of the Sea Convention* 303-04 (J. Van Dyke ed. 1985).

[72]*Quoted in* Booth, *supra* note 70, at 381.

[73]"Judge Orders U.S. Sub Out of Brazilian Waters," *Honolulu Advertiser*, Nov. 5, 1990, at D1, col. 1. When it signed the LOS Convention, Brazil issued a declaration asserting that it "understands" that the Convention does not authorize other nations to conduct military maneuvers, particularly those that involve using weapons, in the EEZs of other nations. Reprinted in *Consensus and Confrontation*, *supra* note 71, at 304-05.

[74]LOS Convention, *supra* note 1, art. 87; *see also* Convention on the High Seas, art. 2, *done* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (1964) (listing four freedoms -- navigation, fishing, laying submarine cables, and flying over the high seas).

installations permitted under international law,[75] freedom of fishing, and freedom of scientific research. This list is not absolute or complete. The 1982 Convention provides for certain exceptions, including policing power with regard to slave trade, piracy, illegal broadcasting, the breaking of submarine cables, and the right of hot pursuit.[76] In addition, articles 88 and 141 state that the high seas and the seabed below the high seas must be used exclusively for "peaceful purposes," a concept discussed in more detail below.[77]

Although nations agree on this concept of freedom of the high seas in the abstract, issues arise when limitations on this freedom are claimed on behalf of "national interest" or "national security." In their 1955 article, McDougal and Schlei framed the proponents' argument for unilateral, exclusionary use of the seas by asking: "If 'freedom of the seas' is an absolute ... it may therefore reasonably be asked why the seas are not as 'free' for nuclear weapons tests conducted in the interests of survival of the West, as they are for navigation and fishing."[78] The next sections look at these arguments in more detail.

***Balancing the Interests of Nations***

The nuclear bomb testing programs described above led the testing nations to make a quantum leap in the size of temporary exclusionary zones they claimed on the high seas. Never before had activities on the high seas laid claim to areas as large as the 400,000 square miles around Bikini Atoll for the U.S. tests (see map 3). The testing generated numerous protests on grounds such as pollution and the

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[75]*Id.* art. 147 reads, "such installations shall be used exclusively for peaceful purposes." In addition, the allowable "safety zone" around such installations is "not to exceed a distance of 500 meters ... except as authorized by generally accepted international standards or as recommended by the competent international organization."

[76]*Id.* arts. 99-111.

[77]*See infra* notes 124-42 and accompanying text.

[78]M. McDougal and N. Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 *Yale L.J.* 648, 685 n. 203 (1955).

legality of the exclusionary zones.[79] McDougal and Schlei responded to these protests by arguing that the freedom of the high seas had never been viewed as absolute[80] and that restrictions on this freedom are permissible as long as the restrictions are "reasonable."[81] They cite many exceptions to freedom of the seas such as those mentioned previously (police powers relating to slave and drug trade, piracy, illegal broadcasting, etc.) to support their statement that "Freedom of the sea is, thus, not absolute and never has been. It is, as it was in the beginning, a legal conclusion invoked to justify a policy preference for certain unilateral assertions as against others."[82] In this view, therefore, freedom of the high seas is not a natural, absolute, and immutable law. Rather, it is the result of a give-and-take process whereby unilateral claims are enacted by many parties until controversies arise, leading to resolutions either negotiated by the parties involved or recommended by a third party such as an international organization. What is implied in the phrase "until controversies arise" is that as long as no nation protests the unilateral claims of the first party, such claims will eventually be accepted as an established, accepted way of doing things, *i.e.* "customary law."[83]

Once protests arise, as they did to the nuclear tests in the Pacific,[84] the decision making procedure for settling these disputes according to McDougal and Schlei is the simple, straightforward method which is universally applied by all decision makers -- the "ubiquitous, but

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[79]*See infra* note 84 and accompanying text.

[80]McDougal and Schlei, *supra* note 78, at 663.

[81]*Id.* at 655-61, 682-95.

[82]*Id.* at 663.

[83]"It is not the unilateral claims to use but rather the tolerances of external decisionmakers, including the specific decisions of international officials, which create the expectations of pattern and uniformity in decision, of practice in accord with rule, commonly called law." *Id.* at 659 n. 62.

[84]*See* Margolis, *supra* note 66, at 629-30, and *see infra* notes 180-90 and accompanying text.

indispensable, standard" of what is "reasonable as between parties."[85] In the case of weapons testing, the factors of reasonableness which they found to be most relevant were:

> [T]hat it is for a purpose much honored in world prescription [self-defense], that it asserts the least possible degree of authority necessary to the achievement of its purpose, that it is limited both in area and in duration to the minimum consistent with its purpose, that the area which it affects is of relatively slight importance to international trade and fishing, and that it is asserted in a context of crises which makes its purpose of paramount importance to all who value a free world society.[86]

Later, these authors minimized the intrusion on the rights of other nations by stating:

> Plainly no existing prescriptions in the regime of the high seas are literally applicable to the unique problem presented by the tests. The United States claim bears no similarity whatever to those which, historically, "freedom of the seas" was intended to combat. Others are not excluded from the area affected in order to enable the United States to grant fishing monopolies to its nationals or to pursue the commercial aggrandizement of the United States in any way. It is apparent, also, that the claim of the United States offers no serious interference with the policies of promoting commercial navigation and fishing which underlie "freedom of the seas." Moreover, the claim does not offend against the subordinate policies against international friction which are involved in claims to exercise police powers on the high seas. No ships are seized or

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[85]McDougal and Schlei, *supra* note 78, at 660.

[86]*Id.* at 686. The limits referred to were, however, in fact quite broad. By 1954, approximately 35 surface or atmospheric nuclear bombs had been detonated, with warning areas that covered an area of approximately 400,000 square nautical miles. This warning area was in effect for, at first, months, and then years at a time. 4 Whiteman, *supra* note 18, at 557-60.

condemned, nor is civil or criminal jurisdiction of any kind asserted.[87]

These arguments would apply not only to nuclear testing but to any sort of weapons testing or other military activity on the high seas. McDougal and Schlei addressed the environmental effects of nuclear blasts by balancing the contribution of these tests towards protecting the values of the Western world with what they considered to be the minimal negative effects on the environment.[88]

Other authors have questioned whether the international community is well served by such heavy reliance upon the test of "reasonableness." O'Connell maintains, for instance, that

> However plausible the concept of reasonable use may be, it is essentially relativistic and hence susceptible of subjective evaluation .... The concept is therefore not capable of resolving specific questions: all that it is capable of is the exclusion of their automatic resolution according to rigid rules, and the requirement that resolution be based upon appraisal as distinct from mandate.[89]

The relativistic approach of McDougal and Schlei also means that the legal analysis of a problem may change as new facts become available. They acknowledged, for instance, that "[t]he facts available as to the extent to which water and fish were made radioactive by the tests, and in what areas, leave much to be desired."[90] Nonetheless, they discounted the dangers of radioactivity and paid little concern to the long-term problems created by these tests.[91] They also stated that "[t]he United States ... took swift action to mitigate the effects of the test mishaps .... Settlement of all Marshallese claims is in immediate

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[87]McDougal and Schlei, *supra* note 78, at 684 (citations omitted).

[88]*Id.* at 652-53, 690-95.

[89]1 D. O'Connell, *supra* note 64, at 58.

[90]McDougal and Schlei, *supra* note 78, at 692.

[91]*Id.* at 652-53, 692-94.

prospect."[92] We now know the Marshallese have suffered numerous serious health problems, including thyroid cancers, and have experienced long-term psychological problems as well.[93] The settlement of the Marshallese claims has been a continual problem, and although a substantial settlement has been included in the Compact of Free Association,[94] many Marshallese are still unsatisfied with this formula.[95] A modern reappraisal of the proper balancing process is offered below.

*The Official United States Position*

When the United States first articulated its position on high seas weapons tests and their attendant danger zones, it stated that it asserted no sovereignty over these danger zones, and that they were only warning areas, subject to freedom of navigation. The U.S. government thus took a different approach from that of McDougal and Schlei when defending the testing in the 1950s. This position was spelled out in a paper prepared for the use of the U.S. delegation at the Conference on the Law of the Sea held at Geneva at 1958:

> The Delegation should bear in mind, however, it does not necessarily follow as seemingly suggested by McDougal and Schlei, that a nation may unilaterally appropriate for its exclusive use a portion of the high seas for this purpose. In particular, the United States has been careful not to claim the right to establish a prohibited or restricted area which is tantamount to closing off a portion of the seas as a matter of enforceable right, action customarily taken only within the limits of territorial waters.
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> In contrast, Danger or Warning areas on the high seas are predicated on the principle of voluntary compliance. As a matter of comity

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[92]*Id.* at 653.

[93]See Van Dyke, Smith, and Siwatibau, *supra* note 26, at 734-38.

[94]Compact of Free Association Between the United States and the Republic of the Marshall Islands, reprinted following 48 U.S.C. sec. 1681 (Supp. 1990).

[95]A special arbitration panel in the Republic of the Marshall Islands began hearing testimony on this matter in 1989.

these areas are generally observed .... [This] has been brought out in *International Law Situation and Documents* (1956) of the U.S. Naval War College. This reference states in a Note at 627: "The nuclear testing areas in question have been established as danger areas, warning all vessels and aircraft to stay clear, but not prohibiting them from entering the hazard area."

Observance on that basis presupposes, of course, the reasonableness of the area or zone from the standpoint of size, duration, and location. On the basis of those objective standards, the Danger Areas for the United States tests would seem internationally acceptable since the area is situated in a relatively remote portion of the ocean off the track of normal surface or air routes [an American airline is the only one which is required to detour from its usual route] and in an area that is not historically a fertile fishing ground ...

Most important, however, is the fact that there has been no protest [up to this time - 1958] of the United States' conduct of its tests in the Pacific. In short, the international community has recognized the international validity of the United States' position.[96]

Although this "official" position has been articulated often by U.S. government lawyers, it may be disingenuous because it tries to draw a line that is difficult to sustain in practice. Note, for instance, the ambiguous statements made by the late Admiral W.H.P. Blandy, the Commander of the 1946 Bikini Atoll tests -- Operation Crossroads: He declared the "entire area" surrounding Bikini and nearby Enewetok "out of bounds" and said that "[i]f any ship actually tried to interfere with tests in any way ... we would use force to see that they did not interfere. We would escort them out forcibly if necessary."[97] Whether he was talking of that area within territorial waters (which he

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[96]4 M. Whiteman, *supra* note 18, at 550 (the words in brackets were inserted by Whiteman).

[97]*N.Y. Times*, June 26, 1946, at 7, col. 5.

would have jurisdiction over) or the entire warning area is uncertain.[98]

A more recent confrontation occurred on July 28, 1989, when the U.S. Navy postponed a planned launch of a Trident II, D-5 missile from the nuclear submarine *U.S.S. Tennessee* because four Greenpeace vessels were in the vicinity. The Navy tried unsuccessfully to board one of the Greenpeace ships, and Greenpeace personnel were able to place a "nuclear free seas" banner on the submarine. Greenpeace later left the area and the test subsequently occurred.[99]

In December 1989, when Greenpeace again tried to disrupt a Trident launch 50 miles off the Florida coast, the U.S. Navy was successful in using force to move the Greenpeace vessel from the launch area. Greenpeace spokespersons said their flagship, the M/V *Greenpeace* (which was flying a Dutch flag), was repeatedly rammed, but the Navy used the word "shouldered" to describe the process of pushing the vessel away from the launch area.[100]

In their subsequent defense of these actions, Navy lawyers stated that the Greenpeace vessel was permitted under international law to assume the risk of entering the "warning zone," which was 30 miles wide and 200 miles long. The vessel was not, however, within its rights, they argued, when it entered the "launch safety zone," which the Navy established with a 5,000-yard radius around the actual launch site.[101] The Navy had the authority to establish this zone, they contended, because it had the right under international law to launch a missile, and the only safe way to do so is to keep other vessels from

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[98]*See also* the incidents described *supra* at notes 56-63 and accompanying text and *infra* at notes 117-18 and accompanying text.

[99]"Greenpeace Succeeds in Halting Test Launch," *Honolulu Advertiser*, July 29, 1989, at B-1, col. 1; Cmdr (JAGC, U.S. Navy) Charles R. Hunt, Greenpeace and the U.S. Navy: Confrontation on the High Seas 2 (paper prepared at the Naval War College, Newport, R.I., May 14, 1990).

[100]Jeffrey Schmalz, "After Skirmish with Protesters, Navy Tests Missile," *N.Y. Times*, Dec. 5, 1989, at A1, col. 2 (national ed.).

[101]*Id.*, quoting Vice Admiral Roger F. Bacon; Hunt, *supra* note 99, at 2.

the immediate launch site. Other vessels must respect this safety zone, according to this view, because of their duty to show "due regard" for the exercise of navigational freedoms by the Navy's vessels.[102] Officials from Greenpeace responded by saying that they would sue the Navy for compensation for the damage to their vessel.[103] These positions are analyzed in more detail below.[104]

It should also be noted that the United States does attempt to exercise jurisdiction over vessels flying its own flag in the warning areas[105] and is authorized by international law to do so.[106]

*The Soviet Position*

The Soviet Union's analysis of the legal regime governing missile testing on the high seas is similar to the official position of the United States. When it first announced a broad-ocean-area missile test in the Pacific Ocean on January 8, 1960, it issued a "request" in the interests of navigational safety to all nations to avoid the area.[107] It has continued to issue these announcements prior to each of their Pacific

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[102]*See* Hunt, *supra* note 99, at 6, 12; the "due regard" phrase comes from article 58(3) and 87(2) of the LOS Convention, *supra* note 1.

[103]Schmalz, *supra* note 100.

[104]*See infra* notes 156-69, 188-90 and accompanying text.

[105]*See* Bigelow v. United States, 267 F.2d 398 (9th Cir.); *cert. denied*, 361 U.S. 852 (1959). In Reynolds v. United States, 286 F.2d 433 (9th Cir. 1960), the court reversed the trespass conviction of an anthropologist who sailed into the 390,000 square mile danger area surrounding the Enewetok Proving Grounds to protest the tests, because it found that the U.S. Atomic Energy Commission did not have the statutory authority to issue regulations barring trespass on the grounds it used. See 4 M. Whiteman, *supra* note 18, at 582-83.

[106]LOS Convention, *supra* note 1, art. 92(1). See also "Weapons Testing Zone," *supra* note 21, for a more thorough discussion of a state's jurisdiction over vessels flying its own flag.

[107]*See* text in note 4 *supra*. A similar announcement was made again on September 11, 1961 for the same general area. N.Y. Times, Sept. 11, 1961, at 2.

Ocean missile tests, and sometimes issues announcements immediately following the conclusion of tests reopening the area ahead of the pre-announced time.[108]

The Soviet Union has, on the other hand, taken a more exclusive approach to the missile launchings and military maneuvers in the Barents and Kara Seas and in Peter the Great Bay.[109] At times, they have disclaimed responsibility for damage to ships or aircraft entering these danger areas. Although their warning does not explicitly preclude entrance, it violates the accepted norm that military activities should not endanger legitimate shipping activities. The British Admiralty's Notice to Mariners concerning 'Firing Practice and Exercise Areas', for instance, reads as follows: "Range Authorities are responsible for ensuring that there should be no risk of damage from falling shell-splinters, bullets, etc., to any vessel which may be in a practice area."[110] The United States has similar wording in its notices: "The responsibility to avoid accidents rests with the authorities using the areas for firing and/or bombing practice, these areas will not as a rule be shown on [public] charts."[111]

The Soviet Union and the U.S. navies both enter the warning zones of the other in spite of requests to do otherwise. In 1961, for instance, the commander of a Soviet observation fleet monitoring a Soviet Pacific Ocean impact area commented, "United States ships and planes did not leave the target area and the Soviet ships in peace even for a single moment."[112]

In the early 1980s, when a Soviet Union intelligence ship tried to monitor an SLBM test off the Florida coast, it was requested to clear the area four nautical miles from the submarine. The Soviet ship

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[108]Foreign Bulletins Information Service (FBIS), Soviet Union.

[109]The attendant notice stated that it "warns the owners of Soviet and Foreign ships or planes that it will not bear responsibility for any material damage that might be caused to ships or planes crossing the limits of the danger zone." *Washington Post*, Sept. 2, 1961, at 1, col. 6.

[110]From 4 M. Whiteman, *supra* note 18, at 625.

[111]*Notice to Mariners*, *supra* note 12, Jan. 2, 1987 at I.20.

[112]*N.Y. Times*, Nov. 1, 1961, at 16, col. 3.

eventually backed off, but only to a point 2000 meters from the submarine before the U.S. Navy conducted the launch.[113] In the December 1989 Florida incident involving the Trident missile,[114] a Soviet vessel monitored the launch but did stay outside the 5,000 yard "launch safety zone" claimed by the U.S. Navy.[115]

No incidents involving the use of force have yet occurred between these two nations. But force was used by the United States against the M/V *Greenpeace* in December 1989 as described above.[116] And force has also been used by the French, who have boarded and seized the vessels of protesters sailing in international waters off of Moruroa within the proscribed warning areas of nuclear tests.

In June 1972, Canadian David McTaggert, sailed the ketch *Vega* -- renamed *Greenpeace III* -- into the one hundred thousand square mile danger zone that the French had declared surrounding Moruroa Atoll. The French dispatched a fleet of vessels that included a 600-foot cruiser, minesweepers, and tugboats to charge the ketch from several different angles. At one point the ketch was almost crushed between the hulls of two of the warships. After the atmospheric detonation of the bomb, the French sent a minesweeper which rammed the vessel's stern leaving her totally paralyzed. Later the ketch was towed into the lagoon at Moruroa by the French for minimal repairs to keep her afloat. The vessel was towed to open sea and McTaggart and his crew were left on their own to limp back to Rarotonga while the French completed the series of testing on Moruroa.[117]

A year later, in June 1973, McTaggart, sailed *Greenpeace III* into France's declared warning zone off Moruroa, but still in international waters. The French Navy boarded the boat and physically assaulted and then arrested the crew. A similar incident occurred a month earlier with the 30-meter former Baltic trader *Fri*. The New Zealand Government formally protested on both occasions, stating that the

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[113]"Soviet Intelligence Ship Intrudes on Trident Test," *Aviat. Wk. and Sp. Tech.*, Jan. 25, 1982, at 21.

[114]*See supra* notes 100-103 and accompanying text.

[115]Hunt, *supra* note 99, at 5.

[116]*See supra* notes 100-103 and accompanying text.

[117]R. Hunter, *Warriors of the Rainbow* 116-17 (1979).

French Government had no right to interfere with navigation on the high seas and complaining about the illegal arrest of New Zealand citizens. The Canadian Prime Minister, Pierre Trudeau, also protested to the French Ambassador.[118]

At the First United Nations Conference on the Law of the Sea leading to the 1958 Geneva Convention on the High Seas, France was one of the nations supporting absolute freedom of the seas: "[N]o state may validly purport to subject any part of them to its sovereignty."[119] This Conference was held before France began testing its nuclear weapons in the Pacific.

***1982 Law of the Sea Convention--The "Peaceful Purposes" Clause***

The 1982 Law of the Sea Convention[120] carries forward the notion that all nations have broad freedoms on the high seas.[121] Like the 1958 Convention on the High Seas,[122] it includes the words "*inter alia*" (among others) to show that the high seas freedoms specifically listed, *e.g.*, fishing, navigation, and overflight, are not the only freedoms allowed by the Convention. Proponents of missile testing

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[118]S. Firth, *supra* note 38, at 101-02.

[119]*Quoted* in Ris, "Comment - French Nuclear Testing: A Crisis for International Law," 4 *Den. J. Int'l L. and Pol.* 111, 119 (1974).

[120]The LOS Convention, *supra* note 1, has been ratified by about 43 nations as of this writing (December 1990) and will take effect when 60 nations have ratified it. A few nations, such as the United States, have refused to sign or ratify it because of a disagreement with the provisions covering deep sea mining, and others have expressed concern about the financial obligations that might accompany ratification. *See generally Consensus and Confrontation*, *supra* note 71, and Van Dyke and Yuen, "'Common Heritage' v. 'Freedom of the High Seas': Which Governs the Seabed?" 19 *San Diego L. Rev.* 493 (1982). The non-seabed provisions of the Convention appear, however, to have been accepted as a good codification of the norms that govern maritime activities and all nations have viewed this Convention as a primary source of customary international law.

[121]LOS Convention, *supra* note 1, art. 87.

[122]Convention on the High Seas, *supra* note 74, art. 2.

have used these implied freedoms as justification for using the high seas for such military purposes.[123] A problem would clearly arise, however, if the military activities interfered with the other legitimate uses.

Another aspect of the Convention that influences use of the seas and applies to weapons testing zones is Article 88: "The high seas shall be reserved for peaceful purposes." Through Articles 58 and 141, this principle also applies to the exclusive economic zone and the seabed and its subsoil. The meaning of the term "peaceful purposes" is not agreed upon. The proponents of missile tests maintain that these tests are conducted for "peaceful purposes." They argue that the objective of the tests is to prepare for self-defense and thus to enable the testing nation to keep the peace and maintain national security.[124] The U.S. position during the negotiations of the 1982 Convention was presented as follows:

> The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement. The Conference was not charged with such a purpose and was not prepared for such negotiations. Any attempt to turn the Conference's attention to such a complex task would quickly bring to an end current efforts to negotiate a law of the sea convention.[125]

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[123]M. McDougal & W. Burke, *Public Order of The Oceans* 760 (2d ed. 1987); Hunt, *supra* note 99.

[124]McDougal and Schlei, for instance, stressed the "overriding utility of the [hydrogen bomb atmospheric] tests to the free world." McDougal and Schlei, *supra* note 78, at 691. George Schultz, President Reagan's Secretary of State, argued that it was the strength of the United States that brought its adversaries to the bargaining table. Speech given at Kennedy Theater, University of Hawaii at Manoa, July 21, 1988.

[125]5 UNCLOS III O.R. (67th plenary mtg.), para. 81, *quoted in* Francioni, "Peacetime Use of Force, Military Activities, and the New Law of the Sea," 18 *Cornell Int'l L.J.* 203, 222 (1985).

The text of the Convention appears to support the conclusion that, although military activities inconsistent with the U.N. Charter are prohibited, at least some military activities on the high sea are permissible.[126] Because the freedom of military vessels to navigate the high seas is confirmed in the 1982 Convention in Article 95 ("Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."), it is argued that "the 'peaceful purposes' provision must be read as including military uses."[127] Article 301 declares that

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Because Article 301 places a qualified prohibition on the use of military force, it would appear to follow that the "peaceful use" principle was not intended to ban all military activities from the ocean. Similarly, because Article 19 prohibits certain activities in the territorial sea, it can be argued "that such operations are permissible in the ocean beyond national jurisdiction."[128] This position is supported in a 1985 report of the U.N. Secretary-General which concludes that

> ... military activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in

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[126]*See generally* David L. Larson, "Naval Weaponry and the Law of the Sea," in *The UN Convention on the Law of the Sea: Impact and Implementation* (E.D. Brown and R.R. Churchill eds.), 19 L. Sea Inst. Proc. 41, 56-57 (1987); Bernard H. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea," 24 *Va. J. Int'l L.* 809, 829-32 (1984).

[127]R.J. Zedalis, "Foreign State Military Use of Another State's Continental Shelf and International Law of the Sea," 16 R*utgers L.J.* 1, 95 n. 393 (1984).

[128]Francioni, *supra* note 125, at 223.

particular with Article 2, paragraph 4, and Article 51, are not prohibited by the Convention of the Law of the Sea.[129]

This conclusion does not end this inquiry, however, because the broad and elastic term "peaceful purposes" must be seen as subject to evolution over time. This hopeful phrase encompasses the aspirations of the world community that we can begin to resolve our conflicts through nonviolent means.

A recent article by the Soviet scholar V.F. Tsarev[130] supports the notion that Article 88 does not prohibit all military activities, but it also states that:

> The common requirements of using the high seas for peaceful purposes imposes an obligation to perform activities, including those of a military nature, in a way so as not to threaten the peace and security of states or create an obstacle for international merchant navigation.[131]

Tsarev then lists certain activities that *are* prohibited because they interfere with other interests of states and other legitimate uses of the sea:

> ... *tests of nuclear weaponry*; establishing naval and aircraft proving grounds; combat training areas within close proximity of the shores of foreign states or navigation routes of significant importance to international navigation; *missile*, torpedo, artillery and other *shooting*, in particular, in areas allocated by international programmes for scientific research and requiring the permanent presence of scientific research vessels for certain periods of time; and the installation of autonomous buoy stations.[132]

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[129]Report of the [U.N.] Secretary-General, *General and Complete Disarmament Study on the Naval Arms Race*, Doc. No. A/40/535, para. 188 (Sept. 17, 1985).

[130]V.F. Tsarev, "Peaceful Uses of the Sea: Principles and Complexities," 10 *Marine Policy* 153 (1988).

[131]*Id.* at 156.

[132]*Id.* at 156-57 (emphasis added).

This list is instructive because it includes nuclear tests and military maneuvers and missile tests that interfere with navigation or scientific research.

A similar approach has been taken by Boleslaw Adam Boczek who referred to the "constructive ambiguity" of the "peaceful purposes" clause as a conscious compromise acceptable to both the maritime powers and those nations that wanted to restrict military activities on the oceans.[133] Although the goal expressed in this phrase of demilitarizing the oceans remains in the category of "soft" law, "it will provide a legal base for efforts at restricting military uses of the oceans."[134] Boczek suggests that "in accordance with the principle of effectiveness, it could be argued that the peaceful purposes clauses must be allowed some legal effect other than that meant by Article 301; otherwise they would be redundant."[135] He usefully points out that a number of specific limitations on military activities at sea have already been agreed to, including the Sea-Bed Treaty,[136] and the nuclear-free zone treaties covering Latin America[137] and the South Pacific.[138] Finally, he emphasizes the customary law restraints that exist under the duties of "reasonable regard" for the interests of other nations.[139] Among his specific conclusions, for instance, is that "even under customary international law it would be difficult to argue that a

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[133]Boleslaw Adam Boczek, "The Peaceful Purposes Reservation of the Convention on the Law of the Sea," in *Ocean Yearbook* 8 at 329, 336 (E.M. Borgese, N. Ginsburg, & J. Morgan eds. 1989).

[134]*Id.* at 360.

[135]*Id.* at 358.

[136]Seabed Treaty, *supra* note 25, discussed *infra* at notes 146-47 and accompanying text.

[137]Treaty for the Prohibition of Nuclear Weapons in Latin America, *done* at Tlatelolco, Feb. 14, 1967, 634 U.N.T.S. 281, 6 I.L.M. 521 (1967).

[138]South Pacific Nuclear-Free Zone Treaty, *done* at Rarotonga, Aug. 6, 1985, 24 I.L.M. 1440.

[139]*See infra* notes 150-69 and accompanying text.

nuclear test on the High Seas was an activity showing reasonable regard to the interests of other states."[140]

It must thus be seen that the "balance" applicable to resolving disputes among competing users of the high seas is an evolving one. In one of the key sentences in the McDougal and Schlei analysis of the propriety of the U.S. tests in the 1950s, they refer to the purposes which the concept of freedom of the seas was "historically" designed to combat.[141] In as much as treaties signify emerging customary law, the commitment in the Law of the Sea Convention that the high seas should be used only "for peaceful purposes" may affect McDougal's argument by making it less "reasonable" to use the seas for military activities.[142]

The "aspirational" views of those nations that are not maritime powers can be exemplified by discussions held at the Asian-African Legal Consultative Committee, which was formed in 1957 to consider and debate important matters of international law. In his inaugural address to this 1957 session, Jawaharlal Nehru, then Prime Minister of India, asked whether nuclear tests were consistent with international law.[143] By 1964, the subject had been thoroughly researched and discussed with a final report issued containing the viewpoints of the delegations of Burma, Ceylon (Sri Lanka), India, Indonesia, Japan, Pakistan, Thailand, the United Arab Republic (Egypt), Ghana, the Philippines, Laos, and the League of Arab States. Question six related directly to the topic of freedom of the high seas:

> Does the interference with the freedom of the air or the sea navigation resulting from declaration of danger zones over the areas

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[140]Boczek, *supra* note 133, at 343.

[141]This language is quoted *supra* in the text at note 87.

[142]*See* Anthony D'Amato, "Law Generating Mechanisms of the Law of the Sea Conference and Convention," in *Consensus and Confrontation: The United States and The Law of the Sea Convention* 125 (J. Van Dyke ed. 1985).

[143]*The Work of the Asian-African Legal Consultative Committee 1956-1974* at 24 (1974).

where the tests may be carried out amount to violation of the principles of international law?[144]

The question as written is easily applicable to any testing activity that threatens the safety of those within the declared zone. The conclusion drawn from the participants of the Committee was:

> Test explosions of nuclear weapons carried out in the high seas and in the airspace there above also violate the principle of the freedom of the seas and the freedom of flying above the high seas, as such test explosions interfere with the freedom of navigation and of flying above the high seas and result in pollution of the water and destruction of the living and other resources of the sea.[145]

*The Seabed Treaty*

The 1971 Seabed Treaty prohibits nations from placing on the seabed "any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching, installations, or any other facilities specifically designed for storing, testing, or using such weapons."[146] Nations testing nuclear-capable missiles on the high seas monitor these missile flights with transponders secured to the sea floor. These transponders are not meant to be mobile, and are implanted weeks or even months before a test. Although some language in the Seabed Treaty is ambiguous,[147] this practice would appear to violate the language in the treaty quoted above prohibiting use of the sea floor for the testing of weapons of mass destruction.

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[144]*Id.* at 27.

[145]*Id.* at 96.

[146]Seabed Treaty, *supra* note 23, art. I(1). The original Soviet draft of the treaty would have gone even farther and "banned all military uses of the seabed including submarine surveillance systems." Larson, *supra* note 126, at 56.

[147]*See* 2 D. O'Connell, *supra* note 64, at 827; Boczek, *supra* note 133, at 338.

### *Applying Customary International Law to Exclusionary or Warning Zones*

The McDougal and Schlei analysis[148] outlined above[149] was based on their view of the state of customary international law as it existed in 1955 when their article was written. Has that law changed? Were they correct even in 1955? How should the matter be analyzed today? Have nations accepted or rejected the legitimacy of exclusionary and warning zones? Is a nation that establishes an exclusionary or warning zone liable if its military activities injure a vessel of another nation?

*The Concept of Reasonable Use.*

Nations that test missiles and nuclear bombs argue that those activities are essential to their national security. They maintain that the attendant warning areas are reasonable in size, duration, and location when balanced against the rights that are infringed upon.[150] The sizes of impact areas and missile/gunnery firing ranges range from as small as a line between two points or as large as an area encompassing hundreds of thousands of square miles.[151] They remain in effect for as short a time as a few hours, or as permanent features to be reckoned with by mariners and pilots at all times.[152]

Countries establish such extensive warning areas to limit the danger to ships and aircraft. "Thus, the greater the scope of humanitarian measures, the greater the encroachment on the high seas. The question arises, therefore, as to whether such progressive exclusion of other persons from the high seas is to be regarded as justifiable by reason solely of the underlying motives."[153] An appropriate response to such

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[148]McDougal and Schlei, *supra* note 78.

[149]*See supra* notes 78-95 and accompanying text.

[150]McDougal and Schlei, *supra* note 78, at 691.

[151]*See Notice to Mariners, supra* note 12.

[152]*Id.*

[153]Tiewal, "International Law and Nuclear Test Explosions on the High Seas," 8 *Cornell Int'l L.J.* 43, 48 n. 9; *supra* note 93, at 48, n. 9; *see also* Margolis, *supra* note 66, at 636.

an inquiry was provided by one of the leading legal authorities in Britain, Earl Jowett:

> I am entirely satisfied that the United States, in conducting these [nuclear test] experiments, have taken every possible step open to them to avoid any possible danger. But the fact that the area which may be affected is so enormous at once brings this problem: that ships on their lawful occasions may be going through these waters, and you have no right under international law, I presume, to warn people off.[154]

Even more limited zones can create significant burdens. A Soviet naval official stated recently that over 100 incidents occur each year in which the passage of Soviet commercial vessels is interfered with by military activities of other nations.[155]

The U.S. Navy position is that it is entitled to use ocean areas temporarily for military purposes, even if it interferes with other uses, as long as their use is "reasonable":

> Temporary reasonable use of areas of the high seas for military purposes has been accepted as coming within the concept of the right of self-preservation of a nation and within customary international law practice .... It must be concluded, therefore, that designation of temporary zones of "use" as "warning areas" is legal where done in a reasonable manner.[156]

A Navy commentator analyzing the December 1989 "warning zone" off the coast of Florida, which was 30 by 200 miles, argued that this

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[154]*Quoted in* Tiewal, *id.* at 48, n. 9; *see also* Margolis, *supra* note 66, at 635: "The Marquess of Salisbury, representing the Foreign Office in these debates over the Pacific thermonuclear experiments, felt compelled to concede the point."

[155]Statement of Admiral Nikolai Amalko, consultant to the Soviet Foreign Ministry, to the U.S.-Soviet Symposium on the Law of the Sea, Moscow, November 29, 1988.

[156]Hunt, *supra* note 99, at 11.

"relatively large area"[157] was justified because the Trident missile "is a sophisticated, long range missile that needs an extensive operating area."[158] Because it was only seven hours in duration, in an area previously used for missile testing, and unlikely to disrupt navigation, this commentator viewed it to be "reasonable."[159]

*"Due Regard"*

The concept of a "reasonable use" is closely linked to the requirement in Articles 58(3) and 87(2) of the 1982 Law of the Sea Convention[160] that each nation exercise its freedoms of the high seas with "due regard" for the rights of other nations. The U.S. Navy issues warnings prior to its missile tests in order to fulfill its obligation to alert others to the hazardous activities in the region.[161] The Navy argues that it does not "appropriate" the waters in a warning zone, because it does not prohibit entry into them; it simply warns others and lets them evaluate the risks for themselves.[162]

With regard to a "launch safety zone," however, the Navy argues that it has the right to prohibit entry into these waters because it needs a defined secure area from which to launch its missile. Vessels above a submarine launch could disrupt the missile's trajectory, creating risks to the submarines's crew and to third parties.[163] Delays while waiting for a vessel to leave can be expensive -- the short delay in July 1989 created by Greenpeace's presence[164] cost the United States an esti-

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[157]*Id.* at 12.

[158]*Id.* at 12.

[159]*Id.* at 13.

[160]LOS Convention, *supra* note 1.

[161]Hunt, *supra* note 99, at 12.

[162]*Id.* at 13.

[163]*Id.* at 14.

[164]*See* supra notes 100-103 and accompanying text.

mated $2,000,000.[165] The 5,000-yard-radius safety zone established for the Trident launches was based on the lessons learned from earlier launch failures which scattered debris up to 4,000 yards from the launch point.[166] Based on this reasoning, the Navy argued that Greenpeace had a responsibility to show "due regard" for the Navy's legitimate use of the seas and should not have interfered with its launch.[167]

This argument -- that separate rules apply to a "launch safety zone" from those that apply to a "warning zone" -- appears to be a new approach put forward by the Navy. It can arguably find support in the provisions in the 1982 Law of the Sea Convention that authorize safety zones around artificial installations.[168] Those zones are, however, limited to a radius of 500 meters,[169] and thus are not as burdensome as the 5,000-yard zone claimed around the Trident launch site.

*Abuse of Right.*
Article 300 of the 1982 Law of the Sea Convention says:

> State Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute *an abuse of right.*[170]

Atmospheric nuclear weapons testing is clearly a case of abuse of right, given the overwhelming evidence of its harmful effects on the environment. The results of the U.S.-detonated 1.4 megaton blast over Johnston Island in 1962 lit the sky from Australia to Hawaii, destroyed orbiting satellites, popped street-lights in Honolulu, and altered the

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[165]Hunt, *supra* note 99, at 14.

[166]*Id.* at 15.

[167]*Id.* at 16-17.

[168]LOS Convention, *supra* note 1, art. 60(4)-(7).

[169]*Id.*, art. 60(5).

[170]LOS Convention, *supra* note 1, art. 300 (emphasis added).

Van Allen radiation belts that circle the earth.[171] The current French nuclear testing at Moruroa, although underground, is also suspected of producing health risks to the population and the fishing industry.[172]

The testing of missiles without lethal warheads is not as inherently serious as the testing of nuclear weapons, but as discussed above,[173] significant damage can certainly occur when a missile strikes a vessel. Because these missiles are heat-seeking, they will search out and find any ships that are inadvertently in the vicinity of their target area.

With respect to the United States' missile testing site at Kwajalein Atoll, the impact of the repeated launching of missiles into the fragile ecosystem of this low-lying atoll should be considered.[174] The 1982 Law of the Sea Convention requires nations to take all necessary measures "to protect and preserve rare or fragile ecosystems ..."[175] Incoming re-entry vehicles landing in the middle of or on the atoll may do a considerable amount of damage to this marine environment. In addition, the extended duration of many of the warning zones--40 weeks and more per year in some cases -- may constitute a disparagement of the rights of other states, and may adversely affect rights of navigation, overflight, and fishing.

*The Practices of Nations*

In determining what customary international law rules govern this situation, it is important to recognize the difference between a "habitual practice, or usage" and a "legal obligation, or custom."[176] "An habitual practice, such as the avoidance of weapons testing zones

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[171]S. Firth, *supra* note 38, at 25.

[172]*See* H. Atkinson, P. Davies, D. Davy, L. Hill, & A.C. McEwan, *Report of a New Zealand, Australian and Papua New Guinea Scientific Mission to Moruroa Atoll* (1984); Jon M. Van Dyke, "Protected Marine Areas and Low-Lying Atolls" (publication forthcoming in the *Journal of Ocean and Shoreline Management*).

[173]*See supra* notes 56-61 and accompanying text.

[174]*See, e.g.*, Van Dyke, *supra* note 172.

[175]LOS Convention, *supra* note 1, art. 194(5).

[176]See "Weapons Testing Zone," *supra* note 21, at 1049.

on the oceans, constitutes a custom only if states generally recognize that they are legally obliged to adhere to that practice."[177] McDougal and Schlei pointed to the historical right of way given to naval vessels on military maneuvers as established customary law, but also acknowledged that this right-of-way was given because "mariners preferred to avoid exercise areas altogether rather than to be delayed and endangered by unexpected encounters."[178]

This caution by mariners has led to what McDougal and Schlei and others regard as customary law. But is it consistent with the United States' reaction several years ago to the 24-nautical-mile seaward security zone claimed by Vietnam and Kampuchea (Cambodia) which extended beyond the internationally accepted 12-nautical-mile territorial sea limit? The U.S. reaction, based upon the hazard inherent in entering the area, was to issue special warnings to mariners to avoid these areas but these warnings also stated that, "[t]he publication of this notice is solely for the purpose of advising U.S. Mariners of information relevant to navigational safety and in no way constitutes a legal recognition by the United States of the validity of any foreign rule, regulation, or proclamation so published."[179]

Because of the serious danger that can result from entering a warning or exclusionary zone, it is unrealistic to expect many attempts to do so. The key to the formation of international law, in the face of this problem, is protest.

*Protest*

Both McDougal and O'Connell recognize the importance of protest in the forming or inhibition of customary international law.[180] O'Connell specifically points out that international tribunals in cases of disputed territorial claims "have examined protests in the context

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[177]*Id.*

[178]McDougal and Schlei, *supra* note 78, at 678.

[179]Special Warning No. 45, *Notice to Mariners*, *supra* note 12, Jan. 2, 1987.

[180]*See supra* note 83 and accompanying text; 1 D. O'Connell, *supra* note 64, at 42. The United States' recognition of the importance of protest is indicated in the quote prepared for the U.S. delegation at the 1958 Geneva Conference, text at note 96, *supra*.

of the behavior of both parties, and have decided that a protest, in order to be effective, must be made by all reasonable and lawful means, and the vigor with which the protest is made will depend upon the gravity of the threat and the nature of the rights violated."[181]

In an important distinction, O'Connell explains that "[t]he nature of the protest may well vary depending upon whether it aims to reserve existing rights from invasion and so prevent an historic claim from maturing, or, by denying the claimant State the benefit of the element of general consent of nations, to inhibit custom."[182] The United States' Special Warning No. 45 is an example of the latter as they try on the one hand to safeguard ships while protesting Vietnam's right to a 24-mile "security zone." Any protests within designated missile ranges would also be an example of the latter type. Unfortunately, "the advantage lies with the party which acts and the disadvantage with the party which must demonstrate that the action is illegal."[183]

One clear example of a protest occurred after a 1954 U.S. hydrogen bomb test in the Marshalls contaminated the crew of the Japanese fishing vessel *Lucky Dragon* (Fukuryu Maru).[184] The Japanese Government protested this action and notified the United States of its belief that

> the United States Government has the responsibility of compensating for economic losses that may be caused by the establishment of a danger zone and for all losses and damage that may be inflicted on Japan and Japanese people as a result of the nuclear tests.[185]

Another example of a protest of military actions affecting the high seas occurred in the *Nuclear Test* Cases. Australia and New Zealand brought a complaint to the International Court of Justice against France for its atmospheric testing of nuclear devices. Included in the complaint was the claim that "the interference with ships and aircraft

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[181]1 D. O'Connell, *supra* note 64, at 40.

[182]*Id.* at 39.

[183]*Id.* at 40.

[184]*See* Van Dyke, Smith, and Siwatibau, *supra* note 26, at 736.

[185]4 M. Whiteman, *supra* note 18, at 585-86.

on the high seas and in the superjacent airspace [caused by the French tests] ... constitutes infringement of the freedom of the high seas."[186]

A more recent example is the protest by the United States against the Soviet missile test in August 1989 near Hawaii.[187] Although not explicitly claiming that the Soviet test was illegal, this protest based on safety concerns indicates that even a nation that engages in missile testing recognizes that limits exist on this practice.

The contours of the protest issue are complicated, especially as applied to this situation. Is a mere protest sufficient if a state continues to claim and enforce its zone? Which nation has the burden of proof? Is the zone legal if the protest is ineffective and the zone is effectively maintained? Could international law forbid such zones generally but permit a particular zone based on prescription? Can customary international law ultimately resolve this issue through evolving state practice or are new treaties needed?

In the December 1989 U.S. Navy-Greenpeace confrontation off the coast of Florida, it is significant that the Netherlands did not protest the Navy's use of force to remove the Greenpeace vessels from the Trident launch site even though the Greenpeace vessel flew a Dutch flag. In fact, the Netherlands urged Greenpeace to refrain from attempting to disrupt the launch, arguing that to do so would be an "abuse of freedom."[188] (By contrast, both the New Zealand and Canadian governments protested the French use of force in 1973 against Greenpeace vessels near Moruroa.)[189] It may be hard for Greenpeace to gain compensation for the damage done to its vessels if the Dutch government will not support its claim that it was exercising legitimate navigational freedoms. A U.S. Navy officer commenting on this incident argued further that the U.S. action in removing the Greenpeace vessel was justified in part because "no Dutch warship was

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[186]Nuclear Test Cases (*Aus. v. Fr., N.Z. v. Fr.*), 1973 I.C.J. 253, 457, 12 I.L.M. 749, 768 (1973). For the texts of the protests lodged by Australia and New Zealand against France, *see* Ian Browlie, *System of the Law of Nations: State Responsibility, Part I* at 91-94 and 110-11 (1983).

[187]*See supra* note 16 and accompanying text.

[188]Hunt, *supra* note 99, at 19.

[189]*See supra* note 118 and accompanying text.

present to assert primary jurisdiction" over it, and "the United States was left with the necessity of defending its maritime rights" through "self-help."[190]

*Liability*

The ultimate issue of course is what should happen if a vessel is damaged as a result of a missile launched into or from an exclusionary zone, assuming that proper notice has been given. If the nation whose military fired the missile created an inherently hazardous situations, it should be strictly liable for the injuries that result. It could be argued, however, that the vessel was contributorily negligent by entering into a known danger zone. Whether the vessel should have restrained its free navigation through this zone is a question that goes to the heart of the legitimacy of establishing these warning and exclusionary zones.

The instructions to commanding officers issued by the United States and the United Kingdom quoted above[191] illustrate a sense of responsibility toward other vessels in the area. The payments made by the United States to the victim of the 1988 *Jag Vivek* incident[192] as well as the $2,000,000 given to the crew of the *Lucky Dragon* (*Fukuryu Maru*) after their contamination by a 1954 hydrogen bomb test[193] indicate a sense of responsibility on the part of the United States. In these incidents, however, proper warning had apparently not been given to the crew.

It is clearly the responsibility of a risk-creating nation to give a proper warning to the citizens of other nations who may be affected by the actions. "A State is under a duty to notify any other State which may be threatened by harm from the abnormally dangerous activities

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[190]Hunt, *supra* note 99, at 19.

[191]*See supra* notes 110-11 and accompanying text.

[192]*See supra* notes 56-61 and accompanying text.

[193]*See* Van Dyke, Smith & Siwatibau, *supra* note 26, at 736; T.I.A.S. No. 3160 (1955).

which the State permits to be conducted within its jurisdiction."[194] Even with a proper warning, the risk-creating nation must exercise "due diligence" to protect others from its risky activities.

If a proper warning is given, the question becomes whether the temporary appropriation of an area of the high seas by one nation is legitimate and whether the contributory negligence of the vessel entering the exclusionary zone reduces the responsibility of the risk-creating nation. The concept of contributory or comparative negligence is common to legal systems. Under this doctrine, the liability of the party creating the risk is reduced or eliminated if the injured party also contributed to the risk or failed to take standard precautions to avoid it.[195] If, for instance, a vessel sinks in a shallow harbor area creating a navigational hazard, it would be appropriate for the harbor authorities to define a limited safety zone around the vessel until it can be removed from the area. In fact, it would be irresponsible not to establish such a safety zone. Another vessel that is aware of the defined safety zone but nonetheless proceeds through that area and hits the sunken vessel would be contributorily negligent and may not be able to recover damages for the injuries it receives. It can be argued, similarly, that a vessel entering into a warning or exclusionary zone on the high seas established to test missiles or to engage in other hazardous military activities would be contributorily negligent if it were injured in that zone.

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[194]Kelson, "State Responsibility and the Abnormally Dangerous Activity," 13 *Harv. Int'l L.J.* 197, 243 (1972), citing the Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. 4.

[195]For the way this doctrine applies in admiralty situations, *see generally* Samir Mankabady, *Collision at Sea: A Guide to Legal Consequences* 25-31 (Amsterdam: North Holland, 1978). At common law, damages were equally divided if both vessels were negligent, regardless of the comparative degrees of fault. This rule was altered pursuant to the 1910 International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, the 1910 Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, and the United Kingdom's Maritime Conventions Act of 1911. The current rule requires a court to apportion liability "in proportion to the degree in which each vessel was at fault." 1911 Maritime Conventions Act, sec. 1; The Lucile Bloomfield, (1967) 1 Lloyd's Rep. 341, 351.

An evaluation of this argument would require examining the dimensions (in terms of space and time) of the claim made by the nation engaging in military activity and the extent to which it imposes a burden on the otherwise lawful maritime activities of the other vessel. It is easy (and thus "reasonable") for a vessel to go around a small safety zone established around a temporary navigational hazard, but it may be quite burdensome for a merchant vessel to skirt around a zone of thousands or hundreds of thousands of square miles or for a fishing vessel to avoid seeking the living resources of such a sea area for an extended period of time. If it is truly burdensome for a civilian vessel to adhere to the requirements of a warning or exclusionary zone, then it would be "unreasonable" to expect it to do so and its presence in such a zone would *not* be viewed as contributory negligence.

The burden would thus appear to be on the nation creating the dangerous activity to reduce the risk to the extent possible, and this nation must pay compensation for injuries its activities cause to the vessels, property, and citizens of other nations when they suffer injuries while conducting lawful activities in international waters.

**Conclusion**

The relativistic and flexible approach offered by McDougal and Schlei in their 1955 article[196] may be appropriate in some circumstances for new problems that are just beginning to be examined by the community of nations, but the imprecision of this approach is almost an invitation to conflict.[197] As nations focus in on a problem, they develop norms that are specific and understandable in order to promote a stable and predictable world order. Strong protests have been registered against atmospheric nuclear bomb tests on the high

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[196]McDougal and Schlei, *supra* note 78.

[197]The standard of reasonableness "is an imprecise measure of validity whose very imprecision tends to encourage conflict." Dellapenna, "Canadian Claims in Arctic Waters," 7 *Land & Water L. Rev.* 383, 407 (1972).

seas[198] and all nations have now stopped this practice. One can make a compelling argument that this practice is now contrary to customary international law.[199] The analysis of and result reached by McDougal and Schlei would not therefore be appropriate if applied to this issue today.

Missile testing on the high seas interferes with other uses of the high seas (such as navigation and fishing) somewhat less and has somewhat less of a negative impact on the environment when compared to nuclear bomb tests. Nonetheless, the protests of nations to the high seas nuclear bomb testing and the concerns expressed about recent missile test launches[200] clearly indicate that missile testing on the high seas will continue to be accepted as legitimate uses of the sea only insofar as it these tests do not significantly interfere with navigation and fishing.

Attempts to appropriate areas of the oceans for military purposes by declaring "exclusionary zones" on the high seas are now seen as improper because they do not permit other lawful and necessary maritime activities to continue in these zones. The military powers have tried to avoid this problem by declaring "warning" zones instead which are argued to be less intrusive of a claim.[201] In fact, however, such claims are essentially identical with exclusionary zones, and the military powers have acted as if the vessels of other nations are not entitled to enter such zones.[202] Such warning zones must therefore be viewed with the same degree of suspicion and concern that nations have been expressing toward exclusionary zones. The *Corfu Channel*

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[198]*See, e.g.*, the protests of Australia and New Zealand, *supra* note 186 and accompanying text, and the statement by the Asian-African Legal Consultative Committee, *supra* note 145 and accompanying text.

[199]*See, e.g.*, Tiewal, *supra* note 153, at 68-70; Boczek, *supra* note 133, at 343; Werner Levi, *Contemporary International Law: A Concise Introduction* 214 (1979).

[200]*See supra* notes 16 and 180-87 and accompanying text.

[201]*See supra* notes 96-103 and accompanying text.

[202]*See supra* notes 56-61, 97, and 117-18 and accompanying text.

case[203] stands as a strong precedent that maritime navigational freedoms cannot be interfered with, even to serve the security concerns of other nations, and that compensation must be paid when injuries to persons and property occur.

The current state of international law is, therefore, that missile testing on the high seas, and other similar military activities on the oceans are legitimate only if they do not impede free navigation, interfere with fishing activities, cause any significant harm to the environment, or threaten human settlements. Exclusionary and warning zones that cover large areas or are extended in duration cannot be viewed as acceptable.

If a vessel chooses to enter an exclusionary or warning zone on the high seas, the nation seeking to test its missiles or conduct other military operations in that vicinity cannot lawfully seize or remove that vessel without the permission of the nation whose flag the vessel

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[203]1949 I.C.J. 4. The United Kingdom sought compensation for the death of 45 British seamen and injuries to 42 others, as well as for the serious damage suffered by two destroyers when they struck mines while passing through the North Corfu Strait between Albania and the Greek island of Corfu. The International Court of Justice ruled that Albania was liable for the damage even though it had not laid the mine fields, because Albania was in a position to know what was happening in its waters and had a duty to notify other states that might be endangered by the activity. The Court stated that international law obliges every state "not to allow knowingly its territory to be used for acts contrary to the rights of other States." *Id.* at 22.

This case is particularly significant for the present discussion because the British vessels knew that dangers lurked in the Corfu Channel when they sailed through and may, according to some views, have been acting illegally when it entered these waters. *See* Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* at 48, citing the dissenting opinions of Judges Azevedo and Krylov. The Court did not feel that the responsibility of Albania was in any way reduced because the British may have been contributorily negligent in sailing through these waters. The waters were regarded as safe because they had been swept for mines during the two previous years.

flies.[204] And if a vessel operating with the support of its flag government is damaged as a result of the missile test or other military operation, the nation causing the damage would be liable under international law.[205]

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[204]"Weapons Testing Zones," *supra* note 21, at 1057-58.

[205]*See supra* notes 110-11 and 191-95 and accompanying text.

## COMMENTARY

William E. Butler
Centre for the Study of Socialist Legal Systems
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I would like to make very brief comments on some remarks made yesterday. There are three choices presented to us by the constructions of the Convention. The first is to return to the consensus on innocent passage for foreign warships that apparently was reflected in the 1982 Convention between the great naval powers. The second would be to take what I understand to be the Soviet intention in its reinterpretation of the Convention provisions, namely to exclude warships from certain coastal waters on the grounds that innocent passage is not authorized in those waters. And the third approach, which I personally put forward, was to define more precisely the so-called innocent passing condition of warships which were exercising their right of innocent passage. This approach is analagous to the Soviet instruction with regard to fishing vessels, a very specific indication by the coastal state of precisely the physical condition in which warships must be when effecting passage through its territorial sea. It seems to me that if that third approach commended itself, the bilateral schemes by which we avoid incidents at sea might be a useful analogy for approaching this issue.

Now all of these choices have advantages and disadvantages. The difficulty with the first approach, namely, returning to the original consensus in the Convention, is quite simply: are the naval powers willing to do that? Because if they are, the implications are quite clear. They must no longer dispute what they are now disputing.

The second choice, excluding warships from certain coastal waters in principle, has several disadvantages. First, it does not consider the constructive functions that a naval presence may perform, for the coastal state, for the shipping state, for the flag state, and for the international community as a whole. This approach tends to characterize the presence of naval force as evil in and of itself. It seems to me that that is an undifferentiated and unjustifiable position. Second, this approach also assumes that there is a direct correlation between coastal state security and the distance of warships from the coast. In the modern technological age, it seems to me that is a very dubious correlation. Thirdly, I believe that we greatly underestimate the implications of this approach, however justified some may feel it may be with regard to warships, if it were extended to other classes of

vessels. And surely we have seen enough examples in the last fifteen years in the law of the sea negotiations of claims made by one state expanding into something entirely different in the course of time.

The difficulty with the third approach -- defining the innocent passing condition of warships more precisely -- is that it runs the risk of involving the law of the sea negotiations in general in disarmament arrangements without a full consideration of the arms control implications. The law of the sea is, of course, related to arms control relationships; it is related to the deployment of naval force on the high seas in the exclusive economic zone, in the territorial sea, and the like. But whether we can effectively use the law of the sea to further the cause of arms control without directly approaching the arms control issues in a different form is a more dubious proposition. We might well be advised to allow the essential arms control issues to be worked out on a different plane and at a different level and simply address the larger questions of navigation within the framework of the Law of the Sea Convention itself. Thank you, Mr. Chairman.

# SOME CONSIDERATIONS IN FAVOR OF THE UN CONVENTION ON THE LAW OF THE SEA

S. V. Molodtsov
Dr. Sc. (Law)
Professor

Our symposium is being held during a time of improvement in Soviet-U.S. relations. It is to be hoped that the consolidation of good relations between the Soviet Union and the U.S. will also have a favorable impact on the establishment of a stable legal order and on peaceful coexistence in the world's ocean which is, as we all know, a cornerstone of ensuring peace and common security.

In this connection and taking advantage of the presence here of a great number of prominent American and Soviet specialists in the field of the law of the sea, including those who greatly contributed to the work of the Third UN Conference on the Law of the Sea and to the Convention elaborated by this Conference, I take the liberty to recall that for many years running this Conference witnessed everyday cooperation between Soviet and American delegations. Such cooperation resulted in the inclusion in the Convention of a great number of fundamental provisions dealing with straits, the exclusive economic zone, and other sea areas, and corresponding requirements arising from the contemporary state of international relations.

Naturally, not everything went smoothly. The Conference did not succeed in overcoming certain difficulties, including questions with regard to which the USSR and the U.S. failed to find a common approach. Nevertheless, the positive results of our cooperation should inspire us to seek an acceptable solution to unsettled problems in international law of the sea, which is presently in a condition that can only arouse concern among maritime lawyers.

As you well remember, the traditional rules of the law of the sea reflected in the 1958 Conventions on the Law of the Sea were resolutely rejected by the overwhelming majority of developing countries as not corresponding to the contemporary stage of the world's development and as not meeting those states' interests. This traditional law of the sea did not (and could not) stipulate provisions that reflected the realities of the new world or the results of the scientific and technological revolution. This shortcoming in traditional law of the sea gave rise to a considerable number of urgent problems concerning legal regulation of states' maritime activities, including exploitation of marine resources and the most important task of protecting the marine environment.

But the 1982 Convention on the Law of the Sea, summoned to replace the former law of the sea and meet the requirements of international development, appears to be suspended. It is ratified so far by only a small number (thirty-five) of the maritime states. It has not yet entered into force, and nobody knows whether it will enter into force as a universal treaty, because an influential number of Western states, including the U.S., refused to sign it and do not express any intention to change their positions in this regard. The law of the sea is in a state of limbo that may give rise to processes that, with time, will be less and less controllable. The international community is reaping the bitter fruits of possibilities lost both in 1958 and 1960 to settle by consensus a single question -- the limit of the territorial sea.

What is the way out of this situation? The states that did not sign the Convention see it as follows: Many of its provisions, on which universal agreement was not achieved at the Conference, would become rules of customary international law through practice. Other questions regulated by the Convention but not agreed upon by the above-mentioned states would be regulated through bilateral or multilateral agreements which, naturally, would not extend to third countries. This position on the non-signing states proceeds from the divisibility of the provisions of the Convention. It is well known, however, that from the very beginning and by consensus of all Conference participants, including states which subsequently refused to sign the Convention, the new law of the sea as expressed in the 1982 Convention is based on the concept of indivisibility and interrelation of all parts. This is why divisibility is not only a blow at the whole system of the new law of the sea, which was created through enormous efforts for many years, but it nullifies the value of consensus. On many provisions, consensus was only achived because it was understood that the same result would be achieved with regard to other questions. That is why the above-mentioned position of states that have not signed the Convention gives scope for unilateral and arbitrary actions in all essential aspects of the law of the sea, on which, as is known, the consensus appeared to be extremely delicate. Under the present conditions, it is possible to establish a stable and necessary new law of the sea only by renouncing unilateral or group actions and force and by settling the problems affecting the just interests of all members of the international community without any exceptions. Wouldn't it be better to try, in accord with Western delegates who took a comparatively flexible position on Part XI although they did not fully agree with it, to correct discrepancies by adopting rules and procedures through the Preparatory Commission?

Such rules and procedures could probably be formulated without undermining the basis of the Convention and Part XI. It should be possible to remove the existing discrepancies and to open the way for participation in the Convention by all members of the international community. If our American colleagues can suggest a better alternative to this viewpoint, I would be glad to pay tribute to their wisdom and to search for mutual understanding with all other participants of UNCLOS III.

Hoping for broad approval of the UN Convention on the Law of the Sea, I'd like to note the particular urgency and importance nowadays of certain prescriptions that have a universal but compulsory nature. Among them is a provision stipulating that sea areas beyond the limits of the territorial sea are reserved for peaceful purposes (Article 88; Article 147, para. 2 (d); Article 240, para. (a)). Some researchers maintain that the content of the above provision is fully revealed by Article 310, which reproduces Article 2, para. (4) of the UN Charter prohibiting threat of force or its use in relations between states. In my opinion, the Convention puts a broader meaning into the concept of "use for peaceful purposes." This viewpoint is given in my book *International Law of the Sea*, published in Russian and in an article published in English in the *Ocean Yearbook* (1986), so I shall not repeat it.

While discussing at UNCLOS III the question of using sea areas for peaceful purposes, certain delegates (v.V of the Conference's Reports) proposed to indicate in the Convention that the provision on the uses of the seas for peaceful purposes presupposes the establishment of nuclear-weapon-free zones and zones of peace, areas in which the conduct of military exercises, maneuvres, and other military activities are prohibited. Although the considerations of these delegations were not reflected in the text of the Convention, they could be useful for a broader incorporation into the Convention text of such regional agreements as the Rarotonga Treaty on the South Pacific Nuclear Free Zone of 6 August 1985.

Leaving aside other aspects of this problem, I'd like to note in conclusion that the best results for the use of the world's ocean only for peaceful purposes can be achieved through quantitative and qualitative reduction and subsequent elimination of offensive types of naval arms. However, functional and geographic limitations in this field may also yield positive results.

**Anatoly Kolodkin:** Before we hear from Professor Tarkhanov, I give the floor to Renate Platzöder.

## COMMENTARY

Renate Platzöder
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Mr. Chairman, ladies and gentlemen, and friends. I am here in my private capacity, but I would like to clarify the position of the Federal Republic of Germany concerning the Convention on the Law of the Sea.

My country decided in 1984 not to sign the Convention. However, this decision is not a real *no*. It is, if I may say so, a *no, but*. Now, what does it mean, *no, but*? The Federal Republic of Germany has at no time excluded the possibility of becoming a party to the Convention. We take an active part in the deliberations of the Preparatory Commission and work together with other States, especially with the member States of the European Economic Community, to achieve a universally acceptable Convention in due time. We also contribute to the budget of the Preparatory Commission. Beyond that, we support the activities of the Law of the Sea Office of the United Nations with voluntary contributions. For instance, next year the government of the Federal Republic of Germany will finance the first meeting of an expert group which is to analyze the provisions of marine scientific research of the Convention.

Second, I would like to make a short remark on the problem of making the Convention universally acceptable. Because I am here only in my private capacity, I can ask a rather provocative question. Why do we have to change Part XI? The deep sea-bed regime of the Convention might not be perfect, but as a lawyer, I am trained to interpret and apply a legal instrument in favor of my clients, even though it may not be 100% favorable. I would suggest that we work within the framework of the Convention and try to fix Part XI and its related Annexes by applying the least dramatic measures, by namely be means of authentic interpretation.

Yesterday, Professor Clingan suggested other remedies, and I fully agree with his ideas. However, having followed the deliberations of the Preparatory Commission for some years, I have regretfully to add that it will be very difficult to convince the majority of States to agree on measures that would really change the substance of the Convention.

There is a very simple but very convincing argument for not changing Part XI today: deep seabed mining on a commercial scale will not take place for a long time. We negotiated Part XI in the 1970s and the early 1980s, and now, after a few years only, we see that the Convention is in trouble. So, what is the use of changing it today? Our changes may already be out of date in eight or ten years.

In concluding my short intervention, I would like to express the hope that we all use our professional skills to work out the least possible adjustments to repair the Convention. If we endeavor to change Part XI and its related Annexes in real substance, we risk that the Convention will not enter into force for a long time or even will fall apart.

# INTERNATIONAL LEGAL GUARANTEES OF SECURITY ON THE SEAS AND OCEANS

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The safeguarding of security on the seas in its broad political and legal meaning is part of the comprehensive system of international security now in the process of formation. One of the major directions in safeguarding security on the seas is the establishment of the lawfulness of the use of the world ocean. This implements the well-known provision concerning the need to democratize contemporary international relations and universally acknowledges the priority of international law over maritime policy and maritime international relations. At the 43rd session of the UN General Assembly, E.Z. Shevardnadze, Soviet Minister of Foreign Affairs, emphasized that "amidst the military, political, economic, humanitarian, and ecological safeguards regarding comprehensive security, we put its legal safeguards in the foreground" (*Pravda*, 28 September 1988).

The major principles of international law and the principles of the international law of the sea are the legal safeguards for ensuring security on the seas and oceans. The implementation of these principles in international legal acts and national legislation creates equal and mutually beneficial possibilities for cooperation in maritime activities and for supporting peace, legal order, and security on the seas.

One effective and practical way to ensure security on the seas and oceans on the basis of the contemporary maritime legal order is the international legal ensurance of states' activities in the world ocean, that is, a system of measures taken by states to create favorable political and legal conditions within the process of exploration and exploitation of the seas and oceans in their national interest. The political and legal conditions promoting effective maritime activities and ensuring the legal interests of all states parties favor both the international community and individual states.

New political thinking opens up a practicable way to extend international cooperation on the basis of "the priority of international law as a rule of human existence." The main objective of the international legal ensurance of states' activities in the sea is to guarantee security and to extend cooperation between states on the basis of "the

rules of human existence" (E.A. Shevardnadze). The 1982 UN Convention on the Law of the Sea is justly considered to be such a system of legal rules common to all mankind and regulating the uses of the world ocean.

The main measures taken by the states within the system of international legal ensurance of their activities in the world ocean are as follows:

- prognostication, elaboration, and improvement of the international legal regime of the ocean to safeguard peace and security on the seas;
- improvement of national legislation in accordance with the principles and rules of international law of the sea;
- regulation of rules concerning mutual relations between states and their bodies (vessels, ships) operating on the sea;
- elaboration of measures on the effective compliance by the states with the principles and rules of international law of the sea.

In its narrow meaning, international legal ensurance is a system of measures for introducing the principles and rules of international law of the sea into the practical activities of states and their bodies in the world ocean.

To realize legal principles and rules in the practical activities of the maritime bodies it is necessary to proceed from the legislative nature of the principles of international legal ensurance.

Let us consider, in particular, the question concerning the legislative nature of the principle of the freedom of the high seas. What rights and duties of the states are incorporated into this principle?

- The right to exercise the freedom of the high seas (Art. 87 of the Convention) and the duty "to duly consider the interests of other states" in exercising such freedom.
- The right to contact foreign vessels (ships) and other objects of national interest in the sea, and the duty to respect their legal status.
- The right of navigation under the flag of one's state and the duty to effectively exercise one's jurisdiction and control over vessels flying one's flag.
- The right to exercise naval navigation and the duty not to use the high sea for the purposes of aggression.

- The right of fishing and the duty to ensure the conservation of the living resources of the high sea.
- Other rights and duties realized by the states within the principle of the freedom of the high seas.

The principle of the states' sovereignty over their internal and territorial waters means that the coastal state exercises its territorial superiority in such waters with due consideration of one exemption -- foreign vessels' right of innocent passage through territorial seas.

This principle gives rise to the right of the coastal state to prohibit the following major activities in its waters:

- any threat or use of force;
- any exercise or practice with weapons of any kind;
- any act aimed at collecting of information to the prejudice of the defense or security of the coastal state;
- any act of propaganda aimed at affecting the defence or security of the coastal state;
- the launching, landing, or taking on board of any military device;
- the embarking or disembarking of any commodity, currency, or person contrary to the customs, fiscal, immigration, or sanitary regulations of the coastal state;
- any act of wilful and serious pollution of the sea and sea-bed contrary to the applicable rules of law;
- any fishing activities;
- the carrying out of research or survey activities;
- any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state;
- any other activity against the lawful interests and rights of the coastal state.

Therefore, even a short analysis of the legislative nature of only two principles of the international law of the sea shows that security on the seas is directly linked with the regulatory role of the legal regime of the ocean.

The elaboration and improvement of the rules of mutual relations between vessels (ships) during navigation is of special significance for ensuring security on the seas and oceans and for the regulation of the activities of states and their bodies on the seas. The aim of such rules and the need to comply with them is the prevention of incidents at sea.

The USSR and the U.S. have the most experience in elaborating regulations concerning mutual relations between vessels (warships) and

aircraft on the seas and oceans. The Agreement between the Government of the USSR and the Government of the USA on the Prevention of Incidents on and over the High Seas signed on 25 May 1972, as well as the Protocol to the Agreement of 22 May 1973 are good examples of the practical settlement of one of the urgent military and political problems in the interests of ensuring peace and security on the seas and oceans. The practical implementation of the provisions of the Agreement and the Protocol for fifteen years has shown their great vitality and positive impact on the situation in the world ocean.

It is not by chance, therefore, that other states have followed suit: on 15 July 1986 a similar agreement was signed between the USSR and Great Britain, and on 25 October 1988 between the USSR and the Federal Republic of Germany.

For the first time in history the Agreements on the prevention of incidents incorporate the political legal basis of safe relations between vessels, ships, and aircraft. The Agreements are based on the principles and rules of international law and international law of the sea which form the theoretical foundation of the system of the international legal ensurance of security on the seas. It is common knowledge that incidents on the sea may be both accidental and, as an exception, premeditated. In both cases these acts are unlawful, infringing upon the security at sea. Therefore, it is necessary to actively suppress them.

All states, and not only the contracting parties to agreements, must suppress such incidents. This lawful assertion is based on the provisions of the Charter of the United Nations and the main principles of international law. It is fully in line with new political thinking based on the facts of life of the contemporary world.

The trends in the development of contemporary international relations and the political and diplomatic dialogue between the USSR and the U.S., as well as between the USSR and West European countries, demonstrate that maritime international relations may and must be safe if they are based on the major principles of international law. The security of such relations is based on the assumption that all mutual relations between states and their bodies (vessels, ships, and aircraft) in the world ocean should proceed from contemporary international law, in particular from its universal principle of mutual denunciation of force or threat thereof.

The legal ensurance of security on the seas and oceans will be effective only if the international legal training of all officials engaged in maritime activities is properly organized. Such training in the present period should, presumably, take due account of the new political and legal situation in the world which is associated, first and foremost, with the perestroika of international relations and with the

need to establish a comprehensive system of international security, the integral part of which is security on the seas and oceans.

Besides doctrinal political and legal problems, new factors are making way in international legal training:

- the increasing influence of the problems of the world ocean on the development of contemporary international relations,
- the turning of sea waters and the sea-bed into an object of global interest to all countries of the world,
- the growth of the priority of international legal knowledge of the Ocean in the system of special education,
- the complication of the legal regime of the world ocean under the influence of social and scientific technical progress,
- the extension and qualitative renewal of maritime links between the states,
- the aggravation of problems associated with the prospecting and exploitation of marine mineral resources and living resources of the sea,
- the increased interrelationship of the problems of the world's ocean with the global problems of today.

Under the conditions of the contemporary, dynamic international situation and in connection with the new problems of international law of the sea associated with the adoption of the new Convention, the range of maritime legal problems, requiring deep examination, will be steadily increasing.

Therefore, the practical problems concerning the improvement of the system of international legal ensurance of security on the seas and oceans will become more urgent, because all kinds of maritime activities should be exercised against a favorable political and legal background.

## COMMENTARY

Stoyan Stalev
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I am particularly pleased to participate in this extremely useful meeting because I know the history of the development and deliberation of the United Nations Conference only from literature, and now I can feel part of its atmosphere. I would like to draw your attention to two problems and to ask some questions of Professor Oxman.

Our country adopted a new law on maritime areas in 1987. This act to a great extent follows and accepts the provisions of the United Nations Convention, proving how some parts of the Convention can develop into customary international law before the Convention itself comes into force, as some scholars here have already told us.

Two solutions of the new act may be of some interest to you. The first of them is about the applicable law in the economic zone and on the continental shelf, questions of private international law. I think that such questions of applicable law in this area will become more actual with the development of these institutions. Our act does not give a general answer to all questions of applicable law. It discusses only the applicable law for *delicto* liability. Article 31 of the act provides that damages caused by violation of the sovereign rights of the coastal state, the Bulgarian state in its economic zone and on its continental shelf, are subject to Bulgarian law and that disputes are solved by the Bulgarian courts. That means that the *delicto* liability in such case is governed by the law of the coastal state. But it does not mean that all kind of torts will be subject to the Bulgarian law. A collision between ships that has nothing to do with sovereign rights in the economic zone or on the continental shelf is not covered by this conflict of law rule. One must also have in mind that not every violation of sovereign rights in the economic zone and continental shelf can lead to damages for the coastal state. Even if there are damages, this does not mean in all situations that the Bulgarian state will be the plaintiff. The damages can concern the interests of private persons or juridical entities. I think that the application of the law of the coastal state in such cases is correct and it is based on the principle of *lex locus delicti*, in effect application of the law of the state where the damages occur. One can presume here that for the application of

the law of the coastal state in such narrow cases, the economic zone is deemed to be the territory of the coastal state.

The next question is really addressed to our distinguished American colleagues. It is about the jurisdiction of the coastal state in the contiguous zone. When our law was elaborated in the preparatory group, a lot of discussion ended, unfortunately, with an unclear formulation of articles. Two opinions were available.

The first of them proposed that the coastal state has penal jurisdiction in the contiguous zone if the foreign vessel has committed a violation against the fiscal, immigration, etc., laws of the coastal state in the territorial sea. The violation itself must be committed in the territorial sea and then and only then can the vessel be arrested under the exercise of penal jurisdiction in the contiguous zone. If a vessel has committed a violation only in the contiguous zone, the coastal state can take only preventive measures but cannot exercise penal jurisdiction.

The second opinion was that the coastal state has penal jurisdiction also when the violation is committed in the contiguous zone itself. This question is important for states which introduce the contiguous zone in their internal law. It is also closely connected with the right of hot pursuit. I would be glad to hear some comment from our Soviet colleagues on this topic, too. Thank you, Mr. Chairman.

## COMMENTARY

Nikolai V. Amelko
Candidate of Naval Sciences
Consultant to the Foreign Ministry, USSR

Thank you, Mr. Chairman, for giving me the opportunity to address this forum. I am a consultant of the Foreign Ministry, but I am expressing my personal opinions.

It is a great honor for me to be present at this representative forum of world famous scholars, who discuss very important issues for the international community and in particular the Convention on the Law of the Sea. Many of those present here were the authors of the Convention, which was born with great difficulty and took a great amount of time to elaborate. There is no question that the Convention is a compromise among all signatories, even those who have not as yet signed or ratified it. But the fact is that the Convention is in a state of suspension.

There are two reasons for that. The first one is the need to specify certain provisions of the Convention, which can be interpreted in various ways. That is the subject of this symposium. There's no big problem here; it can be resolved within the framework of the Preparatory Commission. The second, which is first in importance, is the need for political will. The very fact that certain states, some of them very powerful, have not signed the Convention makes us think that they lack such political will. Unfortunately, some political figures continue to bring old approaches to international relations. Hence, selective application -- that is, the use of only advantageous provisions -- causes various premeditated violations of the Convention.

Dr. Saguiryan and Professor Butler spoke about the interpretation of innocent passage. In the Convention, we interpret innocent passage in only one way. I, for one, do not know of instances when the Soviet Union has objected to innocent passage of vessels, including warships, when they have followed international sealanes. Maybe it is necessary to specify this issue somewhat. But as regards the Black Sea conflict when two destroyers entered Soviet territorial waters, I must say that the U.S. side invoked not the 1982 Convention but the 1958 Convention.

Elementary logic is lacking in this issue. Professors Clingan and Oxman called the Convention a compilation of all international laws and said that it is not necessary, as it were. I think it is good that there will be a single international law, but saying that the Convention is not

necessary contradicts the logic of international relations. I would be very glad to be wrong in saying that they are in favor of dividing the Convention, of adopting certain parts but objecting to Part XI.

It is known that considerable changes have taken place in international relations in the political, economic, ecological, and humanitarian and other fields. Even in such a complex field as the military, there is agreement, and elimination of the entire class of short and medium range missiles has been started. There is progress in the agreement on 50 percent reductions in strategic defensive arms. Negotiations have started on the mandate to reduce conventional arms. There are other important consultations going on.

The only important field where there is no negotiating mechanism is the field of naval armaments. We are well aware of the Soviet initiatives put forward by Mikhail Gorbachev in Murmansk, Vladivostok, Belgrade, in the interview in the Indonesian newspaper, *Merdeka*, in the Indian Parliament, and finally, in Krasnoyarsk. They were put in a general form by Foreign Minister Eduard Shevardnadze at a special session of the UN General Assembly. Many parts of these initiatives have to do with international law of the sea, with the protection of normal navigation and the economic use of seas and oceans.

Unlimited everyday activities of naval forces directly intervene in navigation and lead to accidents which violate the rule of law at sea. Major maneuvers such as 'Team Spirit,' involving up to seventy warships, Canadian maneuvers with 300 warships and 100 planes, Australian, Japanese, and other countries' maneuvers intervene in normal navigation in straits and in traditional sealanes. Artillery training maneuvers and bomb dropping also intervene dangerously in normal navigation. I will give just one example from Asia, the Pacific, and the Indian Ocean. According to the data from the Ministry of Merchant Marine, in 1987 there were 212 incidents of intervention in normal navigation as regards only Soviet vessels, compared to 218 for the years 1985 and 1986 combined.

In the above-mentioned initiatives by the Soviet government on naval armaments, safety measures are represented very broadly, but unfortunately, we have not seen a response to these initiatives. I'm not trying to reproach anybody or to whitewash ourselves. I'm saying this to show the interdependence and similarity of problems of maritime law and of naval armaments. Solutions to some of these problems resolve other problems, and all such solutions are important for the international community. I believe that our forum will have a positive

and scientifically-founded influence on the future of the Convention on the Law of the Sea.

Today's problem is to make the Convention the legal norm, and this problem can be solved if we find compromises in the vague aspects of the Convention and if states have the necessary political will to keep it alive and to avoid the trend to divide and maybe even to bury the Convention. I wish good sailing to all of us and fast progress towards our ultimate goal of making the provisions of the 1982 Convention acceptable to all states. Thank you.

# INTERNATIONAL NAVIGATION AND THE CHANGING LAW OF THE SEA

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For a long time international navigation has influenced the development of international law of the sea. However, in recent decades the situation has begun to change, and at the Third UN Conference on the Law of the Sea navigation, which remained one of the leading activities of states in the world's ocean, was overshadowed by other interests, first and foremost resource interests. Sometimes it seemed that navigation was perceived by certain delegations as an undesirable activity, a potential source of marine pollution. One of the Soviet delegates called the Conference's Third Committee, which dealt with matters of protection and conservation of the marine environment, including prevention of pollution from ships, "The Committee for Suppressing Navigation." There was some truth in this joke.

Nevertheless, thanks to substantial efforts, mainly on the part of maritime countries, the 1982 Convention on the Law of the Sea has incorporated provisions which meet, on the whole, the interests of international navigation.

Thus, the 1982 Convention reaffirmed and to a certain degree developed and specified such provisions as the principle of the freedom of the high seas, including freedom of navigation and the exclusive jurisdiction of the flag state over its vessel, as well as the right of innocent passage of foreign vessels through the territorial sea. The right of transit adequately protects the freedom of vessels' passage through major international straits connecting two parts of the high seas (or exclusive economic zone), earlier in force. In other straits used for international navigation a regime of innocent passage is stipulated which cannot be suspended by states bordering the straits. Recognition of the archipelagic states' sovereignty over archipelagic waters is to a certain extent compensated for by the introduction of the right of archipelagic passage in sea lanes and of the right of innocent passage

outside such lanes. In spite of the fact that coastal states are given certain rights with regard to foreign ships in the economic zone for the purpose of protecting the marine environment from pollution, the principle of the freedom of navigation and other related lawful uses of the sea have been preserved on the whole. Of great significance for international navigation are the conventional provisions establishing priority (although a limited one) of international rules and standards over national requirements with regard to design, construction, and certification of the crew and equipment of foreign ships.

Nevertheless, one cannot help seeing that the regime of international navigation in the light of the provisions of the 1982 Convention has undergone significant and complicating changes. First of all, the universal expansion of areas under the sovereignty or jurisdiction of coastal states has negative consequences for navigation. The recognition of the twelve-mile territorial sea caused those maritime countries which traditionally had a smaller breadth of territorial sea (Great Britain, for example) to extend it, for quite understandable reasons, to twelve miles. At this forum we have learned that the United States is going to do likewise, which is of course quite lawful. Moreover, the lack in the 1958 Convention of the Territorial Sea and Contiguous Zone of precise criteria for applying the method of straight baselines to delimit the territorial sea resulted in its very broad implementation, which substantially increased the areas under the sovereignty of coastal states. Probably, the 1982 Convention further encouraged the application of the straight baselines method, having provided for its additional use (para. 4, Art. 7). In this connection the concern of certain members of the UN International Law Commission, voiced during the preparation in 1956 of the "Articles Relating to the Law of the Sea" and regarding the potential expansion of internal waters at the expense of the high seas through deliberate advance of port installations far seaward, looks naive now. Now it is done in a much simpler way and without resorting to such expensive measures.

The inclusion of sea areas by numerous archipelagic states has also considerably reduced the high seas areas.

The contiguous zones which the coastal states may establish on the basis of the 1982 Convention are extended, as compared with the 1958 Convention on the Territorial Sea and Contiguous Zone, from twelve to twenty-four miles.

Despite the limited possibilities provided by the 1982 Convention for exercising the rights of the coastal state with regard to foreign vessels in the economic zone, such rights (in particular, the right of physical inspection) may, nevertheless, in certain situations considerably hamper international navigation, because the coastal state can

exercise control over practically any foreign ship having no immunity, not just tankers, or nuclear-powered ships, or ships carrying dangerous substances. Normal passenger ships can also become subject to control.

To a substantial degree complications for international navigation may ensue from the incompleteness or deliberate vagueness of many provisions of the 1982 Convention. I wish I could agree with Professor Molodtsov, whom I regard as one of my few teachers, that the provisions concerning navigation are mainly clear and that there are only some minor exceptions. Even in such a traditional and seemingly well developed institution of the law of the sea as the right of innocent passage through the territorial sea, the Convention does not answer a number of rather significant questions. For example, it is not clear whether the right of innocent passage (without visiting the internal waters of the coastal state) concerns only those parts of the territorial sea where there are already lanes usually used for international navigation, or established by the coastal state, or whether broader interpretation is possible. May the coastal state close for navigation certain areas of the territorial sea for reasons other than stipulated by para. 3, Art. 25 of the Convention (in particular, with the aim of protecting and conserving the marine environment)? May the coastal state enforce the laws and regulations adopted by such states if at their violation the passage of a foreign ship remains innocent (compare, for example, para. 2"h", Art. 19 and para. 2, Art. 220)?

The 1982 Convention, having extended the contiguous zone to twenty-four miles, did not make clear whether the coastal state could extend relevant laws and regulations to this zone. There are two opinions regarding this question. The restrictive interpretation is that the coastal state in the contiguous zone may only prevent violations in its territory, or punish for the already-committed violations within the limits of the territorial sea. The other opinion proceeds from the assumption that the coastal state has the right to extend its jurisdiction to the contiguous zone and, accordingly, both to prevent and to punish for violations in the zone.

Rather complicated problems of interpretation can emerge with regard to the provisions of the Convention regulating the regime of international straits. Besides the geographical criterion (connection of two parts of the high seas or economic zone), the question arises about whether this or that strait is used for international navigation. If the second criterion is independent of the first, it would appear that neither the regime of transit passage, nor that of innocent passage, stipulated by Part III of the Convention, extends to straits not used for international navigation. Moreover, under the restrictive interpretation

of the innocent passage concept, such straits probably may also be excluded from the regime of innocent passage through the territorial sea because they have no lanes generally used for international navigation. Such an important question as enforcement of relevant laws and regulations by the coastal state, in particular in connection with Arts. 42 and 233 of the Convention, is not quite clear. This latter point is significant in characterizing the regime of archipelagic passage: if the state bordering the strait may take appropriate enforcement measures only in situations stipulated by Art. 233, the archipelagic state has no rights whatsoever with regard to foreign vessels exercising archipelagic passage, because Art. 233 is applicable only to straits.

Specific problems may arise in connection with control exercised by coastal states over foreign navigation in the economic zone with the purpose of protection and conservation of the marine environment (in particular, in connection with the evident vagueness of such notions as "significant pollution," "substantial discharge," "major damage"), application of the so-called universal jurisdiction of port states, implementation of "safeguards" with respect of international navigation, etc.

Certain problems may also emerge with respect to the high seas. For example, Art. 221 of the Convention stipulates the right of the coastal state, "pursuant to international law, both customary and conventional," to take and enforce measures beyond the territorial sea with regard to a foreign vessel suffering a maritime casualty which may be expected to result in major harmful circumstances for the coastal state. The wording of this article, although it is very close to the provisions of Art. 1 of the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, still differs from it, providing, perhaps, for less strict conditions for interference. In particular, it omits the reference to the "major and practicable danger" for the coastal state. Another question arises here on whether Art. 221 establishes a new regime in addition to the existing ones, in accordance with the 1969 Convention on Intervention and in conformity with the insufficiently defined "customary law," or if it just refers to these two regimes?

Taking into account the complexity of the situations in which the 1982 Convention was formulated, it is difficult to reproach its authors for deficiencies and vagueness. It is well known that with the purpose of achieving compromise in certain provisions of the Convention certain vague wordings, sometimes allowing the directly opposite interpretation, were included deliberately. Moreover, such a large-scale convention can hardly pay more attention to the questions of

international navigation. But understanding, in this case, is poor consolation.

In the existing situation, when the majority of states extend their jurisdictions, establishing twelve-mile territorial seas, archipelagic waters, and economic zones, and in their legislation do not always limit their rights to the 1982 Convention, the best way out for international navigation would be, of course, universal adoption of the Convention. At least, this would allow the settlement of discords concerning interpretation and implementation of its provisions through mandatory dispute settlement procedures.

However, the actual situation with respect to the ratification of the 1982 Convention shows that even its entry into force is hardly possible in the nearest future. Moreover, its entry into force with a limited number of participants at the initial stage may result in additional difficulties for navigation because the states members will have the formal right to claim the privileges ensuing from the Convention and deny such privileges for the non-participating states.

Besides the 1982 Convention, events not directly associated therewith may be of certain concern for international navigation. In particular, one cannot help noting the tendency towards the consistent reduction of areas open for navigation in the world's oceans. The question is not only the growing number of so-called "special areas" subject to the MARPOL 73/78 Convention, in which additional restrictions are put on exploitational discharge from vessels, but also the "especially vulnerable" areas for whose protection limitation or even entire prohibition of navigation therein is contemplated. And following from the actions of Ecuador, which claimed the establishment of a fifty-mile zone of limited navigation, certain countries may be inclined to settle such questions unilaterally.

In certain areas of the world's ocean, international navigation competes with activities on the exploration and exploitation of sea-bed resources, which inevitably results in the physical reduction of areas open for navigation. The provision reading that artificial islands, installations, and structures may not be established "where interference may be caused to the use of recognized sea lanes essential to international navigation" (para. 7, Art. 60 of the 1982 Convention) should probably be specified and developed.

In the present situation, characterized by increasing difficulties for international navigation, and considering the multiple uses of sea areas, it is appropriate to ask if it might be expedient to elaborate a special convention designated exclusively for the regulation of international navigation.

Such a convention could settle questions regarding interpretation and bridging the gaps in the 1982 Convention. Despite the fact that this convention will probably be applied to a limited number of participants, it would undoubtedly affect the practice of other states as well.

The idea of establishing a more favorable regime for international navigation is partially laid down by the 1982 Convention itself. For example, in providing the coastal states, in specific situations, with the right to stop and inspect foreign vessels, the Convention simultaneously binds the states to cooperate "to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea" (para. 2, Art. 226). Para. 7, Art. 220 provides for the establishment of procedures whereby the coastal state should refrain from exercising its rights of enforcement even when the discharge from the foreign ship in the economic zone results in major damage.

Such a convention should both ensure the necessary conditions for navigation in various sea areas and provide for the conditions of the vessels' access to foreign ports, as the essence of merchant navigation lies not in exercising the freedoms of the high seas, the right of transit through international straits, and the right of innocent passage through the territorial sea, but in possibly unrestricted visits to foreign ports open to merchant ships. The draft convention on the regime of vessels in foreign ports, submitted by the Soviet Union to IMO as far back as 1975, could become an integral part of the new convention.

Such convention could incorporate provisions on the harmonization of control over foreign vessels in ports, as is provided on a regional level by the Paris Memorandum.

IMO would probably be the most appropriate forum for the elaboration of such a convention, as it has taken place during the recent formulation of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Irrespective of the final results, the work itself on such a draft convention would undoubtedly be useful for protecting the interests of international navigation.

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Please let me use this podium to ask two questions. The first is addressed to Professor Clingan, who said in his written report:

> Take for example the Canadian Arctic. This area is environmentally sensitive and all agree that protection is required. It is for that purpose that the ice-covered areas article was inserted in the treaty.

My question is: why do you refer just to the Canadian Arctic? Does it have anything to do with the U.S. Arctic and the Soviet Arctic?

The second question I would like to put to all: Recently we are witnessing a phenomenon in international practice when bilateral governmental agreements on navigation include provisions borrowed from the UN Convention on the Law of the Sea. All those borrowings that I have run across in my practice concern Article 19, that is, peace, good order, and security of coastal states, Article 23 dealing with nuclear vessels and vessels carrying dangerous cargo, and Article 25 concerning nondiscrimination when stopping innocent passage. My question is: how shall be form our attitude to that approach? Is that positive or negative or what? Does it have anything to do with the package and the probability of tearing the package apart?

## COMMENTARY

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### Comments on Ambassador Hasjim Djalal

Firstly, I am deeply honored and grateful to have been invited to this historic meeting. Coming from Canada, I am thus, like Ambassador Djalal, from neither of the two superpowers principally represented here, yet inevitably affected by the actions of both!

The discussion, since we started yesterday, has been worthwhile as well as stimulating. Having participated here also in Pacem in Maribus 1985, I am not at all surprised by the excellence of Soviet scholarship in the law of the sea area.

However, today we seem to be talking more about the viability and future of the 1982 UN Convention on the Law of the Sea and seem to be addressing our principal subject -- navigation -- only in passing or using it to illustrate political points and problems. A discussion amongst states that have either not signed or ratified the Convention, on the present and future effect of the treaty, is somewhat circuitous at least. Positions restated again and again by such states, particularly if such positions are only too well known, are neither very helpful nor very convincing. In that respect, I can only associate myself with Ambassador Djalal's remarks that the new law of the sea is the *total package* as contained in the Convention and that endless discussions on what may or may not be customary international law of the sea are probably not helpful at best and may jeopardize the whole process at worst! For example, Canada, one of the major beneficiaries of the Convention's provisions, has signed but not so far ratified. Canada participates vigorously in the Preparatory Commission and is in general studying how the treaty can be brought into effect. However, there is strong pressure from our large southern neighbor not to do anything at this stage.

### Comments on Dr. Platzöder:

I also believe that Dr. Platzöder's suggestion that any legal instrument is subject to legal interpretation is not provocative at all. On the contrary, it is a most realistic suggestion as it simply urges that we

lawyers should get back to what we do best -- legal interpretation -- and get out of political analysis. There has never yet been a perfect treaty. If there were, we would all be out of business! After all, the Law of the Sea Convention provides guaranteed employment for several generations of lawyers, so what are we waiting for?

**Comments on Dr. Barabolya:**

I would like to congratulate Dr. Barabolya on a very interesting presentation on a subject often neglected and sometimes wrongly thought to be archaic. As Dr. Barabolya has shown, it is real and on the increase!

However, the Law of the Sea Convention also reflects the traditional approach to piracy and does not really cover the more modern version described by Dr. Barabolya. The traditional definition, as set out in Article 101 of the Convention, refers to "illegal acts committed for private ends by crew or passengers of a private ship against another ship, person or property on the high seas or outside the jurisdiction of a state." That definition hardly covers acts perpetrated against merchant vessels at anchor or in coastal transit off the coasts of West Africa or Southeast Asia. Such acts are generally committed within the jurisdiction of coastal states and, often, consist simply of acts of armed robbery or theft by persons operating in small boats from the shore.

Furthermore, the Convention also does not foresee Dr. Barabolya's "state-sponsored" piracy or acts of terrorism with so-called "political" overtones. In traditional maritime law, state-sponsored piracy goes back at least 400 years when "privateers" were licensed by "letters of marque" to engage in such acts by their respective sovereign.

Today the inadequacy of the Law of the Sea Convention in this respect has been illustrated twice recently. Firstly, the International Maritime Organization (IMO) has just concluded an International Convention on the Suppression of Illegal Acts against Merchant Ships -- the so-called *Achille Lauro* Convention. It is hoped that this Convention, which was concluded in record time, will cover this void in international law. Once it enters into effect, hopefully soon, it would go a long way towards resolving some of the problems described by Dr. Barabolya.

Secondly, merchant vessels under many different flags, all exercising innocent passage, have in recent years been attacked, frequently damaged, often destroyed, and their crews injured and killed, in the Gulf War -- by acts which are nothing less than state-

sponsored piracy! Although these attacks were clearly illegal under international law, only the major maritime states, after considerable delay, stepped in. Even then, protection was only extended to "their" flag vessels. This concentrated the fury of the attacks on the remaining innocent, entirely neutral-flag vessels. Although the Gulf cease-fire has now eased this problem, it has to be remembered that for a considerable period international navigation on one of the most crucial routes in the world was jeopardized on a daily basis without anyone lifting a finger! As usual, when "armed conflict" prevails, international law quails -- exactly the situation the Law of the Sea Convention was supposed to prevent.

As a result, I fully agree with Dr. Barabolya's suggestion of establishing a UN Task Force on Piracy. However, the terms of reference of such a task force must also cover the type of state-sponsored piracy which existed in the Gulf. Nevertheless, we must remember that the UN has had already several opportunities to take action in the Gulf, which would have had the clear blessing of international law, yet it has failed to do so. Does this mean that such a task force may only be effective against the much rarer, but more traditional acts of piracy but would stay away from the increasing acts of state-sponsored piracy?

# SOME INTERNATIONAL LEGAL ASPECTS OF ESTABLISHING HISTORICAL RIGHTS WITH REGARD TO SEA AREAS

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The question of recognizing the rights of the coastal states to certain sea areas as "historic" ones is of substantial significance for international navigation. The status of historic sea areas is similar to the status of internal waters and thus the discretional powers of the coastal state, in particular in the sphere of navigation regulation, will apply in this case to the waters of bays, small seas of a bay type, estuaries, straits, etc. The difficulty lies in the fact that international law of the sea does not contain clear-cut criteria which reveal in a uniform and precise way the legal basis for the lawful historical title of the coastal state to the above-mentioned sea areas.

In accordance with the customary rules of international law, historical title means continuous and uninterrupted possession of certain territories, including sea areas, if other states do not impede such possession and do not make protests to this effect. Thus, long possession should testify to the consent of all states concerned for the established regime of historic waters. However, the tacit consent of the states of the world community is not an easily provable fact because often claims for sea areas, as British scientist Brownlie has correctly noted in his authoritative course of international law, "do not acquire such a degree of recognition which would be sufficient for justifying the presumption of tacit consent."[1]

The 1982 UN Convention on the Law of the Sea does not contain any legal rules with regard to historic waters and only mentions historic bays. For example, para. 6, Art. 10 (the maximum width of the mouth, the method of drawing a closing baseline, etc.) "do not apply to so-called *historic* bays," i.e., it is admitted that such bays may

[1] Ian Brownlie, *International Law* Vol. 1. Moscow, 1988. p. 258 (in Russian).

become part of internal waters even if their closing line lies beyond the limits established by the generally recognized rules of international law (twenty-four miles).

In questions concerning the acquisition of rights to historic waters, the international law doctrine is based, to a considerable degree, on the judgments of the Central American Court of 19 March 1917 regarding the regime and the status of the Gulf of Fonseca and of the International Court of Justice of 18 December, 1951 concerning the Anglo-Norwegian dispute on fisheries. Both judgments emphasize that historic waters are water areas with the above-mentioned historical title, i.e., as the Central U.S. Court put it, "the century-long or from time immemorial possession" in the aggregate with the tacit consent of other states. In this connection the decision of the International Court of Justice notes that "tolerance displayed by foreign states with regard to practice in this question is an indisputable fact."

However, according to a number of scholars of international law, the judgement on the Anglo-Norwegian dispute "by no means may be a precedent," as Columbus put it. This opinion is shared by Fitzmorris. Special literature, in particular the above-mentioned work by Brownlie, also notes that "care should be taken" in looking for proofs of tacit consent with regard to maritime claims.

Thus, the establishment of the historical title of the coastal state to sea areas based only on the criterion of comparatively long, peaceful (uninterrupted) possession is disputable and difficult because of conceptual divergences. Of interest in this connection is the status of Gulf of Aqaba as a "historic" one, which was discussed in the 1950s by the UN International Law Commission on the initiative of the Arab states. At that time, among other legal grounds for the coastal state to acquire historic rights to certain sea areas, were considered such geographical factors specific to the area as its location aside from navigational sealanes, configuration, and contiguity to the coasts of one or several states. The specific defensive and economic interests of the coastal state, including the economy of the coastal part of the territory or of the whole country, were also taken into account. The sum of these factors, as well as the subjective intent of the coastal state to obtain legal title and the tacit consent of other states during the more or less long, continuous, peaceful (uninterrupted) exercise by the coastal state of its power over the sea area are criteria for the rightful establishment of the historic waters regime.

At the same time legislative practice in the light of customary, established rules of international law, meaning its compliance with the above-enumerated criteria, shows that in actual practice states -- Kenya, Sri Lanka, Thailand -- often declare as their historic waters

and bays the areas over which they exercise their power for a comparatively short period of time. Moreover, a number of states -- Mauritius, the Seychelles, Pakistan -- have reserved in their national legislation the possibility of declaring as "historic" in the future certain sea areas adjacent to their coast and to automatically transfer to them the status and the regime of internal waters. It is evident that such practice runs counter to the requirements of international law and is fraught with a considerable threat to international navigation.

# INTERNATIONAL LEGAL LIABILITY FOR OIL POLLUTION DAMAGE

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## Reasons for the Adoption of International Legislation on Civil Liability for Oil Pollution Damage

Oil pollution presents a large and ever-growing danger for the world's oceans, for the interests of the coastal states and the whole of the world community.

It causes damage to the waters and the resources of the world's oceans, upsetting its biological environment and thus undermining the traditional marine industries. It irreparably damages the coastline, and makes beaches and other places of rest unavailable for recreation.

Among the causes of oil and oil products pollution, a large share is associated with carriage of goods by sea. In the 1950s to the 1970s, the numbers and the size of cargo ships greatly increased. The tanker fleet has been growing especially rapidly. Suffice it to say that the annual tonnage increase in 1974 was equivalent to the tonnage of the world's tanker fleet in 1957. Although the number of oil escapes following upon maritime casualties is not greater than the cases of oil pollution for other reasons, their danger is great. The case of *Torrey Canyon* tanker, which sank in March 1987 eighteen miles off the coast of Great Britain, acquired ill fame. The casualty resulted in the escape from the vessel's bunkers of some 60,000 tons of crude oil. Subsequently the tanker was destroyed and the oil escaped into the sea and burned. The damage incurred by Great Britain as a result of this casualty amounted to some 14 million dollars. The catastrophe also caused great financial damage to the coastline of Brittany, to which the residues of the escaped oil were carried in spite of measures taken by the French authorities.

The catastrophe with the *Torrey Canyon* tanker has raised a very urgent question: under the existing national laws and the international convention limiting the liability of a shipowner, the victims are sometimes not able to get compensation adequate to the damage inflicted upon them. For instance, the 1957 International Convention

Relating to the Limitation of the Liability of Owners of Seagoing Ships, which entered into force on 31 May 1968, limits the liability of a shipowner to the amount of 1,000 francs Poincare for each ton of the ship's tonnage.

After the incident with the *Torrey Canyon*, the British government proposed that IMCO examine questions facing the world community with respect to this casualty. In May, 1967, the extraordinary session of the IMCO Council adopted a decision to examine, together with other problems of a navigational, technological, and legal nature, all issues relating to the nature, scope, and size of the shipowner's and operator's liability for losses incurred by third parties as a result of an incident. To consider legal issues, the IMCO Council established a Legal Committee which, in its turn, set up a Working Group on the questions of civil liability for oil pollution damage. The Legal Committee also decided to cooperate with the International Maritime Committee (IMC). IMC formulated the Draft International Convention on Civil Liability for Oil Pollution Damage. During 1968-1969 the Draft was twice discussed by the Legal Committee's Working Group and twice by the sessions of the Legal Committee itself and then submitted for consideration to the International Legal Conference on Oil Pollution Damage held by IMCO.

Delegations from forty-eight countries, observers from six states, and a number of international organizations participated in the Conference, which was held from 10 to 29 November in Brussels.

At the Conference emerged two opposite approaches to the settlement of the questions of liability for oil pollution damage. A large group of delegations regarded as of paramount importance the interests of those who suffered from pollution, and they made every effort to maximally enhance and toughen the liability of shipowners for such damage. This group included the delegations of Indonesia, India, Ireland, Spain, Portugal, Yugoslavia, and others. The position of the U.S., France, FRG, Belgium, and the Netherlands was not that extreme but nevertheless was determined, first and foremost, by the need to protect the coastline from pollution. The third group of states -- Greece, Japan, Liberia, and to a certain extent Great Britain and the Scandinavian countries -- guided by the interests of their tanker fleets, adopted measures aimed at relieving the liability of the shipowner. The two opposite approaches to the purposes of the Convention and the concrete arrangement of forces at the Brussels Conference predetermined the compromise nature of the Convention adopted thereby.

## The 1969 International Convention on Civil Liability for Oil Pollution Damage

The Convention applies to vessels actually carrying oil in bulk as cargo (para. 1, Art. 1). This means that the conventional rules do not apply to vessels not carrying oil as cargo even if they carry oil as fuel or lubricants, nor to vessels carrying oil as cargo but properly packed. *Oil* means any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil, and whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship (para. 5, Art. 1). Thus, if a ship carries oil in bulk as cargo, it does not matter whether pollution was caused by this oil or the fuel or lubricating oil.

In accordance with Art. II, the Convention applies exclusively to pollution damage which occurred on the territory, including the territorial sea, of a contracting state and to preventive measures taken to prevent or minimize such damage. Therefore, the nationality of the victim, its place of residence, or the place where the principal agency of the organization which suffered losses is located, are of no significance. It is enough if damage to the victim is caused on the territory of a contracting state. Under this condition, the Convention applies both to ships navigating under the flag of a contracting state and to the ships flying the flag of a non-contracting state.

Discussing the question of who is liable for oil pollution damage, the Brussels Conference declined the proposal providing that the ship operator -- a person operating the ship on its own behalf and on any legal grounds -- should be subject to liability for damage. In virtue of para. 1, Art. III of the Convention, the owner of the ship is liable for any pollution damage. *Owner* means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. There is an exemption from this conventional provision: if a ship is owned by a state and operated by a company which in that state is registered as the ship's operator, "owner" means such company.

The 1969 Convention establishes tort liability, i.e., liability of the shipowner for causing non-contractual damage not to his contractor by agreement but to third parties. The liability should be recognized as strict -- it can be imposed on the shipowner in the absence of his fault. Although the liability of the shipowner is beyond the limits of the principle of fault, it, nevertheless, is not absolute. Paragraph 2, Art. 3 of the Convention provides a list of grounds on the basis of which liability does not attach to the owner. The latter is not liable if he proves that the damage:

a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable, and irresistible character, or
b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
c) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

The shipowner may be exonerated wholly or partially from liability if he proves that the pollution damage resulted wholly or partially either from the conduct of the person who suffered damage and who acted or failed to act with intent to cause damage, or from the negligence of that person.

The 1969 Convention has considerably enhanced the liability of the shipowner for pollution damage as compared with 1957 Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships.

Paragraph 1, Art. 5 of the 1969 Convention determines the limits of liability. First of all, the owner of the ship is entitled to limit his liability to an aggregate amount of 2,000 francs Poincare for each ton of the ship's tonnage. (Initially the amounts determining the limit of liability of the shipowner were indicated in the Convention in francs Poincare. Later, in accordance with the 1976 Protocol, the unit for calculating the limit of liability was substituted by the unit of Special Drawing Right (SDR) established by the International Monetary Fund). 2,000 francs Poincare are equivalent to 133 SDR or 143 US dollars (as of 6 February 1986 one unit of SDR make 1.11173 US dollars).

In the interests of the owners of large tankers the same article establishes the second, "upper" limit: the aggregate amount of 2,000 francs for each ton of the ship's tonnage must not exceed 210 million francs Poincare, which is equivalent to 14 million SDR or 15 million US dollars.

The owner of the ship is not entitled to avail himself of the limitation of liability provided for by the 1969 Convention if the incident occurred as a result of his actual fault.

The 1969 Convention contains a requirement of compulsory insurance or other financial security to cover the liability for pollution damage. According to para. 1, Art. VII of the Convention, the owner of the ship registered in a contracting state and carrying more than

2,000 tons of oil must maintain insurance or other financial security to cover the liability for pollution damage under the Convention.

To attest to the insurance or other financial security covering the liability, a certificate is issued to each ship by the appropriate authority of the state of the ship's registry.

One of the specific features of the 1969 Convention lies in the fact that a claim for compensation for pollution damage may be brought directly against the insurer or other person who provides financial security for the owner's liability.

The requirement of compulsory insurance or other financial security may not apply only with respect to ships owned by a contracting state. But in such case a ship must carry a certificate issued by the appropriate authorities of the state of the ship's registry stating that the ship is owned by this state and that the ship's liability is covered within the limits prescribed by the Convention.

The 1969 Convention entered into force in 1975. Among its Contracting Parties are fifty-four states including Belgium, Great Britain, Greece, Liberia, the Netherlands, Scandinavian countries, FRG, France, Japan, and others. The USSR acceded the Convention on 24 June 1975, Italy on 27 February, 1979.

### The 1971 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage

During the formulation of the Draft Convention on Civil Liability for Oil Pollution Damage, certain delegations proposed that not owners of ships but cargo owners be liable for pollution damage. Such proposals were founded on the assumption that marine pollution is caused by the rapid growth of the oil industry itself and the ensuing technological development of transportation rather than by the carriage of oil by sea. It became clear at the Brussels Conference that even substantial enhancement of the shipowners' liability cannot sufficiently indemnify for damage caused to the victims of pollution. It was also evident that the shipowning circles could not agree that the consequences of introducing objective liability, i.e., liability occurring irrespective of fault and, besides, a rather strict one, would fall only on them. Taking into account such positions, the delegation of Belgium submitted for the consideration of the Conference a draft convention on establishing an international fund at the expense of payments made by owners of oil carried by sea which would indemnify the damage incurred by the victims of pollution. The Conference came to the conclusion that the question needs further examination. It adopted a resolution requesting IMCO to work out a new draft

convention. Its purpose would be, firstly, to provide adequate compensation to persons who suffer damage caused by pollution and, secondly, to relieve the shipowners with respect to the additional financial burden imposed on them by the 1969 Convention.

During 1970-1971 the Working Group established by the IMCO Legal Committee held four sessions and discussed the major principle of the future convention on an international fund and the initial draft elaborated by the delegation of Sweden. The Draft approved by the IMCO Legal Committee was submitted for consideration to the International Conference which took place in Brussels from 30 November to 18 December 1971. The Conference adopted an International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage.

The 1971 Convention on the Fund is a supplementary to the 1969 Convention. Only contracting states to the 1969 Convention can be parties to the Fund Convention.

According to para. 1, Art. IV of the 1971 convention, the Fund shall pay a certain amount of compensation to a person who suffered pollution damage if such person has been unable to obtain full and adequate compensation from a shipowner under the terms of the 1969 Convention:

a) because no liability for the damage arises under the Liability Convention;
b) because the shipowner is financially incapable of meeting his obligations;
c) because the damage exceeds the owner's liability under the Liability Convention.

The Fund incurs no obligation to pay compensation if:

a) it proves that the damage resulted from an act of war, hostilities, civil war, or insurrection or was caused by oil which has escaped or has been discharged from a warship or other ship owned or operated by a state or used on government non-commercial service;
b) the claimant cannot prove that the danger resulted from an incident involving one or more ships.

Besides paying compensation to the person who suffered pollution damage, the Fund must partially indemnify the shipowner for his liability under the 1969 Convention ("roll-back" rule -- Art. 5 of the 1971 Convention). Such compensation to the shipowner is paid in the

amount not exceeding 85 million francs Poincare, which is equivalent to 5.6 million SDR units or 6 million US dollars. The total amount of compensation paid by the Fund, including the sum paid by the shipowner to the person who suffered damage (in accordance with the Liability Convention) and the sums which the Fund must compensate to the shipowner, makes at present 657 million francs Poincare, which is equivalent to 45 million SDR units or 50,027,850 US dollars.

The Fund's Assembly may exceed this limit for no more than 900 million francs Poincare, which is equivalent to 60 million SDR units or 66,703,800 US dollars.

The Fund compensates the victims of pollution and partially indemnifies the shipowners at the expense of initial contributions made by receivers of oil carried by sea. In virtue of para. 1, Art. 10, each person receiving contributing oil by sea in a contracting state in an amount exceeding 150,000 tons within a calendar year must make initial and annual contributions to the Fund.

Contributing oil means crude oil and fuel oil.

Account is taken of oil which comes to the contracting state by sea (import), transported between sea ports/terminal installations of this state (coasting trade), delivered to the port/terminal installation of the contracting state from off-shore oil-producing installations, as well as of oil carried by sea, discharged in a non-contracting state, and then delivered to the terminal installations of the contracting state. Contributions to the Fund are charged on the basis of a fixed sum for each ton of contributing oil determined by the Assembly. The sums depend on the amount of compensation provided by the Fund, and compensation, in its turn, depends on the numbers and scope of tanker incidents.

Any state may at the time of its accession to the Convention declare that it assumes obligations to contribute to the Fund for oil received within the territory of that state.

The Fund is an international governmental organization.

To organize its work, the Fund has an Assembly and a Secretariat headed by a Director and an Executive Committee.

The 1971 Convention entered into force in 1978. As of November, 1985, its contracting parties and, therefore, the Fund's members consisted of thirty-four states, including Great Britain, Italy, France, FRG, the Scandinavian countries, Japan, and Yugoslavia. The Soviet Union is not a contracting state to the Fund Convention.

**Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969**

The above-stated system of compensation for oil pollution damage, which was embodied in the 1969 and 1971 Conventions, successfully functioned in the 1970s and goes on to function in the present time. However, beginning with the late 1970s it became subject to criticism. The thing is that lately the amount of damage caused by oil pollution has greatly increased. For example, in March, 1978 the *Amoco Cadiz* tanker, owned by a U.S. company and flying the Liberian flag, suffered a casualty on the coast of Great Britain. As a result of the incident, 230,000 tons of oil escaped into the sea. The damage to the environment is estimated at two billion US dollars.

Due to the rapidly developing processes of inflation in a number of countries and some other economic factors, the sums of indemnification and compensation paid under the 1969 and 1971 Conventions depreciated by 3 to 3.5 times and ceased to be adequate. It should also be added that, due to the establishment by the states of exclusive economic zones, a question arose on the need to compensate for damage caused to the marine environment in such zones.

The practice also showed a tendency to extend the 1969 and 1971 Conventions to ballast tankers and combined carriers.

In these conditions, on the insistence of a number of IMO member states, a decision was adopted to entrust the IMO Legal Committee to start to revise the 1969 and 1971 Conventions.

At its four sessions (March, 1982 to September, 1983) the Legal Committee examined a wide range of conventional provisions. The draft protocols to the 1969 and 1971 Conventions prepared by the Committee were submitted for consideration to the International Conference on Liability and Compensation with Respect to Transportation by Sea of Certain Substances, which was held in London from 30 April to 25 May 1984. The Conference adopted a 1984 Protocol to amend the 1984 Fund Convention.

According to the 1984 Protocol to the Convention on Liability for Oil Pollution Damage, its application is extended not only to tankers carrying oil in bulk as cargo but also to ballast tankers and combined carriers unless it is proved that they actually do not carry oil and that they have no residues of oil after the earlier-performed carriage.

The Protocol specifies the meaning of damage subject to compensation caused by pollution. The definition of damage emphasizes, in particular, that compensation for impairment of the environment other than loss of profit from such impairment is limited to costs of

reasonable measures of reinstatement actually undertaken or to be undertaken.

The Conference also expanded the geographical sphere of the application of the Convention. By virtue of the 1984 Protocol, the Convention is extended both to the territory, including the territorial sea, of a contracting state and to its exclusive economic zone. If a contracting state has not established such a zone, the Convention applies to damage occurring in an area beyond and adjacent to the territorial sea of that state, determined in accordance with international law and extending for not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

At the Conference a group of states (France, U.S., Canada, FRG, and many developing countries) insisted on still greater toughening of the shipowner's liability. The delegations of these states proposed to exclude one of the three grounds provided for by the 1969 Convention, relieving him from the obligation to compensate for damage due to "the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function" (para. 2(c), Art. III). The other group of states (USSR, Cuba, Greece, etc.) proceeded from the need to extend the scope of this paragraph's application. Judicial practice is contradictory in settling the question of what is meant by "other navigational aids" mentioned in para 2"c", Art. III: any navigational aids or only aids similar to lights. The Supreme Court of Sweden, considering the consequences of the incident with the Soviet ship *Tsesis*, which was stranded on rocks in the area of the Stockholm archipelago because of the wrong designation of the depth of the maps, concluded that maps should also be referred to as navigational aids. After sharp discussion, the Conference preserved this ground for relieving the shipowner from liability in the initial form.

For the owners of ships of small tonnage (up to 5,00 GRT) the Protocol determines the limit of liability of 3 million SDR units, which is equivalent to 3,335,190 US dollars. For ships with a tonnage in excess of 5,000 tons, the limit of liability is calculated by means of adding to 3 million units of account 420 units of account (466.93 US dollars) for each additional ton exceeding 5,000 units of tonnage, provided, however, that this aggregate amount does not exceed 59.7 million units of account (66,370,281 US dollars).

According to the Protocol, the owner shall not be entitled to limit his liability unless it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such

damage, or recklessly and with knowledge that such damage would probably result.

The Protocol provides for a simplified procedure of amending the shipowner's limits of liability. However, such amendment is possible only upon the request of at least one-quarter of the contracting states. An amendment is adopted by a two-thirds majority of the contracting states present and voting on condition that at least one-half of the contracting states shall be present at the time of voting. No amendment may be considered for less that five years from the date on which the Protocol was opened for signature nor for less than five years from the date of entry into force of a previous amendment. No limits of liability and compensation may be increased so as to exceed the amount laid down by the Protocol to the 1969 Convention multiplied by three.

The Protocol to the 1969 Convention enters into force twelve months following the date on which ten states, including six states each with not less than one million units of gross tanker tonnage, have become its parties.

**Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1971**

Due to the close relationship between the 1969 Liability Convention and the 1971 Fund Convention, many substantial provisions of both Conventions were amended in a similar direction. For example, the Protocol to the Fund Conventions extends to the same types of vessels to which the Protocol to the Liability Convention extends. Both Protocols contain identical definitions of such concepts as "oil" and "damage from oil," and the geographical scope of these Protocols application is also similar.

At the first stage of the Fund's activities, the maximum amount of compensation payable by the Fund for pollution damage was determined in the sum of 135 million SDR units (150,083,550 US dollars), including indemnification received from the shipowner. The second stage of the Fund's activities begins when the combined quality of contributing oil received in sea ports of any three states parties to the Fund equals or exceeds 600 million tons per year. At this stage the limit of compensation payable by the Fund is raised to 200 million units of account (22,346,000 US dollars) with respect to any incident.

The Conference deleted from the 1971 Convention the rule making the Fund liable for compensation to the shipowner for part of the sums paid by the latter to the victim ("roll-back" rule -- Art. 5 of the

1971 Convention). This rule was aimed at relieving the liability of the owner. Since at the moment of the amendment of the 1969 and 1971 Conventions it became evident that it is necessary to raise the liability of the shipowner, the need for the "roll-back" rule fell away.

The Protocol made some amendments with regard to the organizational forms of the International Fund's activity; in particular, it abolished its Executive Committee.

The 1984 Protocol to the Fund Convention will enter into force twelve months following the date on which at least eight states have become its parties.

The unamended provisions of the 1969 and 1971 Conventions together with the provisions of the 1984 Protocols make the 1984 International Convention on Civil Liability for Oil Pollution Damage and the 1984 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage. There are grounds to assume that the 1984 Conventions will enter into force in five to nine years.

*Anatoly Kolodkin:* A comment and a question. First of all, I would like to defend our American colleagues because, as far as I know, the U.S. was one of the few countries that signed the Protocol of 1984.

Second, could you please cover very briefly the impact of the decision of the U.S. court in the *Amoco Cadiz* case on the liability issue. As far as I know, that decision was against the classical norms on divided liability between three companies, Amoco Cadiz, Amoco Cadiz International, and Standard Oil of Indiana.

*A. G. Kalpin:* You defend the U.S. in vain; I don't think they need such defense. But the gist of my answer is that the U.S. ratified neither the 1969 nor the 1971 Conventions. As concerns the Protocol of 1984, by itself the signing of the Protocol of 1984 does mean in any way that the U.S. becomes a member of the 1969 or the 1971 Conventions, because they have not ratified them. In October of this year, I was at a session of the Legal Committee of the IMO when they raised that question. The representative of the U.S. had to clarify that the U.S. is not yet a member of either convention. It can become members of the FUND Convention after it becomes a member of the Convention on the Liability of Oil Pollution Damage.

I didn't quite get your question about divided responsibility for the damage connected with the *Amoco Cadiz* shipwreck. You speak of the liability of the shipowners and two operators, the affiliated company and the principal company. I do not quite see what law applied in that

case. The court could not and did not apply those two conventions because the Americans are not members of them. The judge, basing his judgment upon who was the actual damage inflictor, found it possible to divide the liability between the companies. Probably the judge was guided not by the norms of international law, not by the two conventions that I mentioned, but by the national law of the United States. What impact that could have on the decision of the U.S. to join those two conventions, I must admit I cannot foresee. For the answer to that question, you should probably turn to our American colleagues.

# THE ROLE OF LEGAL RULES, OPERATING DURING ARMED CONFLICTS, IN THE REGULATION OF RELATIONS AT SEA AND MAIN DIRECTIONS OF THEIR MODIFICATION

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Ladies and gentlemen, dear comrades. Professor Gold today reminded us of the old formula according to which when cannons speak, law becomes quiet. He expressed the suggestion, which I support, that contemporary law must become more active so as not to be suppressed by the burst of cannons. I intend to speak about the use of law in cases of violence on the world's oceans in the most acute incidents of armed conflicts.

The 1982 Convention proceeds from the close interrelationship of problems of different uses of the sea and the necessity to approach them as a single whole. The preamble of the Convention reflects the interrelationships of economic, ecologic, scientific, military, and technical interests as a single complex, and it can be said that the degree of completeness of any legal regime depends on how these interrelationships are taken into account. To study the processes of strengthening peace and security on the seas and oceans, one could speak about three major fields of human activity: first, activities linked to peaceful uses of the oceans; second, naval activities during peaceful periods; and third, activities under conditions of armed conflict at sea.

If the legal norms for various activities at sea for peaceful purposes are described in the 1982 Convention, and naval activities are causing ever more tension in the context of possible measures that may lead to naval disarmament, the relations of states which develop in the course of an armed conflict at sea are regulated by the conventions which were adopted in the previous century and in the first half of this century, and they have a greater historical than practical value.

The archaic nature of the majority of norms was mentioned in the report of the UN General Secretary that was dedicated to research into the naval arms race (UN Doc. A/40/535 of 17 September 1985.) The report concluded that there was a need to modernize the laws and customs of naval war. This issue follows from the qualitative and quantitative changes in military fleets, the appearance of new systems, and the types of armaments and tactical ways of conducting combat activities at sea, the need to prevent harmful effects on the marine

environment caused by states' military actions, as well as a great range of activities of states that require immunity from armed actions.

On the whole, to modify the system of legal norms in effect during armed conflict, it is necessary to maximally limit the scope of military actions in the process of their development when it is not possible to prevent armed conflict by other means. This is required rather than codification of the rules of armed actions at sea, which would only legalize naval war and would not preclude the use of force from international relations. I believe that such modification could be directed as follows.

First of all, the concept of zonal limitations could be rethought to make them broader and stricter. The coevolution of the types of force used at sea and of the corresponding norms of international maritime law makes it possible to consider spatial limitations for war at sea, putting outside of national jurisdiction the exclusive economic zone, the continental shelf, and the bottom of the sea, giving them the status of neutral surfaces and prohibiting military action in such areas by convention.

Secondly, it is necessary to support the neutral status of these areas by demilitarizing the regions used for prospecting for raw materials, energy resources, and elements of their infrastructures.

Third, it is necessary to clarify the status of nuclear facilities in order to prohibit states that have nuclear fleets to transfer or sell nuclear warships to other countries, to prohibit the use of such warships in local armed conflicts, to immunize nonmilitary nuclear vessels, and to cover the Geneva Convention of 1949, particularly Article 56, by the provisions of the 1977 Protocol on International Armed Conflict.

Finally, we can consider immunization from military activities, an effort of general human importance, as, for example, legal protection of research programs, especially those which are global or long term. In the context of the primacy of law in international relations and in particular at sea, it should be emphasized that modifications of legal norms in effect during armed conflicts make it possible to neutralize the use of force against navigation, economic activities, or other types of activities at sea.

# SOME LEGAL ASPECTS OF STATES' MILITARY ACTIVITIES IN THE WORLD OCEAN

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The problems of military uses of the world's oceans and the air space over it are extremely extensive and many-sided. I should like to touch upon three major questions: missile tests in the world ocean, innocent passage of warships in the Black Sea, and so-called "state piracy."

Missile practice in the world ocean and the related declaration of zones dangerous for the navigation of vessels and flights of aircraft have become military and political facts of life, existing for more than one decade. Many countries, including the USSR and the U.S., test nuclear weapons and have to declare such zones. Actually, there are two attitudes towards the location of such zones.

The first attitude is that zones harboring activities dangerous to marine and air navigation should be located in remote areas of the world ocean, far from the recognized international routes and harvesting areas. The practice of large states exactly follows this way, because in remote areas there is less chance of interfering with the interests of other states in their uses of the high seas.

But we recognize the other attitude when such zones are declared in international straits of universal significance and at the approaches thereto. Dozens of missile practice areas and training grounds are located in the zones of such straits as the English Channel, the Straits of Dover, the Straits of Gibraltar, the Korea Straits, near the island of Crete, etc. Such situations cannot be considered as normal.

Zones of missile practice that are dangerous for maritime and air navigation must not be located in routes of intensive international navigation, in recognized fishery areas, or in proximity to other states' shores. We can understand and share the opinion of our American colleagues that such zones must not be extensive and they must not hamper the legitimate activities of other states. Furthermore, in our opinion, the seizure of merchant or other non-military vessels that call at such zones in spite of notifications is absolutely inadmissible. To protect international navigation and lawful interests of the users, dangerous but not closed areas are declared on the high seas.

The word *closed* cannot be applied to the high seas, and calls at dangerous zones are not prohibited.

On the other hand, all responsibility for risks and possible damage must be carried by the vessel itself which, despite the notification, entered such zone at its risk, and not by the testing state. We positively disagree with those authors who speak of the need to compensate for damage to vessels that enter danger zones despite the notification.

It goes without saying that the best way of settling this question is an overall ban on any missile practice and tests. This ban will probably be realizable only when nuclear missile weapons are entirely prohibited. Then this question will no longer arise. But until this happens, our duty as scientists is to insist that states agree officially to eliminate all grounds for combat training, missile, anti-aircraft, and other practice and exercises in the routes of international navigation, especially in straits and at the approaches thereto.

In the Soviet and foreign press there have been many publications concerning the passage of the U.S. warships through the territorial waters of the USSR off the Crimean coast. We agree with Mr. Butler that there should be no seas without innocent passage through the territorial waters of the coastal states. However, some of our colleagues forget that in accordance with the 1958 and 1982 Conventions there are two kinds of passage through the territorial sea: with and without calling at a port. The passage is innocent in both cases.

Let us ask ourselves whether there is an innocent passage through the territorial waters of the Black Sea that includes a port visit. Of course there is. But in this case innocent passage needs authorization. If there is authorization for visiting a port, then there is innocent passage through the territorial sea. If there is no such authorization, there is no innocent passage. There is nowhere to sail.

It is inconceivable how innocent passage can be physically exercised through the territorial waters in the Black Sea without calling at a port -- in other words, to exercise expeditious passage from one part of the high seas to another. Figuratively speaking, the Black Sea is a "wash-tub." The warships enter it through the Bosporus and return to exit through the same point. Where does the Black Sea lead? To the Baltic Sea? To the Atlantic Ocean? It leads nowhere. So, can there be innocent passage through the territorial waters in the Black Sea without calling at any port? There is not and there cannot be such passage physically. Therefore, the allegations of the U.S. representatives (officials and scientists) that the American warships exercised innocent passage through the Soviet territorial waters off the Crimean shores cannot be taken seriously.

Let us imagine the following situation: the Soviet missile cruiser *Kirov* escorted by a large anti-submarine ship is sailing from Vladivostok to the Panama Canal. To "cut off" the route, it doubles the capes of the American coast within the limits of the U.S. territorial sea. Would the Americans feel uneasy about such "innocent passage"? Would they consider such navigation in the U.S. territorial waters as innocent passage? The answer can hardly be in the affirmative. This is why all measures should be taken so that there are no such "innocent" passages in the future, because Soviet warships have never yet intruded into the territorial waters of the United States. This is why Soviet legal and political literature quite fairly characterized the acts of the above-mentioned U.S. warships as a provocation.

And the last question. If I correctly understood our Canadian colleague Professor Gold, he denies state piracy as such. I share his viewpoint. There is not and cannot be any state piracy. A warship is an authoritative armed special body of a sovereign state, acting on behalf of its flag state. Therefore, any unlawful seizure or sinking of a foreign warship is not "state piracy," but an act of aggression subject to the definition of this notion adopted by the XXIX session of the UN General Assembly as far back as 1971. A warship cannot be a pirate ship. Also, it makes no sense to deviate from the notions of piracy and aggression already recognized by international law. Broad and arbitrary interpretation of these notions is inadmissible. Such are my general considerations on the above-mentioned issues.

# INTERNATIONAL LEGAL ISSUES OF COOPERATION BETWEEN STATES IN SUPPRESSING PIRACY AND TERRORISM: SOME ASPECTS

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All peoples inhabiting our common Earth's home are interrelated and all are naturally interested in establishing and maintaining a stable legal order in the world ocean which could be an adequate safeguard for ensuring the priority of law in this sphere of international relations.

This work will touch upon only certain elements of the stabilization of the legal order in the world ocean, those which concern the principles of the freedom of navigation and the exclusive jurisdiction of the flag state over its vessels. Both principles were reaffirmed by the 1982 UN Convention on the Law of the Sea and, to a certain extent, developed and concretized.

The principle of the exclusive jurisdiction of the flag state, directly ensuing from the principle of the freedom of the high seas, is aimed at the maintenance of due legal order in the world ocean. This principle imparts accuracy and clearness to the entire structure of the legal regime of the high seas and to the very content of the freedom of the high seas.

The legal regime of navigation on the high seas is based on the generally accepted provision whereby any ship is subject to laws and rules of only that state whose flag it flies. The principle of the exclusive jurisdiction of the flag state is determined by the legal nature of the high seas lying beyond national territory and being in common and equal use of all states. In particular, it follows from this principle that on the high seas a ship can neither be stopped nor can any enforcement measures be taken in her regard on the part of other states without the direct consent to that effect of the flag state.

At the same time, generally accepted exemptions from the principle of the exclusive jurisdiction of the flag state have long been known. The 1958 Geneva Convention on the High Seas, which mainly codified the relevant rules of customary international law, besides intervention on the basis of an international treaty, provides for the following exemptions:

1) suppression of piracy (Art. 14-21)
2) suppression of the slave trade (Art. 13)
3) verification of nationality (Art. 22)
4) the right of hot pursuit (Art. 23)

The 1982 UN Convention on the Law of the Sea has extended the list, having included therein the possibility of interference for the purpose of suppressing unauthorized broadcasting (Art. 109), as well as with regard to vessels without nationality (para.1(c), Art. 110).

An essential novelty is introduced to the institution of the right of hot pursuit. The 1982 Convention provided for the right of hot pursuit to be exercised not only from areas under the sovereignty of the coastal state but from the economic zone or from the waters of the coastal state's continental shelf. It should be noted, however, that hot pursuit from these areas can be exercised, with all other conditions adhered to, only in connection with such violations of the laws and rules of the coastal state that give the latter the right of the entire implementation of its jurisdiction, i.e., including detention, institution of proceedings, and punishment of the offenders. This circumstance should be born in mind, as the competence of the coastal state concerning enforcement measures with regard to violations committed beyond the limits of its territorial sea, does not always coincide with its legislative competence.

In addition to exemptions from the principle of the exclusive jurisdiction of the flag state stipulated by Part VII of the 1982 Convention, there are two more cases of possible interference on the part of foreign states that arise from the provisions of Part XII. First is the right of the coastal state to adopt protective measures with regard to a foreign ship for the purpose of preventing grave and practicable threat of pollution in case of casualty. This right is known to be provided by the 1969 Intervention Convention and the 1973 Protocol thereto. However, the 1982 Convention considers the relevant conventional provisions as rules of customary international law (para. 1, Art. 221). Secondly, the so-called jurisdiction of the port state stipulated by Art. 218 of the Convention can be regarded as a specific exemption. Although the implementation of such jurisdiction is in no way associated with any enforcement measures on the high seas or even in the areas under the sovereignty of the coastal state, the state whose port a foreign ship voluntarily visits is vested with essential rights ensuing from the implementation of international rules and standards that such vessel has violated beyond the territorial or zonal jurisdiction of the port state.

The exemptions from the principle of the exclusive jurisdiction of the flag state, the list of which is strictly limited, pursue different purposes. For example, suppression of piracy and abuses with flags is aimed at maintaining the necessary legal order on the high seas. Other exemptions (the right of hot pursuit, in particular) provide for additional protection of lawful rights and interests of coastal states. And, finally, the exemptions of the third group stipulate a more effective control over the conduct of ships on the high seas as compared with that which can be exercised by a flag state alone.

It should be emphasized that exemptions from the principle of the exclusive jurisdiction of the flag state by no means substitute for the principle itself, which is of basic importance for the implementation of freedom of navigation on the high seas. These exemptions are of an exclusive nature. Any acts of interference with foreign navigation exercised outside the precisely determined framework of the exemptions signify a violation of the principle of freedom of the high seas and, due to this fact, are considered as unlawful. States should be very careful in applying exemptions from the principle of the exclusive jurisdiction of the flag state, stipulated by international law, in each case not only assessing the lawfulness of their actions but also taking due account of the interests of navigation.

In view of the above-stated, it seems expedient to deal with the provisions of the 1982 Convention (Arts. 100-107) similar to the provisions of the 1958 Convention (Arts. 14-21) and concerning suppression of piracy, and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which was signed in March, 1988 (Rome Convention).

Piracy emerged in ancient times together with the emergence of navigation and sea trade and acquired a reputation as an offense committed *hostis humani generis*. The concept of piracy in its present form had been formulated by the middle of the nineteenth century, when the principle of the freedom of the high seas had become a generally recognized principle of international law and had been developing side by side with the acknowledgement of the sovereignty of states over their territorial and internal waters.

It was also at that time that, in line with the rules of customary international law, universal jurisdiction was extended to piracy.

The codification of the rules on suppressing piracy was completed only at the First UN Conference on the Law of the Sea, having been stipulated by the Convention on the High Seas. It should be noted that at the time of the convocation of the First Conference, acts of violence at sea, including piracy, were not considered an urgent problem.

However, in the 1980s the situation changed and the frequency of pirate attacks showed a tendency to grow. Moreover, the dramatic events on the *Achille Lauro* in 1985 and the *City of Poros* in 1988 showed that the revival of piracy coincided with a dangerous increase in acts of violence at sea. These acts, which are committed with political motivation and can be defined as maritime terrorism, have included among their victims Soviet vessels, too. For example, in 1986 in the port of Namibe, Angola, South American terrorists mined the Soviet motorships *Kapitan Vyslobokov* and *Kapitan Chirkov*. At the same time the Cuban ship *Habana* was also mined and sank because of heavy damages.

The definition of piracy formulated in the 1958 Convention (Art. 15) and reproduced by the 1982 Convention (Art. 101)[1] does not cover such acts, although objectively they do not differ from acts of piracy.

Satya Nandan, UN Deputy General Secretary, speaking at the Rome Conference in 1988, pointed out this particular fact and emphasized that terrorism had become a threat to international navigation, as a result of which peace and good order on the seas are at danger and there is an essential lacuna in the international law of the sea.[2] This

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[1] Piracy consists of any of the following acts:

a) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed:
   i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
c) Any act of inciting or of intentionally facilitating an act described in subparagraphs (a) or (b).

[2] In 1985 the General Assembly of the UN in its resolution 40/61 of 9 December 1985 invited IMO to consider questions of violence at sea and to examine the problem of terroristic acts on board or against sea-going vessels. In this connection, in 1984 the Guidelines were elaborated within the IMO framework which contained practical recommendations for states on enhancing the security measures in

lacuna was filled with the adoption on 10 March 1988 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

As mentioned above, although the offenses with regard to vessels (armed attacks for the purpose of seizing a vessel, property, etc.) committed within the limit of the territorial sea do not differ in their nature from pirate offenses, a complete analogy in terms of international law is inadmissible.

What are the legal differences between them? First and foremost, the notion of piracy refers only to the high seas, including the economic zone. The reference to an act of piracy committed "in a place outside the jurisdiction of any state," contained in Art. 101 of the 1982 Convention should be regarded as referring also to areas that are "nobody's land," for example, islands,[3] while the offenses covered by the Rome Convention and infringing on the safety of navigation are not limited to any areas; acts of piracy presuppose the presence of an attacking vessel (vessels) and an attacked vessel, while acts of

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ports and aboard ships (Resolution A.584 (XIV)). In 1986 Austria, Egypt, and Italy submitted to IMO the Draft Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Doc. IMO 57-125, 1 October 1986). The Draft was based on elements of the previous agreements on the suppression of offenses of an international nature, such as the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) and the supplementary Protocol on the Suppression of Unlawful Acts of Violence in International Civil Aviation Airports (1988), the International Convention on the Prevention and Punishment of Offenses against Internationally Protected Persons Including Diplomatic Agents (1973) and the International Convention for the Suppression of Taking of Hostages (1979).

[3] "[Acts are piracy] only if they are committed on the high seas or in a place outside the territorial jurisdiction of any state, but not in the territory of any state or in its territorial waters" (para. IV of ILC Commentary to Art. 39)/Report of the International Law Commission on the Work of its 8th Session 23 April - 4 July, 1956. General Assembly. Official Records. Eleventh session, Doc. No. 8 (A/31 59). New York, 1956. p.33.

terrorism are committed either aboard ship ("internal seizure") or against a ship.[4]

Pirates have traditionally been considered as "enemies of mankind," and in view of this international law extends universal jurisdiction to acts of piracy. Any state, no matter whether it suffered from the acts of piracy committed by this vessel or not, has the right to seize it beyond the limits of the territorial sea of other states and to take all subsequent measures (convey to a port, arrest, punishment of the offenders) as if this vessel were flying its flag (Art. 105). With regard to acts of terrorism, there is no such universal jurisdiction. Only certain categories of states recognized by the Rome Convention as being linked with the offense have jurisdiction over the acts of terrorism. Such state include the flag state of the vessel attacked, the state whose national the offender is, the state in the territory of which the offense occurred, the state in the territory of which the offender is present, etc.

Piracy is an act committed only for private ends; mercenary ends (*animus furandi*) are not compulsory. Piratical acts can be motivated by hatred or revenge and not only by the wish to get profits, while acts of terrorism, as a rule, are "politically motivated," although on the whole they can be defined as "unlawful acts against the safety of navigation." The 1937 Nyon Agreements, which considered the attacks of submarines to merchant vessels as piratical, are an exception in this regard.[5]

A conclusion can be drawn from the comparative analysis of the 1982 Convention (the 1958 Convention) dealing with the suppression of piracy and the Rome Convention that the main idea of the Rome Convention lies in the stipulation that all member-parties which in

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[4] "Acts committed on board any ship by the crew or the passengers and directed against such ship or against the persons or property on board cannot be regarded as acts of piracy." (para. VI, Art. 39). Op. cit., p. 33.

[5] For details, see R.A. Kolodkin, "On the Results of the International Negotiating Conference on the Suppression of Terrorism at Sea, *Morskoi Transport*, Issue 5 (89), Moscow, 1988. p. 2-5; O.V. Bozrikov, "Rome Agreements on the Suppression of Acts of Terrorism at Sea: Some Maritime Aspects," *Soviet Yearbook of Maritime Law*, Moscow, 1989. p. 151-154.

line with international law can claim jurisdiction over the offense committed, should undertake to effectively implement such jurisdiction and impose strict penalties on the offenders following the "either extradite or try" principle.

In view of the above, it is reasonable to ask: what do these unlawful acts, besides the above-mentioned, have in common? The answer is both complicated and simple: both piracy and maritime terrorism are offenses of an international nature. These internationally unlawful acts of international terrorism, maritime terrorism, piracy, unlawful broadcasting, etc. threaten and violate the normal development of international relations.

Suppressing offenses of an international nature (piracy and maritime terrorism in our particular case), states must strictly comply with obligations regarding the suppression of unlawful acts of violence at sea imposed on them either in accordance with the agreements to which they are contracting parties, or in virtue of the rules of customary law. They must also pool their efforts, first and foremost, within the framework of the UN and IMO. UN naval forces, if established, could play a decisive role in this process. Proposals for the establishment of such forces were many times put forward by the USSR and backed by a number of other UN members.

Practice shows that it is impossible to put an end to such phenomena as piracy and maritime terrorism without concerted and resolute efforts by all states and international organizations. The united approach of the international community to the problems of maritime terrorism would be most appropriate for its suppression. As far as international law is concerned, the relation of piracy to various aspects of maritime terrorism should be made clear, and relevant amendments should be subsequently introduced into the definition of piracy incorporated in the 1958 and 1982 Conventions which could take into account the new forms of violence at sea.

## COMMENTARY

V.A. Romanov
Cand. of Law
Envoy Extraordinary and Minister Plenipotentiary

I quite agree with the majority of the provisions put forward yesterday by our distinguished guests, Professor Clingan and Professor Oxman. Participating in the First Soviet-American Symposium, we recall with great satisfaction the time when our cooperation took place on an official basis and was initiated -- at least at the stage of preparing the Conference on the Law of the Sea -- by modest members of the U.S. delegation: Bernie Oxman (he wasn't a professor then) and Leigh Ratiner, who came to the Soviet delegation in 1971 and suggested that we exchange views on the draft seabed clauses introduced by the Soviet delegation.

Since then the Soviet-American dialogue dealing with the work of the Conference has continued. The Sea-bed Committee provided an opportunity for broader cooperation in the form of the Group of Five. Sometimes, showing less respect, they called us "the gang of five" but we were not hurt in any way. On the whole, the Symposium is a logical completion of what has been going on for almost two decades.

The agreement that I mentioned at the beginning refers, first of all, to Professor Clingan's idea concerning the need for consultations. He means non-official consultations, which would concentrate on the part of the Law of the Sea Convention that interprets the seabed regime. It is a tried way to resolve matters; the Conference has taught us many things. Why don't we begin with a so-called amorphous group of scholars who could operate with anonymous texts? Let us not be afraid of that; we have seen its usefulness. Anyway, there should be texts that could half jokingly be sealed with a "burn before reading" stamp. I think that in this way we could find areas of agreement and, naturally, disagreement that exist with regard to Part XI and establish the minimum of amendments to be introduced to make the Convention acceptable to the U.S. and to some Soviet departments as well -- we only *signed* the Convention, and not all of us share the same views.

Observing for a number of years the non-participation and non-signing of the Convention by the U.S., I feel as if we are speaking about the immortal Shakespearean play *Hamlet* in the theatre but without the prince himself. Here I see a big constructive step forward in our American colleagues' overcoming of the psychological barrier. After the humiliating experience, they have found strength to again

get involved in the process in which they played such a prominent role during the formulation of the Convention. This is a matter for the future; it will take some time to develop. But what shall we do now?

Professor Clingan quite subtly analyzed the possibility of using the great degree to which the Convention reproduces the rules of customary international law, or rules which can be interpreted as such. The problem for this country is somewhat different. We, together with many other states, signed the Convention, and we are committed to the Vienna Convention, which obliges us not to perform actions running counter thereto. This is the reality our country has to face. As far as customary law is concerned, or rather the positions in virtue of which an attempt could be made to base oneself on customary law, I see a certain minus, because we can hardly find a somewhat satisfactory rule of customary law, even if it does exist, on such an issue as freedom of passage, which is of decisive importance for us. The 1958 Convention provided that the right of innocent passage in international straits cannot be suspended. It is innocent passage that we many times rejected together during the last Conference and that is not compatible now with the realities of world relations. Some time ago Professor Clingan voiced a very interesting idea that freedom of navigation delivers a coastal state from the need to decide whom it will let pass and whom it will not. I believe that we could interpret freedom of passage as a postulate of the non-alignment concept, the concept that is the basis of the broad international regime. Some time ago Professor Clingan dealt with the sovereign right to communication. This is, in other words, an expression of an unsuspended right to innocent passage.

A more serious question arises in comparing international customary law and those procedures which are also, to my mind, common heritage, but not the common heritage mentioned by Part XI, which has become the subject of disputes, but the common Soviet-American heritage. Probably, both American and Soviet colleagues remember how difficult it was to develop and adopt this concept. I believe that departure from the Convention substantially undermines our previous near-commitment to the most important conventional provisions. Both you and we were much displeased with the imperfectness of the Convention provisions, but we cherished the hope that, by applying arbitration judgments, we could remove the drawbacks of the Convention. Absence of the possibilities stipulated by the Convention (for example, non-contracting states will hardly be able to make use of the conventional procedures for settling disputes) substantially weakens the institutional and legal basis of the legal order in the world ocean.

There is another aspect of customary law that embarrasses me. Of course, I am not a specialist in state law and I know little of the American Constitution, but as far as I remember, according to the Constitution, international treaties duly ratified by the President with the advice and consent of the Senate are the highest and supreme law of the country. I have a question in this respect: will the American courts or the American administration consider rules of international customary law as supreme law of the country if they are not duly incorporated in a treaty and ratified? This is a rather serious matter. Let me give you an example. The Soviet Navy is sometimes called "a geographically disadvantaged navy," and I would not like it to become "a legally disadvantaged navy" having to base itself not on the stable conventional rules of the law of the sea but on something elusive and intangible, which is just typical of international customary law.

In conclusion, I would like to say that we are not just deciding the question of 'to be or not to be' for this major international legal act. We are dealing with the question of 'to be or not to be' for the legal order of the world ocean, for the overall system of rules without which international contacts would be impossible. It is this question that is at stake now.

We have spoken a lot about creeping jurisdiction, the tendency towards appropriation. But some authors speak about oceanic imperialism, when minor states become major oceanic managers due to conventional provisions imparting them with sovereign rights over large territories. The problem of oceanic imperialism is a grave one. I believe that in the U.S. a study has been published entitled "Whose Law of Whose Sea?" As far as the international legal order in the world's ocean is concerned, it can be characterized only by the postulate, "the common law of the common ocean and sea." At a maritime conference Henry Kissinger, when speaking on legal issues, referred to an American lawyer who tried to distinguish between scholars and lawyers. He said that the major function of scholars is to find difficulties in every problem they tackle, while the function of lawyers is to remove difficulties in every problem they have to tackle. That was approximately in 1975. I believe that we all, Soviet and American participants, are a combination of scholars and lawyers who have already spotted their difficulties.

# SOME LEGAL ASPECTS OF SUPPRESSING TERRORISM AT SEA AND PIRACY

Captain V.S. Knyazev

According to the definition given by the 1958 Geneva Convention on the High Seas and reproduced by the 1982 UN Convention on the Law of the Sea, piracy, with all the ensuing legal and factual consequences, is an illegal act of violence, detention, or depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft on the high seas or in a place outside the jurisdiction of any state. Piracy also includes voluntary participation in such acts and the inciting of the intentional facilitation of such acts.

The Convention on the High Seas and the 1982 Convention, defining piracy in such a way, call upon all states "to promote the eradication" of this phenomenon and provide for the right of any warship to effect the seizure of pirate vessels "on the high seas or in any other place outside the jurisdiction of any state."

Will only "promotion," without more specific obligations, suffice today for the successful suppression of piracy? Presumably, it will not. The practical recommendations of IMO to this end can hardly be effective.

The problem is complicated by the fact that piracy in its classical form has ceased to exist. Today it is rather difficult to give any significant examples of piracy in its pure form. More often than not, attacks and depredation take place within the limits of the territorial sea, more rarely in the economic zone. Presumably, the absence of classical characteristics in acts of brigands does not relieve the fate of their victims.

Foreign warships cannot effect the seizure of pirate vessels. This is a prerogative of the local police or other national units designated to suppress armed robbery, but they are not strong enough. It is evident that suppression of piracy requires the united efforts, both legal and, so to speak, physical, of not only states adjacent to the potentially dangerous waters but also of other countries that are users of such sea areas.

Taking account of the concentration of piracy in certain areas of extensive navigation (the Straits of Malacca, areas of the South Chinese Sea, the Gulf of Guinea, etc.), it is believed expedient to draw up regional agreements on suppressing piracy, which could be acceded to by other states concerned, the users of sea lanes. The operation of such regional agreements could be extended to the territorial seas of the countries of the region that are participants to the agreement.

Certain problems may exist with regard to the preservation in the 1982 Convention of all attributes of the definition of piracy in the 1958 wording, specifically the territorial aspect to which the definition of "piracy" is applicable. As well as the 1958 Convention, the 1982 Convention deals with the high seas or any other place outside the jurisdiction of any state. So far as the majority of coastal states have established by their laws the 200-mile economic zones within which they exercise certain jurisdiction, a question may arise on the lawfulness of the seizure of a pirate ship by a warship flying a flag other than the flag of the coastal state, and on the application of the definition "pirate" to such ships within the limits of such zone. Already in the lobby of the Third UN Conference on the Law of the Sea there were opinions that the reference to the "places outside national jurisdiction" should be deleted and instead "places outside the outer limits of the territorial sea" should be mentioned as a territorial sphere for the provisions on piracy. Presumably, such a decision would preclude the double interpretation of such provisions. Of course, one can refer to Art. 58 (para. 2) of the 1982 Convention providing that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part" (i.e., with Part V "Exclusive Economic Zone"). However, the question arises whether the provisions on piracy, taking account of the possible practical actions associated with the suppression of piracy (the possibility of marine environmental pollution, etc.), are entirely compatible with Part V. The answer to this question can hardly have a single meaning.

To confirm the right of any warship to seize a pirate in the economic zone, it seems more appropriate to consider the notion of "the limit of state jurisdiction" (it is more correct to say "the limit of the application of state jurisdiction") with regard to piracy. The 1982 Convention establishes the actions or activities the coastal state may conduct in its jurisdiction in various maritime zones. In the economic zone, the coastal state has the sovereign rights over resources and jurisdiction with regard to the establishment and use of artificial structures, the conduct of marine scientific research, and the protection and conservation of the marine environment. It does not follow from the above that a state has exclusive jurisdiction within the limits of its economic zone to suppress piracy, and, presumably, it may only suppress pirates and impose penalties on them on an equal basis with other states.

An examination of contemporary legal aspects concerning suppression of the phenomenon that we used to call piracy, in combination with terrorism, which due to various reasons has received

wide coverage, makes us ask whether the acts of maritime piracy and terrorism are two aspects of the same thing, namely an international offense at sea.

In March, 1988, the Diplomatic Conference in Rome adopted under the auspices of IMO the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. In all its major elements and wordings the Convention is similar to the 1970 Hague and the 1971 Montreal Conferences. The Convention is based on the absolute application of the "either try or extradite" principle. The effectiveness of this principle, if consistently applied, is evident. The Convention determines, with respect to its purposes, what an offense is, establishes the duty of the parties to extend their criminal jurisdiction with the aim of prosecuting persons suspected of such offenses in their territory or in territories under their control and either to bring such persons to trial in their own countries or to extradite them to the country having relevant jurisdiction and having asked for such extradition.

The Convention regards as unlawful and intentional:

- the seizure of a ship by force or threat thereof;
- an act of violence or threat thereof against a person on board a ship if that act or threat thereof is likely to endanger the safe navigation of that ship;
- the destruction of, or damage to, a ship or its cargo that is likely to endanger the safe navigation of that ship;
- placing on a ship a device or substance that is likely to destroy that ship;
- injury or killing of any person.

The Convention shall apply to:

- the waters beyond the limits of the territorial sea, if the ship is navigating or is scheduled to navigate through such waters;
- the waters beyond the territorial sea of the flag state if they are the place of departure or destination of a ship;
- the territory, territorial sea, or archipelagic waters of a state other than the flag state where the above-mentioned offense was committed; or
- the territory of a state other than a flag state where the alleged offense is found.

Thus, the responsibility for piracy comes when piratical acts are committed beyond the limits of territorial waters, and for terrorism --

in any place where the 1988 Rome Convention is applied, including the areas beyond the limits of the territorial sea.

If we compare the definitions of piracy in this Convention and the definition of piracy (without its territorial aspect) given by the 1982 Convention, we shall see that the 1988 Convention does not single out the purposes of the offense (for private ends, for non-private ends, politically-motivated, etc.) and does not refer persons who committed an offense to this or that specific category (for example, the crew or the passengers of a private vessel). At the same time, an act of violence against a person on board a ship, which is recognized as an offense by the 1982 Convention, is not such in accordance with the 1988 Convention if it "cannot endanger the safety of navigation." In practice it is rather difficult to comply with such condition or furnish evidence of compliance therewith.

With the exception of such nuances, the comparison of the two Conventions suggests that the 1988 Convention could also cover piracy. In any case, this idea can be supported by the afore-mentioned regional agreements. When we say that unlawful acts, "which are directed against the safety of maritime navigation and endanger innocent lives, threaten the safety of persons and property, and seriously impair the functioning of maritime services and in doing so are the subject to deep concern for the international community as a whole,"[1] we are defining not just terrorism but, to an even greater extent, piracy.

Presumably, there is great potential for cooperation between states through the further development of legal rules and through the joint actions of naval forces for the benefit of all seafarers.

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[1] UN Doc. A/42/688, 5 November 1987, p. 11.

## DISCUSSION

*Thomas Clingan*: May I ask at this stage if anyone has any questions to address to any of our speakers this afternoon?

*Marina Drel*: I would like to briefly comment on one of the matters touched upon in the course of our discussion: compulsory settlement of disputes.

Just now in the remarks by Mr. Romanov, we heard the idea that states not participating in the Convention can hardly have access to procedures envisaged in the Convention. I don't think I would say that without reservation. I believe that access to compulsory arrangements is quite possible without participating in the Convention. It is natural that this matter will be in the realm of theory until the Convention comes into force. And I would indeed stress that the Conventional system of compulsory dispute settlement can be effective only within the framework of the Convention, whereas outside the Convention none of the envisaged arrangements, excluding perhaps the International Court of Justice, can work. The *full* advantages and possibilities for compulsory settlement can be used only by state parties to the Convention.

But, one way of access for non-participating states can be found in bilateral treaties or multilateral treaties envisaging compulsory jurisdiction of the Law of the Sea Tribunal or arbitration of some categories of disputes or a specific dispute after it has emerged. I believe, however, that this way is full of hardship. The conclusion of a convention, for example, can be prevented by the absence of diplomatic relations or by abrogation of an existing treaty, so we could really speak about the full opportunity of access only for states parties. But at the same I think that the access of nonparticipating states is in the interest of the most uniform interpretation and application of the Convention. And this is what the international community is interested in.

My other brief remark concerns the provisions in Part XV. Although Part XV is supposed to resolve disputes, some of its clauses can evoke or provoke disputes. Some phrasings, as in the first part of Article 292, appear to defend the interests of flag states. Specific situations are indeed given in the Convention in which we could apply Article 292. Perhaps we should limit ourselves to the purely formal reference nature of the articles in situations emerging out of breaches of rules of fishing, as in Article 73, or detention of ships and their crews provoked by the application by coastal states of an enforcement

measure having to do with prevention of pollution in the economic zone. That would be a broad interpretation, but it would serve the interests of international navigation without infringing upon any interests of the state that detains the ships. But a broader interpretation, that is, application of the procedure for *all* cases of detention of ships or their crews, for example, could result in a situation in which a research vessel is detained when its right to conduct research is denied. The Convention itself does not clarify anything in that regard, but in practice it is possible. As in cases of detention of passenger ships, cargo ships, or fishing ships, while there are bails and financial guarantees and property or financial claims by the seizing state, I'd say they are satisfied at the stage of detention of the ship. In the same way, I believe it should be possible as concerns research vessels to permit the release of such vessels.

The most recent discussions and materials within the framework of the Preparatory Commission, the Fourth Commission dealing with the rules of the Tribunal, prove that. The rules of the Tribunal do not develop those matters of procedure, of course, but the considerations put forward during the discussion point to a broad interpretation of those provisions.

***Thomas Clingan:*** General Barabolya.

***Piotr Barabolya:*** I have a short comment. I expect that, tomorrow or the day after tomorrow, we will have heated discussions, disputes, a polarity of views. I think that we approached such a stage today in the statements by Professor Molodtsov and Dr. Romanov, and I believe that the arguments should be even more heated.

Dr. Melkov opposed certain ideas about state-sponsored piracy and said that there is no state-sponsored piracy, but only state aggression. Well, excuse me, but there is no norm determining the notion of aggression. There is a resolution by the UN, but this is not a legal norm as yet. As for the notion of state-sponsored piracy, I must say that it even existed in ancient times. If you take a look at the map of the world and see the Drake Passage, you must know that Drake was employed by the state and that he was one of the most famous pirates. You know very well that he served for a long time as a state official of Great Britain and that he even received awards for that. Or take, for example, the Washington Convention of 1922, and you will see there that persons who commit crimes against ships, even though they are employed by the state, are considered as pirates. And I mention here the Nyon Agreement, which declared actions of submarines as

piratical actions, that is to say, state piracy. These doctrines took form during the 1950s when the Kuomintang fleet captured Soviet, British, Danish, and Polish vessels. At that time, those actions were considered not as terrorism but as piracy, because the norm defining aggression did not and does not exist.

There is an international legal doctrine about international piracy, but the norm was not achieved. At the First Conference on the Law of the Sea and in the Law of the Sea Convention, the problem of state-sponsored piracy was considered, and the Soviet Union spoke in favor of including this norm in the Convention. But at that time we were in the minority and we could not press for that. In the Second Conference, this issue was discussed, but we did not raise it. We realized that we could not include it in the Convention. There is only the international legal doctrine, as there exists the doctrine of aggression.

*Thomas Clingan*: Dr. Kolodkin.

*Anatoly Kolodkin*: I think that the short remark about the possibility of access to the procedures according to Part XV for nonparticipating states is very important. I understand that we have here a discussion, and although Dr. Drel is my deputy, I must say that today everybody here has the right to have his or her own opinion in the framework of a plurality of opinions. I have decided to say a few words because this is a very important moment from my point of view.

I remember the 1984 Honolulu seminar when Craig Harrison said that the U.S. must consider that it will lose a lot if it does not participate in the Convention. How will we understand what they will lose, if they say that it is not mentioned in the Convention? For example, in Part XV, Section 2, competence of the tribunal, Article 291, para.(2):

> The dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention.

Here what is meant are legal persons for which the states are responsible in accordance with the relevant article of the Convention. Besides, that, where the Convention speaks about access to the Sea-bed Disputes Chamber in Annex VI, Article 37, it expressly says,

> The Chamber shall be open to the States Parties, the Authority and the other entities referred to in Part XI, section 5.

This is the kind of question on which maybe Professor Oxman could express his opinion. If all parts of the Convention are open, there is no need to participate in the Convention.

*Galina Shinkaretskaya:* Excuse me, Mr. Chairman and Mr. Oxman, if you will be so kind as to let a lady speak. Anatoly Lazarevich, I am trying to answer your question instead of the American side, but there is no need to speak on behalf of the Soviet Union. I have my personal opinion. I have the Russian text of the Convention. Article 288 says:

> A court or tribunal ... shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

It does not say anything about the participants. Annex VI, Section 2, Article 20 paragraph (1) says indeed that the Tribunal is open to States Parties and paragraph (2) for entities other than States Parties.

I cannot but agree with Marina Drel. She said that in order for a nonparticipant to submit a case to the Tribunal, there should be agreement on material issues where competence of the Tribunal exists. I believe that "any other agreement" which is provided by Annex VI, Article 20.2,

> The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

means that this case can be considered by the Tribunal. That is to say, the Tribunal will be used as an International Court of Justice, an ad hoc court. In this case, a nonparticipating state can agree with the participating state to submit a case to the Tribunal or to use any other means of settling the dispute according to the Convention.

So I do not agree here with Dr. Kolodkin. Since I'm not his subordinate, I have a more advantageous position as compared to Dr. Drel's, and I would also like to say the following. Part XV and Annexes (Annex VI, Article 28, for example) provide for the absence of one party before the Tribunal, and using this provision of absence, we can broaden the range of measures provided for in the Convention.

Any international court, where the statutes stipulate so, has the right to discuss and to resolve issues in absentia, to make default judgments if one of the sides has recognized the competence of the court in the dispute, according to the Convention. If the case concerns the substance of the dispute or where states do not agree on fisheries or research in areas under their jurisdiction, I believe the practice of international courts permits investigation of the disputes using temporary protective measures, since here the formula, *competence de la competence*, the competence of competence, comes into play. To resolve this dispute, not the agreement of the state to the consideration of the case is required but the agreement of the state to compulsory arbitration. Such a situation resembles very much the International Court of Justice in general, and an international tribunal in this case. And even, Comrade Kolodkin, if a nonparticipant submits a dispute with the participant to consideration by the Tribunal, this does not mean that its rights as a sovereign state will be violated, since without permission or agreement of a state there can be no consideration by the court.

*Thomas Clingan*: I call on Professor Oxman.

*Bernard Oxman*: I asked for the floor to respond to some of the remarks that have been made over the past two days. Dr. Romanov, an old friend of mine, set the precedent of quoting Shakespeare. As many of you know, one of the great lines of Shakespeare, which was paraphrased in another context at the Law of the Sea Conference, comes from *Julius Caesar* in the famous speech by Mark Anthony at the funeral, in which he says, "I come to bury Caesar, not to praise him." There were times when I have sympathized with Julius Caesar over the past two days. Having said that, however, I do want to express my thanks for the very kind remarks that were made by many of my Soviet colleagues in the course of their comments in the last two days.

A quick remark on the arbitration issue, which has just provoked some lively discussion, that I suspect is a reference back to my own remarks on the question. Nothing precludes states from agreeing by any means they wish to arbitrate their disputes by any means they wish. This is confirmed with respect to parties to the Convention by Article 282, which gives priority to the means chosen by the parties over any means set forth in the Convention. It is therefore open to governments, before the entry into force of the Convention, to agree as between themselves that they will arbitrate certain disputes

pursuant to the rules of the Convention if that is their wish. They can achieve that by bilateral agreement; they could presumably achieve it also by parallel declarations with respect to jurisdiction of the International Court of Justice. I agree that the access of a nonparty to the Convention to the Law of the Sea Tribunal set up by the Convention is more problematic, although even then I think that that is clearly contemplated by, for example, Article 288, paragraph 2, but I'll leave it at that. The important point is that governments can agree on arbitration or the International Court as between themselves anytime they choose.

A great deal has been said over the past two days on the issue of innocent passage in the territorial sea, with specific reference to the incident in the Black Sea a while ago. Both Professor Clingan and I chose not to make specific reference to that incident, but obviously other speakers felt that they should. I therefore feel that some comments on the matter from my own perspective are required.

This is not the first time in the last few months that I've commented on this incident. I participated in a seminar in the U.S. Congress on the Black Sea incident which was most interesting. On the one side were representatives of the Department of State and Department of Defense taking positions with which I'm sure many of you are familiar on this issue. On the other side was a retired United States Navy admiral who was defending the position of the Soviet Union on this issue. I do look forward to the day when I hear such wonderful advocacy of U.S. positions by retired Soviet admirals. At the time, I took a position somewhat between the two, but let me offer you my own analysis of the question.

I think we have to bear in mind that the right of innocent passage applies to all ships; there is no exclusion for warships. I completely agree with Dr. Saguiryan that there can be no requirement for prior notification or authorization. He is absolutely correct, and you can document this with a statement made by the President of the Conference, interpreting the Convention on this question, at a seminar at Duke University in North Carolina some years ago. It is clear that the text does not have to specifically refer to warships by name in order to include them if it refers generally to ships. We must bear in mind that the provisions of the 1982 Convention regarding transit of straits and archipelagic sealanes, freedom of navigation in the exclusive economic zone, and freedom of navigation on the high seas do not explicitly refer to warships, and yet I'm sure it is our conclusion that warships enjoy those rights.

One speaker suggested that the meaning of the word *passage* might have special application with respect to warships. I find this a provocative idea. In considering this idea, we had better be careful about the word *passage*, because it is not only used in the 1982 Convention in connection with innocent passage. It is also used in connection with passage of straits (the term is *transit passage*) and in connection with passage through archipelagic sealanes (the term used in English is *archipelagic sealanes passage*). Therefore, if we try to introduce a restrictive understanding of the meaning of the word *passage* as it applies to warships in innocent passage, we run the risk of getting stuck with that interpretation in straits and in archipelagic sealanes as well. I don't think many people in this room would regard that as desirable.

Moreover, the entire principle of separating out warships is dangerous. My Soviet colleagues in this room who attended the conference will remember well that, even with respect to straits, there were delegations that felt that free transit should be granted to merchant ships but not to warships. That was not the attitude taken by the Soviet and American delegations, who said that the two must go together. I think we have to bear in mind that if we start supporting these separations, they could get completely out of hand. I also agree in this connection with the conclusion reached by Dr. Saguiryan, that the denial of the right of innocent passage to warships could most seriously aggravate, both regionally and globally, the political/military situation. I think that has to be borne in mind.

Nevertheless, it has been suggested that the right of innocent passage exists only where it is necessary to traverse the territorial sea. I have to ask you this question: who is to decide when it is necessary to traverse the territorial sea? Let's bear in mind that the right of innocent passage does not apply only to merchant ships carrying cargoes from one port to another port; it also applies to ships whose function it is to remain and work at sea. It applies to fishing vessels that fish at sea, research vessels that do research at sea, vessels used in connection with exploration and exploitation of the seabed, pleasure craft, and warships. All of those kinds of ships have their primary functions at sea, not in moving from port to port.

Indeed, one of the functions of warships is to patrol the sea in order to aid ships in need and, for example, to protect them from pirates, as Dr. Barabolya stressed in his own comments. In addition to that, even with respect to ships that are only moving from one port to another, changing environmental factors can affect the need to use the territorial sea at any given time or in any given place. Weather, tides,

and other factors are not static; they are dynamic. Thus any analysis of innocent passage that starts from the premise that navigation is only from one port to another or from a static notion of where innocent passage is necessary, is inherently flawed.

Moreover, any analysis of the sealanes question to which I adverted in my opening remarks that proceeds from a premise of coastal state military security is not supported by the Convention. Article 22, which deals with the right of the coastal state to establish sealanes in certain circumstances, makes clear that the purpose of the establishment of sealanes is for the safety of navigation, not for the military security of the coastal state. The question of military security of the coastal state is dealt with in other provisions of the Convention such as Article 19, which prohibits certain activities by a ship in innocent passage, and by Article 25, which deals with the response of the coastal state with respect to acts that are not in innocent passage, and which permits the coastal state to suspend innocent passage in limited areas for limited times for security reasons, if necessary.

A great deal has been said about recent Soviet legislation on the question of the law of the sea and innocent passage. We should bear in mind that that legislation is based almost exclusively on the norms of the 1982 Convention, and I think that is quite commendable. I should note the parallel practice of the United States; President Reagan's 1983 Oceans Policy statement is based on the norms of the Convention as well. However, as scholars not speaking for anybody but ourselves, we know that there is a history to Soviet legislation and Soviet policies on the law of the sea just as there is in the case of the United States. Policies change, laws change. Policies usually change first and then the laws follow them sometime later. As late as the 1958 Conference on the Law of the Sea, it is reasonably clear that the dominant attitude of the Soviet government regarding the law of the sea was that of a land power largely looking inward. But today that is completely changed; today the Soviet Union is itself a great maritime power and must look at the law of the sea in global terms, not in narrow coastal terms.

It is no surprise to professional lawyers that the law takes time to catch up with this or any kind of change in perspective. In some respects, the law is always somewhat out of date. In that sense it seems reasonably clear to me that the continuing coastal orientation in Soviet legislation regarding innocent passage in the territorial sea is really the vestige of an old school of thought that some narrow sectors now stubbornly attempt to retain. Those provisions of Soviet legislation are not reflections of a policy of a modern maritime state with a global role and global interests. But most of the rest of Soviet legislation does indeed reflect that modern perspective.

The innocent passage issue, I think, is eminently manageable in and of itself in a quiet way between the two governments. What troubles me about the debate is the implication that there is a real link between the territorial sea and national security. All of us in this room know that is not true. But others, less sophisticated, may believe it is true. And if they believe it is true that a territorial sea protects national security, then why stop at twelve miles? Why not twenty-five? Why not fifty? Why not two hundred? The more territorial sea, the more national security, because government spokesmen must defend their policies and their legislation. I feel that it is the duty of scholars, in particular, to try to control emotional responses to particular issues and to shed some light on issues where there is a bit too much heat.

From this perspective, I'd like to make two more general observations. Much as most of us in this room might wish that it would be otherwise, there is no guarantee that some strait states will not take the position that the relevant regime in straits is innocent passage. There is no guarantee that every strait state will either ratify the Convention or accept that it is otherwise bound to respect the Convention. Some strait states may continue to maintain the position that many of them took at the Conference, that the regime of passage in straits is innocent passage. Second, there is also no guarantee over the long-term future that the breadth of the territorial sea will stop at twelve miles. We hope so; we hope to see a universal convention someday, but there is no iron-clad guarantee. Therefore, in considering its policies on the question of innocent passage, it is prudent for each country to bear in mind that it may be stuck with the regime of innocent passage in areas where it wouldn't apply if the Convention itself were ratified by every state in the world. It may be stuck with the limitations of innocent passage in straits or beyond twelve miles, at least from the perspective of certain coastal states. Therefore, great care should be taken in supporting limitations on innocent passage.

A brief comment on some other points which were raised. Dr. Bozrikov asked whether the coastal state may apply its penal jurisdiction to the contiguous zone in the absence of acts already committed in the territorial sea. My personal response to that question is, "Yes, it may," but there's a proviso: the penal jurisdiction may be exercised only to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea. In other words, in my view, in each specific case, there must be reasonable grounds to believe that such a violation will occur before there may be any inspection, arrest, or other interference with freedom of navigation. But if there is reasonable suspicion that such

a violation will occur, the coastal state can proceed to apply its penal laws and will of course have to prove its case in court.

Dr. Markov made some interesting suggestions regarding the rules of naval warfare. I fear that his suggestions regarding the exclusive economic zone and the continental shelf inevitably imply that these zones are to be regarded as similar to the territorial sea. I think this could create problems of principle regarding the status of the exclusive economic zone and the continental shelf. In my opinion, it would be best to avoid any mention of the exclusive economic zone and continental shelf as such in connection with noneconomic activities, including military activities. I regard it as regrettable that the British government chose the specific limit of 200 miles rather than some other limit when it prescribed certain military measures in the course of the Falklands War, since I think it would have been best to avoid any confusion between the economic zone and measures of that sort.

Several questions have been raised regarding the ratification of the Law of the Sea Convention. I think most knowledgeable people would agree that a widely ratified convention is in the interests of all countries. Ambassador Djalal's comments and Dr. Molodtsov's comments regarding the greater clarity and stability of a convention as compared to customary international law are entirely true. As Dr. Butler may remember, I made exactly the same point many years ago in an American Society of International Law panel, and I was promptly bloodied by Professor Myres McDougal. But I survived, and I have not changed my mind.

I think most knowledgeable people would also agree that Part XI and the related annexes of the Convention pose an obstacle to its widespread ratification. Full implementation of the Part XI plan is not possible. If the Part XI plan is not modified, certain states whose participation is essential to full realization of the plan will probably not ratify the Convention. I think that it is preferable to modify the plan, to trim one's sails a bit, to promote wider participation and, in that way, to maximize the potential for realizing the underlying common objectives.

References have also been made to the coming new administration in the United States. No one knows -- including, I suspect, the new administration -- what its policies regarding the law of the sea will be. But I think it is a mistake to confuse changes in government with changes in interest. As far as I know, the underlying United States' interests in this matter have not changed very much, if at all. I doubt very much that the United States Senate would accept the full Part XI plan as it now stands whatever the attitude of the new administration.

Many knowledgeable people also agree that Part XI and its annexes are already out of date. Some provisions are based on assumptions that have simply proved to be mistaken. The challenge to creative thinkers is to find ways to overcome the obstacles posed by Part XI to the achievement of the goal of a widely ratified convention. In the abstract, I am quite convinced this can be done. But it remains to be seen whether there is sufficient political will on all sides, not just in Washington, to make this happen. I certainly hope so.

In the meantime, we have to make sure that the other parts of the Convention are respected. A lot of people forget that there are two ways that the other parts of the Convention can fall apart. One is if we call another comprehensive conference on the law of the sea, God forbid, in the immediate future. The other is by virtue of state practice inconsistent with the Convention.

If states begin to act in a manner that is contrary to the other parts of the Convention, it will make ratification by those and other states more difficult. As has been pointed out by many speakers here in the last two days, most countries are agreed that many of the old norms of the law of the sea are now gone forever. What is to replace them pending the entry into force of the new Convention? Eventually, there may be a universally ratified Convention. But what about the interim period? Surely, one doesn't mean to imply that coastal states like the United States that have not accepted the Convention are entitled to claim more jurisdiction than coastal states like the Soviet Union that have signed the Convention. Surely, one also does not mean to imply that flag states like the United States that have not signed the Convention are entitled to claim greater rights for their ships than flag states like the Soviet Union that have signed the Convention. Whether we call the interim result customary international law or not, it seems clear to me that we have to conclude as a matter of policy that all states should behave in the manner consistent with the other parts of the Convention while we try to work out the problems of Part XI. Otherwise, the underlying objective of a widely ratified convention could elude us completely, and I certainly hope that doesn't happen. Thank you, Mr. Chairman, for this chance to respond.

*Thomas Clingan*: I now turn the microphone over to Dr. Kolodkin.

*Anatoly Kolodkin*: I have a question for Mr. Oxman. In speaking about limiting the naval arms race, an American official said that the U.S. is an island state. Could you express your opinion as a lawyer: can we speak about the United States as an island nation or not?

*Bernard Oxman*: There's a famous poem in English which begins, "No man is an island." I would hope that the future of international relations will begin with the idea that no country is an island. We can, of course, regard the continents as islands floating on a planet three-fourths of which is oceans. I presume that what was meant is that, given the geographic position of the United States, communications between it and many of its friends, allies, and commercial partners take on exactly the same characteristics as they would for an island country, because one must travel on or over the sea. The exceptions, of course, are friends like Canada and Mexico, but many others are across great seas and oceans.

*Thomas Clingan*: I turn the microphone over to Dr. Kolodkin.

*Anatoly Kolodkin*: Let me emphasize on behalf of the Soviet Maritime Law Association and irrespective of the subordination of institutes, Professor Oxman, please, that I think this is a misunderstanding. It is not correct to say that Soviet lawyers and our government or anybody in this room understands the right of innocent passage according to old thinking, according to our ancient position at the first conference. At the Third Conference on the Law of the Sea, the Soviet Union changed its position. And as regards Soviet legislation, you mentioned the opinion that was expressed by Professor Butler in his very well known article, that Soviet legislation -- that is, the Law on the State Border of November 24, 1982 -- complies completely with the 1982 Convention. It speaks about the right of innocent passage for foreign military ships but remarks that this right is regulated by the Council of Ministers of the USSR. Then on April 28, 1983, the Council of Ministers of the USSR approved the rules for access and passage of foreign military ships through Soviet territorial waters. Sea lanes were touched upon in three areas in the Baltic Sea and in two areas in the Far East. This opinion was expressed in our delegation in which I participated in Soviet-American consultations in the four rounds of such consultations. Right now I would like to say that we do not base this understanding on our legislation. Furthermore, in my introductory statement yesterday, I stressed that we fully uphold international law, respecting the legislation which exists in our territorial waters and so forth.

One more thing. Today in *Izvestia*, an organ of our soviets and of the Supreme Soviet of the USSR, whose role we are presently trying to enhance, on page 4 is an article which speaks about our foreign guests. It says our Soviet-American Symposium on the Law of the Sea

is a good beginning for constructive dialogue in one of the most important areas of international cooperation. Further on, the article names the organizers of the symposium, our organizations together with the American Maritime Law Association and the Law of the Sea Institute of the United States. One of the most important tasks of the symposium is to insure the most favorable legal conditions for the comprehensive study and use of the resources of the world's oceans for the benefit of all peoples. Besides Soviet and American scientists, representatives of Bulgaria, the German Democratic Republic, Poland, Great Britain, the Federal Republic of Germany, and other countries are participating in the work of the symposium, says the news agency of the Soviet Union, *Tass*.

*Thomas Clingan*: Dr. Drel?

*Marina Drel*: Thank you once again for giving me the floor. I would like to comment briefly on the substance of issues we touched upon earlier. Those issues had to do with the competence of compulsory organs for settling disputes according to the Convention when one of the sides in the dispute is a third state as regards the Convention. I concluded that it is possible to provide access to all conventional compulsory bodies for settling disputes, including the Tribunal. This conclusion was based on Article 288 (2) of the Convention.

Article 288 is dedicated to the basis of competence of all conventional bodies. Paragraph 2 states,

> A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted in accordance with the agreement.

So the basis will consist in an agreement. But the major problem has to do with the competence of the Tribunal in settling disputes with the participation of a third party as regards the Convention.

My conclusion was based on the provisions of Article 21, not on Article 20, of Annex VI. I'll explain why. Article 20, in my view, has as its main purpose to provide access to the Tribunal for subjects that are not states as well as for those that are. This follows from Part XI of the Convention and has to do with other issues that can arise. Therefore, I see this article as speaking about participating states, as Professor Kolodkin says, but not as one providing for the competence

of the Tribunal. I regard it as the first instance in international legal practice that provides for access to a judicial body for subjects that are not states. And I exclude here the European Court of Justice. The article on competence is Article 21, which says,

> The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention [which is very important to substantiate my point of view] and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

I understand, and I understood from the very beginning, that those issues of interpretation are very difficult issues. Yesterday's discussion showed that, and obviously we have to take into account that there can be various interpretations and opinions.

I believe that the only way to achieve certain unity in these issues is to have a universal ratification of the Convention, to have it enter into force. Then, there will be no third parties in the Convention and there won't be that problem of access to those bodies. That is, in short, what I wanted to say.

***Thomas Clingan:*** Thank you very much. Are there any further comments on the matters we have been discussing?

***Anatoly Kolodkin:*** Thank you, Mr. Cochairman. In short, let me say that we must read the Convention in the way it is written. Article 20, paragraph 2, in Annex VI is about access to the Tribunal. Paragraph 1 states that the Tribunal is open to states parties to the Convention, period. Paragraph 2 states that the Tribunal is open to entities other than states parties, but entities here are those entities which are mentioned in Part XI. Those are not third states but all legal persons for which states are responsible in connection with prospecting in the area. Indeed, Marina Drel was quite right in saying that various opinions can exist here, but her statement only substantiates my point of view. Secondly, the Soviet government, the Ministries of the Merchant Marine and of Fisheries, and various scientific groups in this country as well in the United States have to understand that if the Soviet Union and the United States do not participate in the Convention, they won't have any access to the Tribunal. That is very clear.

***Thomas Clingan:*** Any further comments?

*R. V. Dekanozov:* I would like to draw your attention to the peaceful uses of ocean space. We are living at the breaking point when old traditional concepts are under pressure and giving way to new ones. Of course, old postulates still persist, such as, "If you want peace, you should prepare for war." But more and more we see the establishment of the imperative proclaimed by Einstein and other prominent scientists which says that mankind should learn to live together lest it should perish together.

It is not accidental that scientists were the first to speak about this, and it is safe to say that if there is anything that will save mankind it is research, a scientific approach to the major issues facing it. Moreover, jurisprudence, legal science, used to follow in the wake of politics. But today we see more clearly the primacy of law over politics, and it is precisely from this position that we should view the 1982 Convention, especially its provisions relating to the peaceful uses of ocean space.

In discussing the principle of peaceful uses of ocean space, we should consider first the seabed beyond national jurisdiction. This principle was applied first in Points 5 and 6 of the Sea-bed Declaration[1] regulating the regime of the seabed beyond national jurisdiction. Then it was confirmed in Article 141 of the UN Convention on the Law of the Sea, which says that this area is "open to use exclusively for peaceful uses by all States, whether coastal or landlocked, without discrimination..." This article reproduces verbatim Point 5 of the Sea-bed Declaration.

The principle of peaceful uses applies not only to development of the resources but to all kinds of activity. This clearly follows from the text that I've just read. It should also be noted that the term 'peaceful uses' means activity that is peaceful in nature rather than military. As distinct from the 1959 Antarctic Treaty and the Moon Treaty of 1967, which specified the principle of peaceful uses with reference to the Antarctic and celestial bodies, the Sea-bed Declaration I just mentioned is not specific, and this diminishes its effectiveness. However, it obliges states not only to abstain from any military operations but also to takes steps towards making specific the principle of peaceful uses. Point 8 is quite clear in providing for its full implementation in

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[1]Declaration of Principles Governing the Sea-bed and the Ocean Floor, and Subsoil Thereof, Beyond the Limits of National Jurisdiction. United Nations General Assembly, December 17, 1970. G.A. Res. 2749, 25 G.A.O.R.Supp. 28 (A/8028) p. 24.

the form of treaties and agreements on nonmilitarization of the seabed beyond national jurisdiction.

In 1971 an agreement[2] was signed on prohibiting the placing of nuclear weapons on the seabed and in the subsoil thereof, and this applies to the area beyond the twelve-mile zone. This treaty provides for partial nonmilitarilization of the seabed, but this does not at all mean that the nonmilitarization regime applies to the region only partially. The treaty is only first step in elaborating the regime of nonmilitarilization; it is quite clear that it should be followed by other steps. And a good basis for this is Point 8 of the Declaration, Article 141 of the Convention.

Now let us consider the application of this principle to other parts of ocean space, including the high seas. In keeping with the 1982 Convention, the high seas ought to be used for peaceful uses. What is the content of this principle? Does it differ from the application of the same principle to such spaces as the sea-bed beyond national jurisdiction or to celestial bodies, the Antarctic, and so on? Yes, it does differ, because the term 'peaceful' also involves some naval activities. For instance, naval craft should be there to fight piracy, and so on. And naval activities are not confined to the high seas. Naval craft together with other craft enjoy the right of innocent passage, provided the pertinent provisions of the Convention are truly observed. They also have the right of transit passage through international straits used for international navigation; enough has been said about that.

Therefore, the term 'peaceful uses' as applied to the high seas does not exclude all activities of naval or marine craft. It is used in a special way by the authors of the Convention. Here I would like to remind you that the Vienna Convention on the Law of Treaties says that special attention should be applied to terms if it has been ascertained that that was the intention of the architects of this or that instrument. As follows from the 1982 Convention, naval activities are permitted only in certain areas. Article 138 says that the participants promise not to use the threat of naval force in a way detrimental to the interests of naval states or any other way run counter to the principles of the United Nations charter. However, it would hardly be correct to

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[2]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, done at Washington, London, and Moscow, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337.

consider that the content of the principle of peaceful uses as applied to high seas ends here. The principle of peaceful uses also provides for states to take other actions towards further limiting naval activities. This follows from the preamble according to which States Parties conclude that the provisions of the Convention will help consolidate peace and improve friendly relations among all states. Therefore, this applies to the arms limitation of navies, it applies in parts of the ocean with the greatest amount of navigation, and includes the prohibition of nuclear-powered craft, and so on.

The United Nations and other international organizations now want to apply this principle to the Pacific Ocean and other areas. A good example is the 1959 Antarctic Treaty which prohibited any military operations not only in the Antarctic but, in keeping with Article VI of the treaty, also in the adjoining ocean space south of 60 degrees South Latitude. There are other examples when nuclear free zones in the Pacific were established. So the content of the principle of peaceful uses on the open oceans does differ from its other applications, due to the fact that the high seas have from ancient times been used for military purposes when the right of war was an inalienable right of any state. Only a short time ago did mankind begin to develop the Antarctic and other similar regions and, when nuclear weapons appeared, become aware that they might lead to a nuclear holocaust. But the initial political awareness is here and we are considering not only ocean space but also outer space, though we have not yet achieved agreement on prohibiting all kinds of military activities even there. Therefore, in conclusion, I would like to emphasize that the principle of peaceful uses in international law today is of special importance because it may help accomplish the main task facing mankind, the prevention of war which, this time, would wipe mankind out of existence.

*Anatoly Kolodkin*: I am fully in agreement with you in appreciating Article 141 on the reservation of the Area exclusively for peaceful purposes. But I have not quite understood you. The Antarctic Treaty of 1959, while prohibiting military activities, mentions the use of military personnel for peaceful purposes. And Article 141 does not do this. Does this mean that military activities in the Antarctic region can be carried out, or may we establish an equivalence between Article 141 and the Antarctic Treaty?

*R. V. Dekanozov*: Of course we can (e.g. the silence in Article 141 is irrrelevant). We can and should do this.

*Anatoly Kolodkin*: Well, now our positions are quite clear; I can see they are the same.

*Thomas Clingan*: Renate?

*Renate Platzöder*: Once again, the question has arisen whether states that are not parties of the Law of the Sea Convention would have access to the International Tribunal for the Law of the Sea. I do not want to put more oil on the fire, but I want to make one remark. I favor the opinion that nonparties may bring disputes before the Tribunal for two reasons.

First, according to Article 33 of the United Nations Charters, states are obliged to settle their disputes by peaceful means. The dispute settlement system of the 1982 Convention is based on this fundamental provision. I cannot see any court or tribunal which would not look at the question of its competence in a favorable manner, especially in cases where the parties involved agree to submit disputes to the Tribunal, accept its jurisdiction, its rules of procedure, and the laws applied by it.

Now, my second point is a very practical one. It is well known, and it is also explicitly provided for in the Convention, that the International Tribunal for the Law of the Sea shall be located in the Federal Republic of Germany. For quite some time, exactly since September 1981, the city of Hamburg and the Federal Government have been engaged in proprietary work concerning the planning and construction of a building to house the Tribunal. This proprietary work has now reached a stage where an international, architectural competition for the construction and design of the building will have to be conducted. The Secretary General of the United Nations has included in his recent report on the law of the sea such information.

You may ask what this has to do with the question of access of nonparties to the tribunal. The question is of importance in planning. We want to know whether the tribunal and its building will actually be used and whether we shall plan and construct a small and modest building or a more spacious one, which could also be used by nonparties. In my opinion, we should not exclude the possibility that nonparties will become parties later on, and therefore we should design a proper spacious building. If nonparties have a positive experience with the Tribunal, they might be inclined later on to try the treaty.

I have to add that the government of the Federal Republic of Germany decided in 1986 to build the Tribunal at its own expense.

Why don't we wait for the entry into force of the Convention? Because by that time, we will see whether states from all regions will support the Convention. Let me tell a simple old German joke. There is this little girl, who was asked by the teacher about her plans for life. The girl answers, "First I will have a child, then I will become a teacher, then I will get married." The teacher -- and I must say it was a very conservative teacher -- answered, "My darling, you have very good plans for your life, but can't you change the order somewhat?" Sometimes it just happens that life develops in a different way, in a progressive manner. This is just the situation with respect to the planning of the building of the International Tribunal for the Law of the Sea.

I would be most happy to take back to my country from this workshop the confirmation that dispute settlement by peaceful means is still of great general concern. Therefore, there should be no doubt that the Tribunal to be set in Hamburg will be used and will serve for the benefit of all states.

*Thomas Clingan*: Dr. Shinkaretskaya?

*Galina Shinkaretskaya*: My question relates to navigation. If the coastal state decides to limit the entry of marine cargo vessels into its ports guided by consideration of the ship's age, is there any specific legal provision in this case or is it exclusively within the jurisdiction of the state? Of course, we understand that this action would be dictated by considerations of safety. So is it proposed to look into the technical condition of the ship, say, to take into account preventive measures against the spilling of oil? What are the grounds for a decision about these restrictions?

*Anatoly Kolodkin*: Dr. Kiselev has discussed all these details in his report; perhaps he is the right person to ask this question. But generally, these decisions should be made on the basis of internationally agreed standards, and this is mentioned in the 1982 Convention. Are there any more questions?

*Professor Ivanaschenka*: Several people have mentioned missile testing by the United States and the Soviet Union and the possible restriction of navigation as a result of it. Innocent passage by naval vessels through territorial waters was also mentioned. It is my intention to approach these issues in terms of new political thinking, so very briefly, I would like to recall a passage from a statement by the

Minister for Foreign Affairs of the Soviet Union, Shevardnadze, who said that new political thinking has determined the vector of our foreign policy, when the components of foreign policy strategy are realism, a balance of interests, the priority of human values, the idea of equal security for all, speaking to all on an equal footing, the supremacy of international law, and the peaceful solution of all issues. It is precisely in this key of new international political thinking, and I can even say new military thinking in terms of a new Soviet defensive doctrine, that I would like to consider these issues.

A few words about missile testing. Professor Molodtsov, the author of a great number of works and indeed the flagship of Soviet marine scientists, said that missile testing on the high seas runs counter to the 1958 and 1982 conventions, and this makes me ask the following question. Are these military operations by the Soviet Union and the United States in order or not? In trying to answer this question, may I recall the Soviet-American agreement of May 31, 1983 signed by Mr. Schultz and Soviet Foreign Minister Shevardnadze. It deals with the prior notification of launchings of heavy missiles and submarine missiles. Such notifications would be served not less than twenty-four hours before the actual launch, giving details of the area, the direction of the missile's flight, and other specifics.

How should we think about this testing and the Soviet-American agreement? I believe that launching missiles is something that can be described as military activity of the two states, the Soviet Union and the United States. It is part of the military-political relations of these two countries and has been partially regulated in order to prevent the danger of nuclear attack. This was done in the interest of the Soviet Union, of the United States, and the whole world. The preamble of this agreement says that nuclear war should never be unleashed because, in the event that it were, there would be no winner. So launchings of missiles and other marine activities that arise as a consequence of such launchings are regulated by the principle of equal security. The principle of equal security acknowledges the equality of the participants as subjects of international law. In the case of military activities, it takes into account the security interests of both the Soviet Union and the United States, and consequently of all other countries.

So my intention is to try and explain the validity of missile testings, launchings of heavier missiles and submarine-based missiles. Of course, this question of military activities is closely related to other peaceful activities. And peaceful uses of the ocean, of course, largely depend on military activities. This is one of the most important problems of international political and legal relations in preventing a nuclear war from the depths of the oceans and in the promotion of

peaceful relations between the Soviet Union and the United States, between the Warsaw Pact and NATO worldwide.

Therefore, when we speak of military and political activity we cannot but remember the new political thinking and the way it applies to all these relations. We proceed from the stance of a new concept of peaceful coexistence, the core of which is the problem of human survival, the concept of a comprehensive system of world security, the concept, I must say, of international law in politics, in military politics, doctrines, and strategy. Hence the activities I have mentioned earlier. Of course, the primacy of international law helps to establish a world legal order providing for equal security for all states, and friendly cooperation among them.

Another point I wanted to make deals with innocent passage by naval craft through territorial waters. Earlier, it was said that the whole international community can determine whether the interests of coastal states are affected by such passage or not. I disagree with such an approach; it runs counter to my views not only as an international lawyer but also as a navigator of a submarine, and I also served on surface craft. In 1942, I was assigned to another submarine, and the man who replaced me was Anatoly Gorlov. He navigated his submarine along the shortest, but as it turned out, not the least dangerous route. As a result, he put the submarine aground, he was found guilty by a military tribunal, then he was assigned to another submarine, and in one of its sorties he perished.

The time has come for the Soviet Union to launch a whole series of proposals restricting military activities. One of the most dangerous of military activities is naval presence, patrolling by nuclear submarines targeted against the territory of the other side. This applies to American and Soviet submarines. Therefore, the navigation of military naval craft through territorial waters deserves special attention.

The present day surface and submarine craft are nuclear driven, equipped with highly sophisticated technology. And passage by a craft that sophisticated should be treated in a different way than the naval craft of the past. So innocent passage today should follow the shortest and least dangerous routes on the high seas and in the territorial seas. But naval craft follow orders, the will of commanding officers.

The entry of an American cruiser and destroyer into Soviet territorial waters has been mentioned. In that case they didn't follow the shortest and least dangerous route. They followed another route that was not assigned by the authorities. Therefore, it was not quite innocent, the way we looked at it. In the future, when we consider innocent passage by foreign naval craft through territorial waters, we

should take into account current military factors, that these are qualitatively new craft and should be regarded in a different way.

Before I end my contribution, I would like to emphasize the unique nature of the present symposium, which will undoubtedly be extremely useful as regards the agreed drafting of a mutually acceptable interpretation of both the 1982 Convention and other international instruments that comprise the body of international legislation regulating the legal situation on the seas.

Let me draw attention to one thing. To call it an 'American-Soviet' Symposium on the Law of the Sea, that is quite correct, but to call it even an 'International Symposium' would be quite correct as well, and I think that this is the road of the future.

*Thomas Clingan:* Thank you. General Barabolya?

*Piotr Barabolya:* As regards this statement by Professor Ivanaschenko, here I'll say that Plato is my friend but truth is dearer to me. I cannot share your opinion as regards missile testing in the world ocean. I think that these tests are not new thinking but military demonstrations in front of each other. That is my present view, and that used to be my view when I was head of the International Legal Department. Unfortunately, that period was very difficult, and we had to demonstrate our force in front of each other, but I can quite agree with you that indeed the time has come to raise the issue of reducing the number of such tests, and then stopping them in the same way as we are talking about halting underground nuclear testing.

I believe that this is the correct attitude, not because I participate at present in the Soviet Peace Committee, but because I believe that this situation relates to the survival of mankind. We have discussed the problem to the effect that today in the world ocean, on the high seas, including the economic zones and territorial seas, zones are declared as prohibited, as dangerous for sailing. About 3000 areas are declared as such annually, and the surface of these areas measures millions of square kilometers, in the Mediterranean, North Atlantic, Sea of Japan, Pacific. If you take a look at our hydrographic chart, you will see inscriptions denoting areas for artillery and antiaircraft testing. Captains continue to hear over the radio that in this or that region, missile and artillery testing is being conducted; don't enter those areas, or you can be hit. I support absolutely your principles of equality and equal security, and I'm saying this in order to reduce as much as possible missile testing in the world ocean. This issue will come up in the near future before our two countries.

*Thomas Clingan:* Dr. Molodtsov?

*S. V. Molodtsov:* I would like to comment on the statement by our captain, Professor Ivanaschenko. With a few exceptions, I'm ready to put my signature under his statement. The issue of missile testing is at present one of the most important issues today, and here we need complete understanding of our goals both in the Soviet Union and in the United States. On the basis of mutual understanding, we have to proceed in a certain direction. I believe that combat testing, including launching of missiles in areas of intensive international navigation and fisheries, is inadmissable. Such testing is an encroachment on the freedoms of the high seas and on the provisions of both the 1958 and 1982 conventions, which prohibit states from conducting such activities, or rather make them take into consideration the interests of other states. Such missile testing is a gross violation and encroachment upon the freedoms of peaceful users.

As for the Soviet-U.S. agreement you mentioned, its purpose was not to provide for the freedom of missile launching, but to preclude incidents that might have serious consequences. It is for that reason that notifications are required, but that agreement makes it possible, both on the part of the Soviet Union and on the part of the United States, to launch missiles. I personally believe that the time has come to renounce even limited missile launches outside of areas of intensive navigation and beyond international fisheries areas. This is required by the new state of international relations, the new political thinking. It is necessary at present, and I would like our American friends to understand that. We must agree, at least at the first stage, to limit even those areas beyond the limits of intensive navigation and fisheries, to limit them to the minimum and in the shortest time, acting rationally and reasonably to achieve complete understanding about the prohibition and inadmissability of such missile testing.

The last time I said that at UNCLOS III, we made a mistake when we did not use the proposal of the developing countries. We were not very farsighted, the developing countries were quite right, and we must now come again to the decision to prohibit such testing. The opinion of the UN Secretary-General and his experts is quite clear in their 1985 report. They concluded that there was the possibility of such decisions and even indicated the unilateral, bilateral, and multilateral way to achieve such an outcome. They stated that there is no need to bring these issues to the bodies which deliberate on disarmament. Under new conditions, we could follow this road.

I repeat that in all other aspects, I quite agree with you. But this is so important and vital a question, linked to other problems of maneuvers, bases, etc. Here we have to use a new approach. Otherwise, we won't be able to resolve those challenging issues that have been put in the context of the new political thinking, which is required to insure stable peace and a comprehensive system of international security.

***Thomas Clingan:*** The final speaker on my list is Professor Van Dyke. I call upon him now.

***Jon Van Dyke:*** I have asked for the floor simply to respond to some of the suggestions that have been made on the missile testing issue and then to offer some thoughts about where we might go from here. I have had a number of opportunities to talk informally with colleagues about my presentation, and we have heard some very thoughtful and useful suggestions just now.

Several issues have come up. One is the question of 'peaceful purposes' and its meaning with regard to the high seas. I had an opportunity to review a very useful article that Professor Tsarev wrote in the April 1988 issue of *Marine Policy* in which he presents what I think is the basic position of both the Soviet Union and the United States: missile testing is not contrary to peaceful purposes because it is designed to maintain deterrent forces in readiness, and thus to insure the peace. Professor Molodtsov and others have suggested that that view ought not to be accepted any longer, that we should recognize how dangerous these weapons are, not only to our two countries but to the entire world, and that we should question whether they are indeed for peaceful purposes.

The issue whether missile tests interfere with fishing and navigation raises other questions, aside from this larger issue of peaceful purposes. We do have the doctrine of the freedom on the high seas, and one can argue that military maneuvers are included in those freedoms, but only insofar as they do not interfere with the lawful and rightful uses of the high seas by other nations for other purposes. Therefore, if military activities are to be conducted on the high seas, in my judgment they must be undertaken with the understanding and acceptance of other nations that may be interested in other uses. This understanding can be gained through negotiations, either bilateral or multilateral, in which the nation conducting the military activities engages in some *quid-pro-quo* trading, compensates other nations for any infringements that may occur, or simply through other arrange-

ments or alliances gains their acceptance of it. But, in my judgment, these activities should not conducted on a unilateral basis in a way that interferes with lawful and reasonable uses by other nations and other persons.

The United States, as I mentioned, does conduct the bulk of its Pacific Ocean testing in Kwajalein Lagoon, and it pays a rather large amount of money to the Republic of the Marshall Islands for permission to do this. So that's one approach: to actually buy the right to use space. The Soviet Union conducts much of its testing in the ocean area just offshore of the Kamchatka Peninsula. Of course, that is acceptable, too, insofar as those waters are Soviet waters. But if nations conduct missile tests in international waters, in my judgment, other issues need to be addressed.

What happens if an accident occurs, if a missile strikes a vessel or in any other way causes harm? The odds of this occurring are perhaps small, but Mr. Richard Palmer indicated to me that his law firm represented a firm that owned a tanker that was struck by a small rocket shot off the east coast of the United States, near Norfolk, Virginia. So these things do happen and, of course, the consequences of a missile striking a tanker could be quite severe indeed. In my judgment, the regime that ought to cover such a situation would be a strict liability regime. In launching a missile, a nation is putting into international space an inherently hazardous instrumentality and under most national laws and under international law, the regime of strict liability would apply.

For example, in the early 1970s a Soviet satellite came down over Canada, and the Soviet Union contributed about three million dollars to Canada to help them clean up the radioactive material that came down from the nuclear reactor of that satellite. The United States has similarly compensated victims of its atomic testing in the Marshall Islands in the 1950s. So I think there is recognition of this strict liability regime.

One of the participants I have talked to here presented me with the following problem: What if you declare one of these warning zones and another nation sends its ship in purposefully to gather intelligence about your military activity? The ship gathering the intelligence knows about the dangers but nonetheless enters the zone. And then let's assume that the vessel is struck. Should strict liability govern in that situation? For example, in 1982 a Soviet vessel was circling near the missile launching site of a U.S. submarine. The U.S. Navy asked the Soviet vessel to back off to a distance of four miles from the launch site. The Soviet vessel refused and moved back only 2000 meters. This apparently was sufficient to avoid being struck by the

missile, but let's assume a situation where an accident does occur. Should the nation launching the missile be liable even in that situation?

In my judgment, there would still be liability because the burden would still be on the country creating the dangerous risk-creating activity. The burden should be on that nation to reduce the risk to the extent possible and then, if an accident still occurs, to pay compensation. I think the advantage of having such a liability regime is to insure that every possible safety precaution is taken and that we work in the direction of reducing these activities to the extent possible.

Again I would like to thank all the people who have offered such useful comments; they have certainly been helpful to me.

I would like now to make just one final observation. We have discussed a long list of provocative and difficult issues during this session. We have had excellent reports from the participants. Where do we go from here? Is it logical to think of joint research projects, of putting together small working parties, or of engaging in more of a give and take in a small dialogue situation? Just what mechanisms might we use to build on this very useful exchange?

***Thomas Clingan:*** If there are no further comments, I think we can consider the first subject to be concluded.

# STRADDLING STOCKS

# PRESSURES ON THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 1982 ARISING FROM NEW FISHERIES CONFLICTS: THE PROBLEM OF STRADDLING STOCKS

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## Introduction

Even before entry into force, a variety of pressures place strains on the balance of interests underlying the 1982 Convention on the Law of the Sea. The most urgent demands relate to navigational and fisheries activities. A most important recent issue concerns *straddling stocks*, i.e., stocks that occur both within the EEZ and adjacent to it.

From the perspective of a growing number of important coastal states, the 1982 Convention on the Law of the Sea did not adequately settle the issue of straddling stocks, those stocks within and adjacent to the EEZ. Article 63 of the Convention stipulates that coastal states and states fishing for straddling stocks beyond the EEZ shall seek to agree on conservation measures applicable beyond the EEZ, either directly or through appropriate regional or subregional organizations. In addition, Article 116 establishes that the coastal state has the superior right, duty, and interest in straddling stocks beyond the EEZ. However, the precise distribution of competences to make these effective is not prescribed in the treaty. The failure to specify consequences for failure to agree on conservation measures for high seas fishing, the uncertain extent of the coastal state's superior right, and the absence of express enforcement measures beyond the EEZ--all these contribute to a situation of high uncertainty and of growing dissatisfaction.

At the final session of UNCLOS III in April 1982, a coalition of states led by Canada, and including Australia, Cape Verde, Iceland, Philippines, Sao Tome and Principe, Senegal, and Sierra Leone, introduced a compromise proposal (A/CONF.62/L.114) on the issue of straddling stocks, which sought to link failure to agree on conserva-

tion measures to the compulsory dispute settlement procedures included in the Convention. Failure to agree, in this case, would mean that the Law of the Sea Tribunal would determine the necessary conservation measures. Not surprisingly, distant-water fishing states strongly resisted this proposal and, given the fact the Convention was nearing final approval, it was withdrawn by its sponsors. Since that time, as disagreements arise about excessive fishing outside the EEZ on common stocks, conflict on this issue has been heating up at sea and pressures have been building within coastal states to extend their jurisdiction beyond 200 miles to protect the stocks in question.

The most important conflicts are currently occurring in the Northwest Atlantic, the Southwest Altantic, the East Central and Southeast Pacific, and in the Northeast Pacific (Bering Sea). Since some states are parties, either directly or indirectly, to several or all of these conflicts, there are definite connections between them in a policy sense.

*Northwest Atlantic*

Prior to extension of coastal state jurisdiction to 200 miles in 1976, fisheries in the Northwest Atlantic were managed pursuant to the International Convention for the Northwest Atlantic Fisheries (ICNAF). The United States withdrew from ICNAF 1977-78 as a consequence of the introduction of a system based on the Magnuson Fisheries Conservation and Management Act (MFCMA). ICNAF continued in force until its conversion in 1978, by international resolution, into the Northwest Atlantic Fisheries Organization (NAFO). Since all stocks in which there was a special U.S. interest at that time occurred within 200 miles, the unilateral extension of jurisdiction under the MCFMA provided adequate protection for the United States. This same extension of jurisdiction was not as effective for Canada because of the interest in cod stocks beyond the 200-mile limit in the Grand Banks/Flemish Cap areas.

In the Canadian view, therefore, a successor organization would be required for two reasons. First, a surplus in stocks existed within the Canadian zone, and second, stocks ranged within and beyond 200 miles in which Canadian fishermen had vital interests. A multilateral arrangement would be needed to provide protection for stocks occurring beyond 200 miles. Consequently, Canada joined with other states in establishing the NAFO by agreement in 1978.

At the beginning of NAFO's existence, the arrangement worked well. Canadian policy for allocating the surplus within its Extended Fishing Zone (EFZ) sought two objectives: (1) to reward cooperation

on conservation of stocks both inside and outside the zone, and (2) to reward arrangements that gave Canadian industry access to foreign markets.[1] Over time, this latter objective has been phased out and only the conservation objective is currently being served.

But, ten years after its creation, NAFO faced grave difficulties from two sources: (1) increasing fishing effort on straddling stocks beyond 200 miles by new entrants to the fishery who are not members of the NAFO arrangement, e.g., U.S., Republic of Korea, Mexico, Panama, Bahamas, Cayman Islands, and Chile, and (2) severe conflict with a very important member of the NAFO arrangement, the EEC, over the fishing operations of the Spanish fleet [and also the Portuguese], and Canada's attempt to conduct surveillance/enforcement operations, particularly at-sea boarding, against the Spanish fleet.[2] The latter conflict was resolved in 1988 with the creation of a new joint inspection scheme in which the EEC is a participant.

Canada charges that Spain and other EEC member states exceed NAFO-recommended TACs by large margins. The EEC, in turn, strongly objects to the scientific advice given to NAFO by the Scientific Council because the basis for the advice (i.e., fishing effort should be set at the $F_{0.1}$ level) is the same as that being used by Canada for resources lying wholly within its jurisdiction.

During the Seventh Annual Meeting in 1985, both the EEC and Spain called for consideration of other management options and indicated a clear preference for fishing effort at the $F_{max}$ level, which would permit greater effort and total catch. Conflict at this time was intense and extended to individual stock allocation decisions as well as

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[1]Task Force on Atlantic Fisheries. *Navigating Troubled Waters: A New Policy for the Atlantic Fisheries*, December 1982 (Ottawa: Ministry of Supply and Services, 1983).

[2]This assessment is made on the basis of official NAFO reports from the Seventh Annual Meeting in 1985. See: NAFO Seventh Annual Meeting, September 1985. Provisional Report of the Fisheries Commission, DOC. #NAFO/FC Doc. 85/8, Serial No. N1098; NAFO Ninth Annual Meeting, September 1987. Draft Provisional Report of the General Council, Doc. # NAFO/GC DOC 87/10, Serial No. 1417 and 1986 Canadian Report on Enforcement in the Regulatory Area, DOC. #NAFO/FC DOC 87/7, Serial No. N1403.

overall TACs. Difficulties were so great that the EEC explicitly threatened to withdraw from NAFO altogether.[3]

The official Canadian position on the issue of straddling stocks is scrupulously cautious. Canada does not assert jurisdiction over the portion of a common stock that occurs beyond 200 miles. The government asserts only special interests that it considers to be implied by Article 116 of the UN Convention.[4] Consequently, the Canadian response to new entrants is that the stocks in question are managed pursuant to a multilateral treaty and are (already) fully allocated on the basis of the best scientific evidence available. All additional fishing is beyond the level of the total allowable catch and is therefore harmful.

Since under customary law there can be no enforcement beyond 200 miles without agreement by the flag state, this position is increasingly ineffectual. Moreover, even where an agreement concerning enforcement existed, as in the first agreement with the EEC, severe conflict between Canada and the EEC arose over management measures concerning appropriate levels of fishing and over Canadian inspection activities against vessels of EEC member states, particularly Spain. As fishing effort remains high, domestic pressure from the Maritime Provinces on the Canadian national government increases and demands are beginning to be heard to extend Canadian jurisdiction beyond 200 miles.

*East Central Pacific*

Despite U.S. acceptance of a 200-mile exclusive fishing zone, which originated in South America, conflict, and even confrontation, has continued since the mid-1970s. The central issue is access to tuna in the region. The disputants are the United States on the one hand, and coastal states of Central and West Coast of South America, on the other. This conflict imposes severe constraints on the Inter-American

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[3]The details of this conftrontation can be found in NAFO Doc. #NAFO/FC. DOC 85/8. For a more extensive analysis of the problem, see Karl M. Sullivan, "Conflict in the Management of A Northwest Atlantic Transboundary Cod Stock," Planning Services Division, Government of Newfoundland and Labrador, Dept. of Fisheries, unpub., n.d. (copy in authors' files).

[4]Telephone conversation with C. Allen, international director, NAFO, Department of Fisheries and Oceans, Ottawa, February 15, 1988.

Tropical Tuna Commission (IATTC) and the regime it serves. Indeed, because of these differences, it has not been possible to agree on conservation and management measures since 1979 when Mexico and the other Central American states broke off negotiations with the United States and denounced the Convention underlying the IATTC regime.

In part, the conflict is over competing philosophies of the management of tuna fisheries. The U.S. maintains that tuna are a special case since they fall into a class of highly migratory species (first identified and proposed by the United States), although the U.S. itself claims exclusive fishery management authority over all such species except tuna. From this perspective, effective conservation is not possible except within the context of a regional organization that includes both coastal and distant-water fishing states. Furthermore, in this view, the coastal state may not manage tuna within its EEZ except pursuant to and in conformity with decisions adopted by the appropriate regional organization.

Virtually all coastal states of the world reject this view and insist on the right to manage all highly migratory species, including tuna, within their EEZs.[5] In addition, for Mexico the tuna conflict with the United States is a straddling stock problem, not a problem of highly migratory species. For this reason, it is legitimate to include this issue as a straddling stock problem over which conflict occurs. This problem differs from others, however, because the major controversy concerns the allocation of the benefits of fishing, rather than conservation alone.

In response to the action by Mexico and others, the U.S. government and industry pursued three strategies: (1) the U.S. fleet significantly increased operations outside 200 miles, (2) the U.S. executive branch invoked the MFCMA to impose embargoes on any state which unilaterally seized U.S. tuna boats in their EEZs; (3) the U.S. sought, eventually unsuccessfully, to split the Mexican coalition and to persuade the Central American states to sign a new, interim

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[5]For a comprehensive evaluation of the various legal arguments, see: William T. Burke. "Highly Migratory Species in the New Law of the Sea," *Ocean Development and International Law Journal*, Vol. 14, No. 3 (1984), pp. 273-314. See also: Izadore Barrett. Development of Management Regime for the Eastern Pacific Tuna Fishery, unpublished Ph.D. dissertation, University of Washington, 1980.

Convention (the San Jose Convention), pending general agreement on a revised IATTC regime.

The San Jose Convention, providing for issuance of licenses by an international mechanism, with enforcement by coastal states, has not come into force. The Convention was intended to put into operation an interim regime until the negotiations over a revised IATTC regime would be concluded. As such, it dealt only with fees; an obligation not to embargo the importation of tuna and tuna products among the parties, provided that thoses states abided by the rules of the Convention; and the creation of a governing body assigned the tasks of issuing regional licenses and levying entry fees.

Mexico, in turn, reacted by: (1) rapidly increasing its capacity to harvest and process tuna, and (2) seeking to replace the IATTC regime with a new regime based on the Latin American Organization (OLDEPESCA). This organization was modeled directly on NAFO, but, significantly, the Mexican intent was to have all coastal states of Central and the West Coast of South America as members and to exclude all other fishing states.[6]

Whereas OLDEPESCA's charter covers the gamut of fisheries development issues for the Latin American region, one of its objectives is to " ... promote and organize utilization of the joint negotiating capacity of the Latin American region ...."[7] Mexico therefore sought to mobilize member states from the date of entry into force of the agreement (November 2, 1984) to negotiate a draft treaty on the basis of which tuna would be managed.[8]

This draft treaty was presented to a Conference of States in January 1988. The coastal states in attendance included Mexico,

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[6]Fernando Castro y Castro. "The Importance of the Exclusive Economic Zone to the Tuna and Fisheries Development of Mexico," In Edward Miles (ed.), *Management of World Fisheries: Implications of Extended Jurisdiction* Seattle: University of Washington Press, in press), Chap. 11.

[7]CPPS, What is OLDEPESCA? (n.d.)

[8]It is not clear from the draft treaty whether this treaty would be a full management organization giving equal attention to conservation as well as allocation. Whereas conservation is mentioned once in the preamble to the draft treaty, all implementing details actually deal only with allocation of the catch among and between coastal states.

Guatemala, El Salvador, Nicaragua, Panama, Costa Rica, Chile, Peru, Ecuador, and Colombia.[9] In addition, Japan, U.S., France, and Venezuela were invited as observers without the right to vote. France insisted on its status as a coastal nation (Clipperton Is.) and did not attend. The United States reportedly expressed disatisfaction with its status as an observer nation as did Venezuela, but both attended. Conflict was high both among coastal states and between coastal states and others and no agreement was reached.

What is important for our purposes, however, is the draft treaty tabled by the coastal nations. The draft treaty incorporated the Mexican perception of the NAFO arrangement. From this perspective, the underlying concept of the treaty was to exchange guaranteed access to tuna in the 200-mile zones of coastal states for coastal state preferential treatment over a considerable portion of high seas area (called the Regulatory Area) out to the line of meridian 145° W.

As reported, foreign vessels fishing pursuant to the agreement in the regulatory area would be subject to TACs and entry fees while each coastal state retained the right to manage all tuna fisheries within its EEZ. Vessels of nonparty states, operating beyond 200 miles, would be prohibited from entering the ports of coastal states and receiving logistic support.[10]

In 1986-87 the United States was able to find a way of reaching bilateral agreements individually with Central American states, which reduced the level of conflict and secured the lifting of the embargoes on their tuna product imports into the United States. But no general agreement is yet in place. As a result, the problem festers and can be reactivated at any time.

### *Southeast Pacific and Southwest Atlantic*

The problems in these regions are connected since they all relate to the fishing operations of Socialist Bloc fleets led by the USSR.[11] Soviet distant-water fleets moved increasingly into the Southeast Pacific, Southwest Atlantic, and Southern Ocean after 1977 as a result

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[9]Reported in Katsuo-Maguro Tsushin, No. 5501, February 3, 1988.

[10]Ibid.

[11]Numerous other states fish in the southeast Atlantic, including Japan, Korea, Poland, Spain, Italy, United Kingdom, France, Greece, and Chile.

of the worldwide extensions of coastal state jurisdiction occurring at that time. As Kaczynski[12] points out, sub-Antarctic fishing off Chilean and Peruvian coasts as well as off Argentina's Patagonian shelf initially were used to supplement and extend the operating time of the Soviet Antarctic fleet. As catches increased, however, the sub-Antarctic areas became important in their own right, the fleet became more specialized, and the Soviet fleet was joined by fleets from Bulgaria, Poland, and Cuba.

Off Chile and Peru, the primary target of the Socialist Bloc fleets has been Chilean jack mackerel (*Trachurus murphyi*), whereas, off Argentina, the primary targets have been southern blue whiting (*Micromesistius australis*) and southern poutassou (*Micromesistius poutassou*). The Chilean position is that it is not known whether there are several stocks of jack mackerel in waters off Chile. The Chileans suspect, however, that the fishery conducted beyond 200 miles by the fleets of the Socialist Bloc may be taking larger adult fish, whereas the reduction fishery within 200 miles may be taking younger fish of the same stock.[13] Jack mackerel seem to have a 2,000 mile spawning pattern with the older fish as much as 1,500 miles off the coast and spawning taking place at between 80-250 miles. Soviet fleets target the larger fish.

The problem this presents for the Chilean government is that Spanish sardine (*Sardinops sagax*) and jack mackerel together account for more than 91 percent of the Chilean total catch in finfish fisheries.[14] Jack mackerel alone accounts for about 42 percent of the total catch. Chilean fishermen therefore consider that they have a special dependence on this stock and that large catches by Socialist

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[12]Vladimir M. Kaczynski. "Economic Aspects of Fisheries Management in the Southern Ocean and Adjacent Waters," in Patricio M. Araua (ed.), Proceedings of the International Conference on Marine Resources of the Pacific, Vina del Mar, 1983, pp. 447-65.

[13]Institute for Marine Studies, World Fisheries Project. Seminar Presentation by Mr. Santiago Montt Vicuna of Chile (Instituto de Fomento Pescero), April 19, 1984.

[14]Vladimir M. Kaczynski. Management Problems of Shared Chilean Jack Mackerel Resource: The Coastal State Perspective, unpublished ms., Institute for Marine Studies, University of Washington, May 1984, pp. 9-10.

Bloc fleets outside 200 miles will adversely affect "... both the availability of the pelagic species in the Chilean coastal waters and the future development of the Chilean fishing industry."[15] Apprehension generated by these problems led to discussions within the Comision Permanente del Pacifico Sur (CPPS), consisting of Colombia, Ecuador, Peru, and Chile.[16] Similar concerns exist for Argentina vis-a-vis southern blue whiting and poutassou stocks on the Patagonian shelf.[17] FAO in 1985 noted a major change in the total catches of southern blue whiting, which increased to 140,000 mt in 1982 and to 260,000 mt in 1983.[18] However, FAO biomass estimates made previously had indicated that the potential yield was only about 100,000 mt. Observing that the largest share of the catch was made by Polish and, to a lesser extent, Soviet fleets, FAO concluded that satisfactory resolution of this straddling stock problem could not be achieved without international cooperation. But international cooperation was difficult to achieve since no regional organization existed and the parties had ignored an FAO working party recommendation relating to the need for exchange of scientific information.[19]

Informal conversations with coastal state members of CPPS and with representatives of Argentina provide evidence of a growing concern on the part of these coastal states vis-a-vis the fishing operations of Soviet Bloc and other distant water fishing states on fisheries off their coasts. In addition, occasional surveillance flights have reportedly provided evidence of illegal fishing by these fleets within the EEZs of the coastal states. Hampered by enormous gaps in capability, and sometimes by the lack of diplomatic relations, fisheries

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[15]Ibid., p. 16.

[16]Luis Arriaga. "Fishing Management and Development in the Southeast Pacific," in *Management of World Fisheries* ..., Chap. 12.

[17]Report of the Ad Hoc Working Group on Fishery Resources of the Patagonian Shelf, Feb. 7-11, 1983, FAO Fisheries Report No. 297, p. 75.

[18]FAO Fisheries Circ. No. 710, Revision 4. *Review of the State of World Fishery Resources*, Doc. No. FIRM/c710(Rev.4)(En), (Rome: FAO, March 1985), p. 15.

[19]Ibid, p. 16.

management authorities in the coastal states are growing frustrated and are becoming restive in their search for approaches to impose effective controls on fleets fishing these straddling stocks.

*Northeast Pacific/Bering Sea (the "Doughnut Hole")*

The facts are that since 1984 Japanese-directed fishing for pollock (*Theragra chalcogramma*) in the U.S. zone in the Eastern Bering Sea has been phased out. In response, the Japanese rapidly increased their fishing effort on pollock in the international area of the Central Bering Sea, popularly known as the "Doughnut Hole." The Japanese reported catch in the "Doughnut Hole" jumped from 135,000 mt. in 1985 to 695,000 mt. in 1986 and 802,646 mt. in 1987, with more than ninety Japanese vessels operating. This catch combined with those of other fleets operating in the area, led to an agreed estimate of a total catch in 1986 on the order of 1 million mt and in 1987 of a total catch of close to 1.3 mmt.[20]

The U.S. industry concerned, and the North Pacific Fishery Management Council, assert that these stocks of pollock are straddling stocks and that such a high level of effort and catch adversely affects recruitment and catch levels on pollock in the U.S. EEZ. In contrast, the Japanese industry contends that these pollock stocks are completely independent of other stocks in the U.S. EEZ since pollock stock structure in the Bering Sea as a whole consists essentially of six independent subpopulations. Neither side in fact yet has the data to support either position conclusively, and the issue is complicated by dramatic confirmation of significant Japanese illegal fishing in the

[20]Memorandum for the Record by Dr. William Aron, director, Northwest and Alaska Fisheries Center, N.M.F.S. Concerning a meeting with Kazuo Shima, counselor, Japan Fishery Agency, August 18, 1987. This memorandum contains three attachments: (1) Japanese pollock catches from the "Doughnut Hole" in 1985-86; (2) Japanese industry views of "Doughnut Hole" pollock stocks; (3) comments by the Japan Fishery Agency on "Doughnut Hole" pollock. The 1987 data are reported by Chris Blackburn, *Bering Sea Pollock: Summary of Findings*, International Pollock Conference, Sitka, Alaska, July 19-21, 1988 (Kodiak, Alaska Groundfish Data Bank, September 8, 1988).

U.S. zone.[21] Clamor by U.S. interest groups for punitive action has escalated rapidly, but here serious complications are encountered by both the United States and the USSR.

This disagreement, though the most recent of all, is the most ominous since it casts both the U.S. and the USSR in the role of coastal states versus Japan, China, ROK, Poland, Taiwan, and potentially others. Consequently, this situation is a potential trigger that can release repercussions severely destabilizing to the United Nations Convention of 1982 depending on the policy choices made by the coastal states.

Important fishing interests in coastal states, and especially in the United States, seem to be pushing hard for unilateral or bilateral extensions of jurisdiction on legal grounds that are questionable or nonexistent. But, were either or both coastal states to extend jurisdiction, this would put intolerable pressure on the Canadian government to do the same. It would be difficult for Canada to resist these pressures indefinitely, and Canadian action, combined with super power action, would most probably stimulate similar moves elsewhere.

Within the United States, the relevant industry group, the North Pacific Council, and their congressional allies, claiming that the issue is one of straddling stock management and that emergency action is needed, called for unilateral U.S. extension of jurisdiction beyond 200 miles. When this was rejected by the United States, reportedly based on objections by the Defense Department and the Legal Advisor's Office of the Department of State, the U.S. industry coalition fell back to a demand for joint U.S./USSR extension of jurisdiction and for declaring the "Doughnut Hole" a sanctuary in which no fishing would be permitted. This recommendation was never officially adopted by the U.S. government (although a nonbinding resolution calling for a moratorium was passed by the Senate), but the United States did invite the Soviets to consider jointly what responses should be taken.

Recognizing the need for better data on the stocks, the U.S. and the Soviet Union agreed to seek more information on pollock stock structure in the Central Bering Sea and an international meeting was quickly convened on the status of pollock stocks. Beyond this, the complications are considerable for both parties because each is

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[21]See Transcript of Hearing before the Senate Committee on Commerce, Science and Transportation, March 16, 1988; Ross Anderson, "A 'Massive' Invasion of Foreign Fishermen?", *Seattle Times*, January 17, 1988.

constrained by conflicts of interest. For instance, if the United States declares that these are straddling stocks and that the United States has superior or dominant rights concerning their use and conservation, the same principle may be invoked against U.S. vessels fishing in the NAFO Convention area beyond 200 miles. Similarly, the USSR cannot espouse this straddling stock hypothesis without facing the prospect of its application to the Soviet Bloc fleets off Chile and Argentina. As a result, fisheries elements in both governments seek alternative approaches to managing fisheries beyond 200 miles.

One approach that was reportedly explicitly considered, and that has so far been rejected, calls for invocation of Article 123 on enclosed and semienclosed seas of the UN Convention. Proponents in both the USSR and the U.S. apparently seek to use Article 123 as a basis for joint control of foreign fishing in the "Doughnut Hole" by the coastal states. Unfortunately for this hypothesis, Article 123 does not provide any rights to coastal states beyond those already available in the EEZ or territorial sea. If Article 123 were used to mask impermissible extensions of coastal state jurisdiction beyond 200 miles to protect fisheries by a superpower, it would also call into question all the other protections of superpower navigational interests in the UN Convention. One would expect, therefore, that member states of CPPS, plus Mexico, Argentina, Canada, and indeed all other coastal states, share a keen interest in the ways in which the U.S. and USSR seek to resolve this problem.

**Implications**

Assuming that the doughnut situation involves stocks common to the high seas and to one or both adjoining EEZs,[22] we have here a serious problem for the future stability of the UN Convention. It is in fact a dilemma. In order to protect the overall balance of interests in the Convention as a whole, the only acceptable resolutions of straddling stock conflicts are those that do not ultimately rest on coastal state unilateral decision. But reliance on multinational solutions may not be sufficient to provide adequate management protections for the stocks in question.

Experience with the NAFO situation shows that for multinational solutions accommodating the special interests of the coastal state to work, they must include a quid pro quo for the distant water fishing

[22]Although probable, we acknowledge that this remains to be established.

states. But, even with such a quid pro quo as allocations within the coastal state's EEZ, relations over time deteriorate over surveillance/enforcement operations by the coastal state beyond 200 miles, over member vessels participating in the arrangement exceeding TACs, and over the extreme difficulty of controlling nonmembers as new entrants.

When these disputes fester, they lead to increasing domestic pressures on coastal states to extend their authority beyond 200 miles to protect the stocks in question. Once these issues reach a high level of salience, governments find it very difficult to resist demands for protective actions by domestic groups, led by their fisheries interests. They may then be forced into choosing policy options that in broader perspective are quite harmful to their larger interests in the UN Convention as a whole. What the U.S. and USSR do now in relation to the Bering Sea is critical and requires care and sensitivity. The issue as a whole demands serious attention.

Given the professed strategic interests of the superpowers, and indeed the international community as a whole in maintaining the balance achieved in the Convention, multilateral solutions to straddling stock problems are preferable. But fishing interests in coastal states are unlikely to find multilateral approaches effective, given the anticipated constraints on coastal state enforcement. Arrangements that might attract coastal state support must therefore tilt in their favor even while significantly constraining the unfettered exercise of coastal state jurisdiction. Such a formula would serve the long-run interests of distant-water fishery states because it is the only alternative to unilateral or bilateral extensions of coastal state jurisdiction.

## A Proposed Approach

How might such an arrangement be crafted? Let us first consider the applicable international law.

The key initial legal question is what authority exists for the U.S. and USSR, as states bordering the Bering Sea, to take conservation action within the central Bering Sea affecting high seas fishing by foreign fishing vessels for groundfish. Could these states, separately or together, lawfully declare that foreign fishing in the "Doughnut Hole" must terminate or that it must be limited to a particular quantity of fish, or number of days, or to the use of certain gear? Or, for example, that special provisions must be observed to protect marine mammals or other incidental catch and that these measures will be enforced by the bordering states?

An initial alternative is to consider what obligations high seas fishing states have regarding conservation of the resources they exploit in the high seas. Exploration of this alternative is in two parts. The first part assumes that such resources are found and occur only *beyond any area of national jurisdiction.* It is further assumed that international law on this question is found in the 1982 Convention. The obligations derived from the Convention, Part VII, Section 2 are:

1. To take necessary conservation measures (Art. 117):
2. To cooperate with other states in taking such measures (Art. 117):
3. To enter into negotiation with other states fishing the same or different resources in the same area "with a view to taking the measures necessary for the conservation of the living resources concerned" (Art. 118):
4. Where appropriate, to cooperate in establishing fisheries organizations to facilitate taking the necessary conservation measures (Art. 118):
5. To take measures "designed, on the best scientific evidence available to the states concerned, to maintain or restore population of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors. . ." (Art. 119):
5. To contribute and exchange "available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of the fish stocks" (Art. 119):
7. To make such exchange through "competent international organizations, whether subregional, regional or global" (Art. 119):
3. To ensure that the measures adopted are nondiscriminatory against the fishermen of any state (Art. 119).[23]

States fishing on the high seas thus have substantial obligations to ake measures to conserve fish stocks there and to cooperate with other

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[23]The states concerned are not required to take the same conservation neasures regarding marine mammals as they are for fish. In particuar, the measures for marine mammals need not be limited to mainaining or restoring populations of stocks at the level that will produce he maximum sustainable yield as qualified by environmental and conomic factors. Article 120 permits the states to regulate the taking f marine mammals more strictly as, for example, by prohibiting any xploitation at all.

states to that end. The most basic obligation is that of contributing and exchanging "available scientific information, catch and fishing effort statistics, and other data relevant to conservation." The range of further cooperative action is as wide as the measures that might contribute to conservation including "negotiations with a view to taking" the necessary measures. Even if negoations do not lead to agreed measures, an obligation would still apply to each fishing state to take unilaterally conceived measures affecting its own flag vessels.

Data about the effects of such measures, both unilateral and multilateral, in light of catch and fishing effort statistics, shall be contributed and exchanged with other states. Furthermore, the obligation to cooperate does not disappear because an effort is initially unsuccessful; continued attempts to cooperate are required if reasonable requests for cooperation are made.

If these obligations are owed, to whom are they owed? At least three recipients are possible: another state or states fishing on the high seas, the general community of states (as where no other states fish the stocks involved), and coastal states adjoining on the high seas area. It is conceivable that states of a region or subregion might be the beneficiaries of the obligation as well. If the fishery in question is subject to an international agreement, the fishing state may also have obligations arising from that agreement.

Although it is evident that high seas fishing states have conservation obligations and duties irrespective of the involvement of other states in the same area, certainly such obligations and duties may be invoked when the interests of other states are directly affected. According to Article 118, the several states fishing in an area have an obligation to each other regarding conservation. Any of these states might take measures to seek to secure the discharge of the obligation of another state. *Nothing in the 1982 treaty or in other customary law, however, authorizes one high seas fishing state to take action on the high seas to enforce a conservation obligation owed to it by another state.*[24] This does not mean that there is no recourse.

Diplomatic action (protests), domestic remedies (embargoes on fishery or other trade, refusal of access to ports for logistic support, denials of economic assistance, suspension of particular benefits),

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[24]As for obligations owed to the general community of states, international law has not yet recognized actions by one state to secure compliance or impose a penalty or other remedy. This is another situation in which system improvement is needed.

international sanctions (remedies available under international agreements, including trade agreements) are all possible instrumentalities. Whether any of these is available and, if so, feasible to employ is another question -- the point is that a state (including a high seas fishing state) whose interests are harmed by refusal of a high seas fishing state to take necessary conservation measures is not necessarily helpless. If the 1982 Convention on the Law of the Sea were in force and in effect between the states concerned, disputes about the applications of articles concerning high seas fishing would be subject to compulsory dispute settlement proceedings in Part XV.

Let us now turn to the second part of this inquiry, which assumes that the stocks straddle both the EEZs and adjacent high seas areas and, therefore, that a coastal state is involved. Article 63(2) of the 1982 Convention requires that the high seas fishing state and the adjacent coastal state seek to agree either directly or through appropriate organizations to take the necessary conservation measures for the straddling stock(s). If this effort to agree is successful, then no problems of conservation or jurisdiction arise. Article 116 of the 1982 Convention establishes that high seas fishing states also have obligations to coastal states. Article 116 declares that the right to fish on the high seas is subject to the rights, duties, and interests of coastal states, specifically referring, inter alia, to Articles 63(2) to 67. At the very least, therefore, states fishing straddling stocks on the high seas have a duty to conserve these stocks and to cooperate with the adjacent coastal state to that end. This would include negotiations to establish agreed measures. The high seas fishing state is obliged to exchange information and relevant data with the coastal state in this process.

If Article 116 is to be effective, it may need to be interpreted to authorize the coastal state to secure its superior right by prescribing conservation measures with which high seas fishing states are obliged to comply. The rights of the coastal state, expressly made superior to the high seas fishing state, would otherwise be empty and the high seas state would have no meaningful obligation different from its obligation to any other state.

The terms of Article 116 establish that high seas fishing rights are now enjoyed only subject to certain specific sovereign rights of coastal states. Whereas the high seas fishing state has obligations to other states, this is the only provision subjecting those rights to specific sovereign rights.

These treaty provisions appear to set out the procedural agenda that must be followed by states in situations such as the "Doughnut Hole" in the Bering Sea. The adjoining coastal states and the high seas fishing states must seek to agree upon necessary conservation measures

for the straddling stocks. They are obliged to negotiate with each other for this purpose. If one or the other side refused to negotiate in good faith, or withheld relevant scientific information or data, or adopted discriminatory conservation measures allegedly applicable to the high seas fishery, then under the 1982 Convention the aggrieved state could seek remedy through compulsory dispute settlement mechanisms, alleging failure to comply with the treaty requirements.

If efforts to agree on a conservation regime are unsuccessful, although all parties have negotiated in good faith to secure such a regime, what further procedural steps may be right to exercise sovereign rights over the straddling stock? Is the situation beyond effective action under the treaty? The answer to this is clearly no. The treaty provides that the coastal state has superior rights over straddling stocks. In the absence of agreed measures, under the treaty the coastal state might prescribe measures for application to all who fish the straddling stocks, including on the high seas; demand that these states comply with these measures; and, if refused, seek a remedy through the compulsory dispute settlement mechanism. In the absence of agreed measures, under the treaty the coastal stae might prescribe measures for application to all who fish the straddling stocks, including on the high seas; demand that these states comply with these measures; and, if refused, seek a remedy through the compulsory dispute settlement mechanism. In such a proceeding the coastal state could base its actions on the interpretation of the relevant articles of the treaty, including Article 116. Whether the coastal state's measures were impermissible and what actions might be taken would be the subject of the dispute settlement proceedings and the outcome could clarify the rights of those concerned.

The above assumes that the 1982 treaty provides the substantive and procedural law to be applied. What might be done in the absence of treaty provisions actually in force? The answer to this is that all the states concerned can adopt the treaty as the guiding law on the subject, if that is their wish. Second, the coastal states concerned might unilaterally offer to proceed on the basis of the treaty. Third, the coastal states need not mention the treaty, but can pattern their behavior in accord with an interpretation of its terms. This would not be difficult to do since at least the treaty provisions on high seas fishing embrace customary international law. The more difficult question is whether the treaty simply calls for the states concerned to seek to agree on conservation measures, which is certainly consistent with international law. This should be the minimum action taken by the coastal states.

Assuming that seeking agreement does not produce an acceptable conservation regime, the coastal states could take actions to demand observance of a conservation regime on the high seas and justify this by reference to Article 116 and the articles referenced therein, claiming that these reflect customary international law. In the event that the high seas fishing states reject this position, the coastal states might offer to adjudicate the differences of legal position.

**An Approach to the Resolution of Straddling Stock Conflicts**

To recapitulate, the course of action outlined above calls for negotiations for multilateral agreement to conservation measures for the "Doughnut Hole," followed in the event of failure by unilateral coastal state prescription of such measures, coupled with submission to third party settlement by an arbitral procedure. This suggestion has substantial precedent in prior international arrangements and proposals designed to deal with a similar problem when exclusive fishing zones were less extensive. In fact, much the same procedure has been accepted by a significant group of states, including several major fishing states.

The reference here is to provisions of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, which permits unilaterally prescribed regulations by any coastal state party for adjacent high seas fisheries in default of agreement, subject to binding dispute settlement on the basis of agreed scientific standards. The United States and a majority of member states of the EEC have ratified this Convention. The USSR, Japan, and Canada, among others, have not.

It is true that these provisions at the time of adoption referred to all fisheries outside a small exclusive fishing zone of twelve miles, whereas the 1982 Convention refers to fisheries outside 200 miles. But, in fact, the 1958 provisions potentially concerned a far larger problem than coastal states now face, since fishing areas adjacent to 200-mile EEZs are a lot less significant than those outside a twelve-mile exclusive fishing zone. If the 1958 provisions were an acceptable approach to the same problem then, they would seem even more reasonable today.

Although the 1958 agreement provided for unilateral prescription by a coastal state, on the basis of objective scientific standards, and for binding third party settlement in the event of dispute, enforcement measures were not specified. Again, the United States has elsewhere formally proposed what may be a workable compromise enforcement approach that may satisfy all those concerned about straddling stocks.

A proposal in 1971 by the United States dealt with closely analogous, if not more substantial, difficulties concerning fisheries beyond national jurisdiction.[25] In the Seabed Committee, during the early stages of the preparation for the Third UN Conference on the Law of the Sea, the United States proposed articles for an agreement that would allow coastal states, where internationally agreed measures could not be negotiated after a period of four months of their submission to the fishing states concerned, to promulgate unilateral measures for stocks beyond coastal state jurisdiction, to exercise significant but not complete enforcement authority, and for compulsory dispute settlement. Except for the enforcement provisions, this proposal strongly resembles the 1958 Conservation Convention.

The enforcement provisions called for each state party to make it an offense for its nationals to violate fishery regulations adopted pursuant to the agreement. Provision was also made for coastal state enforcement in default of international enforcement. However, "Actions under this subparagraph shall be limited to inspection and arrest of vessels and shall be taken in such a way as to minimize interference with fishing activities and other activities in the marine environment." "An arrested vessel shall be delivered promptly to the duly authorized officials of the State of Nationality. Only the State of Nationality of the offending vessel shall have jurisdiction to try any case or impose any penalties regarding the violation of fishery regulations adopted pursuant to this Article. Such state has the responsibility of notifying the enforcing organization or State within a period of six months of the disposition of the case."

Pertinent provisions of the 1982 LOS treaty, the existing 1958 Conservation Convention, and the 1971 proposal in the Seabed Committee appear to provide, in combination, all of the necessary elements for a workable regime for straddling stocks. For the United States, at least, these elements also appear to be an acceptable regime, it having actually accepted or formally proposed all the ingredients, noted above, of an effective international mechanism, supplemented by minimal, and reviewable, coastal state authority if the international measures cannot be agreed.

Were such an approach adopted, it would effectively settle the "Doughnut Hole" problem without prejudice to the strategic interests of the U.S. and USSR in global stability in the law of the sea. Such an agreement would considerably strengthen the hand of the coastal state without institutionalizing an incentive for the coastal state not to agree

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[25]UN Doc. No. A/AC.138/SC.II/L.40.

to conservation measures. If coastal state recalcitrance to agree with high sea states on measures were to benefit the coastal state, this would be a major disincentive for other states to join in any agreement. But under this proposal, failure to agree simply gives the initiative to a third party to decide on the acceptability of coastal state measures. Presumably, parties to the dispute would prefer to avoid having the matter taken out of their hands; this constitutes an incentive for them to agree. The enforcement authority of the coastal state is limited, as it must be since this is a high seas area, but it is not trivial nonetheless. After all, it includes the capability to interrupt the fishing operations of the vessel(s) deemed to be violating regulations made pursuant to the agreement.

Were the "Doughnut Hole" issue solved in this fashion, this arrangement would exert significant influence on straddling stock conflicts elsewhere. As such, it could become the basis of a global solution and could easily be accommodated to the peculiarities of local situations. For this to occur, however, requires joint U.S./USSR leadership. Need it be emphasized that if the superpowers themselves are unable to agree to protect the balance of interests underlying the Convention, this in itself would be an incentive for coastal states elsewhere to extend jurisdiction unilaterally? Done in such a fashion, extensions of coastal state jurisdiction would lead to significant increases in international conflict.

We should note further that even if a multilateral solution as described above were accepted by the coastal states and others fishing in the "Doughnut Hole," there would still remain the serious problem of dealing with potential new entrants and other nonsignatories. This raises delicate questions of the exercise of coastal state authority on the high seas. The final section of this article responds to that problem.

## The Problem of New Entrants and Other Third Parties

As the NAFO experience indicates, the problem of new entrants and other nonsignatories is an especially difficult issue both politically and in terms of maintaining effective management. There would therefore still exist cause for significant domestic political pressure for unilateral extension of jurisdiction by the coastal state if such a large "hole" in the agreement were not closed. The approach to closure recommended here may appear to go somewhat beyond existing international law, but it is based on the obligations affecting all states fishing the high seas and limited by invocation of the compulsory dispute settlement procedure.

All potential new entrants and other nonsignatories to the previously agreed arrangement should be invited to become parties by the coastal states. But what is to happen if an agreement of the kind suggested is not accepted or could not be negotiated or if new entrants refuse to comply with existing conservation measures? To conclude that nothing can be done about straddling stocks because high seas fishing states refuse to accept reasonable conservation measures by agreement is not acceptable when the scientific basis for the measures is submitted to impartial, third-party adjudication. In the past, largely because of the recalcitrance of distant-water fishing states, coastal states employed unilateral action (adopted after the LOS negotiations had revealed a broad consensus on the EEZ approach) to resolve the traditional problem of unregulated fisheries. The straddling stock issue now is simply the last remnants of that traditional problem, dealt with only in general and vague terms by the Third Conference.

Unilateral action of the type indicated above can and should be employed, if fishing states are unreasonable in refusing to negotiate multilateral conservation measures, so long as the unilateral measures are accompanied by the offer to accept third-party binding dispute settlement over the scientific bases for the unilateral measures. Unless something of this sort can be done, the coastal states are helpless before fishing states determined to have their way no matter what. In the long run, this position may push affected coastal states to extension of the 200-mile zone, and this would be best to avoid.

All of the preceding discussion focused on the problem of conservation of straddling stocks. However, the possibility of new entrants into a straddling stock fishery that is subject to a conservation regime also presents an allocation issue. Acceptance of a total allowable catch by the new entrant, which may satisfy the conservation objective, simply means the reduction of the shares of existing entities of the new entrant is entitled to an allocation. Pressures to resist reduction in quotas are likely to undermine the consensus on a conservation regime. Accordingly, there is no alternative to recognizing the authority for the coastal state, or the coastal and fishing states acting together when possible, to prohibit new entrants into a straddling stock fishery already subject to conservation measures, including a total allowable catch. Unless this step can be taken, the prospects of any effective regime for straddling stocks are substantially diminished.

## Conclusion

The 1982 Convention on the Law of the Sea does not adequately define an allocation of jurisdictional competence that will enable the problem of straddling stocks to be resolved, bu the Convention nonetheless contains the means for resolving disputes over such stocks. In the event the states concerned are unable to agree on conservation measures for straddling stocks, the Convention affords a plausible basis for coastal state action to prescribe measures. More importantly, it provides for compulsory resort to third-party dispute settlement for settling differences over the scientific and nondiscriminatory basis for the measures that the coastal state prescribes. For these reasons, despite the imperfections, states concerned with straddling stocks would gain from acceptance of the Convention and, in default of that, from observance of its provisions.

Dispute settlement mechanisms can be employed, of course, irrespective of the LOS treaty, but the value of the treaty is in the possibility of routine resort to such settlement. Such resort carries with it the avoidance of long-running and politically debilitating controversies and, for the fishing interests involved, the probability of a satisfactory management regime that, being installed promptly, avoids loss caused by delay in needed management controls.

Accordingly, fishing and coastal states generally stand to benefit from an effective LOS treaty. Fishing interests, both coastal and distant-water, are also immediately benefited by a system of compulsory dispute settlement and should join with others in supporting ratification of the treaty.[26]

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[26]This applies especially to the fishing groups in the Pacific Northwest whose interests will be helped by prompt resolution of disputes over straddling and other stocks. Strangely, this segment of the U.S. industry has been outspoken in opposition to the LOS treaty.

# FOREIGN OVERFISHING: A DILEMMA FOR CANADA

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Canada is a major beneficiary of the new law of the sea as it has acquired 200-mile fishing zones considered to be the richest in the world -- particularly in the northwest Atlantic Ocean. However, as required under the UN Convention and evolving international law, Canada has also attempted to act responsibly in this area to the extent that research, control, and conservation measures amount to well over $1 billion in costs to Canada per year. Furthermore, Canada has concluded bilateral fishing agreements with a number of long distance fishing states -- particularly the Soviet Union, other socialist states, as well as some EEC states, and Japan. These states are given access to Canadian fisheries zones on a quota-license arrangement.

In order to equitably allocate quotas beyond 200 miles in the northwest Atlantic area, an inter-governmental organization, the North-West Atlantic Fisheries Organization (NAFO) was established to regulate access and quota allocations based on sustained scientific evidence. Unfortunately, from the beginning, NAFO has been less than effective and is considered today to be an inadequate mechanism to protect fisheries resources beyond the Canadian 200-mile fisheries zones. Obviously, fishing in areas adjacent to the Canadian fisheries zones will have an effect upon the resources within such zones. Fish stocks in this area of the northwest Atlantic "straddle" the 200-mile zone and move in and out of such zones at will. Furthermore, a number of spawning areas, situated just outside the 200-mile boundary, are of considerable importance to the viability of Canadian fisheries within the 200-mile zone.

Unfortunately, overfishing by foreign fleets of these "straddling stocks" has, in recent years, reached such proportions that the long-term viability of the Canadian fishing industry is endangered. Equally, the viability of those states that are licensed to fish within the Canadian zones will, inevitably, be affected. Regrettably, NAFO seems to be unable to regulate these activities. NAFO participant states such as Spain and Portugal, and non-NAFO states, such as South Korea, Mexico, and the U.S., are overfishing important cod and

flatfish stocks by over 110,000 tonnes per annum.[1] In 1985 the value of these transboundary stocks caught is estimated to be over $150 million and thus provides a strong incentive for these activities.[2]

Fish stocks that are of specific importance to Canada, such as the northern cod off the coast of Newfoundland-Labrador and the cod and flatfish stocks which migrate across the 200-mile boundaries, are particularly seriously affected by the foreign fleets, which prey on such stocks just outside the 200-mile zone. These stocks are not rebuilding at the rate originally estimated, and there is evidence that some stocks are actually in decline.

The decline of northern cod stocks has already begun to cause hardship to the fishing industry of Newfoundland. This is despite the optimistic forecast, in 1982, that these stocks would increase by 170,000 tonnes to 380,000 tonnes by 1987.[3] In fact, the total allowable catch for 1987 was only about 256,000 tonnes.[4]

It has been estimated that fleets from Portugal, Mexico, Spain, and even Panama landed about 50,000 tons of northern cod from outside the Canadian 200-mile zone in 1985 and were expected to increase this to about 70,000 tonnes in excess of any authorized quotas by 1987.[5] As a result, it is quite easy to conclude that unless this type of overfishing is significantly reduced, the stock will steadily decline. Flatfish stocks are equally endangered as overfishing of this species now amounts to over 35 percent above NAFO quotas.

Despite this evidence, the EEC introduced a directive in 1986 allowing its fleet to further overfish.[6] In 1988 the EEC again set the 1989 Atlantic fishing quotas at twelve times the allocation directed by

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[1]Fisheries Council of Canada, *Foreign Overfishing: A Strategy for Canada*. Ottawa: FCC, 1987, p. 1.

[2]Ibid.

[3]*Report of the Task Force on Atlantic Fisheries*. Ottawa: DSS, 1982, p. 241.

[4]See Note 2 above, p. 2.

[5]Ibid.

[6]Id.

NAFO.[7] Furthermore, the increase of "flag of convenience" fishing vessels from Mexico and Panama, which are not under the control of any responsible state, appear to point to a crisis in one of the world's most important fishery areas.

Canadian fishery policy appears to have to decide amongst a number of different, equally difficult options. Firstly, the current status quo position is to reach international agreement on acceptable quotas to restrain unauthorized fishing and overfishing. This requires that NAFO allocate specific quotas for stocks which are thus kept viable. In addition, it would allocate surplus stocks in Canadian fishing zones to those states which respected the conservation rules set up by NAFO. To some extent, this is clearly the best way and that suggested by the UN Convention on the Law of the Sea.

Unfortunately, the decline of worldwide groundfish resources has resulted in increasing fishing efforts being concentrated in the northwest Atlantic area. Furthermore, the increased cash value of the resource has made attractive a certain amount of risk in overfishing despite increased surveillance. In addition, the fact that many of these stocks straddle the 200-mile zone has resulted in considerable concentration in the areas just outside Canadian jurisdiction. As already indicated, NAFO appears to be incapable of dealing with this problem.

Secondly, Canada could recognize the problem as a serious one that would require solution at the highest international level. It could be pointed out to the EEC, Portugal, South Korea, Mexico, and other states that the overfishing problem is a major irritant in bilateral relations with Canada. If this carries weight, it might be possible to agree to NAFO quotas and not to overfish. As an incentive, surplus allocations could be provided on a selective basis to the most cooperative states.

Thirdly, another option could be for Canada to grant further surplus stocks in the Canadian fishing zone in exchange for agreements not to overfish outside such zones. There are, however, two problems with this option. Firstly, it is not certain that Canada has sufficient surplus stocks to give away. Secondly, this approach would clearly affect the cooperation Canada now receives from the states which have been fishing, under license, in Canadian waters. These states, which include the Soviet Union, Japan, and others, which have

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[7]See Canadian Press Report, "Europe sets Fish Quotas at 12 times Allocation." *Globe and Mail*, 13 December 1988, p.1.

meticulously kept to their license requirements, could clearly demand additional quotas under such an arrangement.

Fourth, Canada could re-think its policies regarding its fisheries obligations. It could recognize that fish stocks outside 200-mile fisheries zones are outside Canadian jurisdiction and that NAFO is, at best, an ineffective organization. As a result, Canada could greatly reduce its NAFO participation and reduce the allocation of Canadian surplus fish stocks to the barest minimum. Surplus stocks would only be allocated on separate bilateral negotiations, based on a variety of specific criteria of greater benefit to Canada. Such an option would divert Canada from its present path of conflict with the EEC and other states but might lead to trading difficulties with free market states such as the U.S. and Japan, which might perceive this policy as a restrictive trade practice.

Finally, Canada could consider the extension of its fisheries jurisdiction to areas outside the Canadian 200-mile, which are considered to be critical to the survival of Canadian fish stocks. This is, obviously, a step which can only be taken after very considerable international efforts have had negative results. It would also require substantial preparation, as it would be seen initially as a technical breach of the law of the sea. On the other hand, it remains to be seen if the new Law of the Sea Convention provides no protection whatsoever against the depletion of a community resource by what can only be termed as rapacious, shortsighted operations by otherwise responsible states. It has also to be remembered that the U.S. and Soviet Union are facing a somewhat analogous problem in the so-called "Doughnut Hole" of the North Pacific vis-a-vis Japan. In fact, the U.S. and Soviet Union have already concluded a treaty which regulates their own fisheries relations in areas beyond 200 miles.[8] This action provides an important precedent for fisheries protection beyond 200 miles elsewhere.

The long-term viability of one of the most important fisheries in the world is clearly jeopardized by the indiscriminate actions of a number of states, which see the freedom of the high seas as a license to exterminate a common property resource. There is clear scientific evidence that fish, which know no borders, range freely across boundaries created by man. In the Canadian context, that is especially serious. Canada expends considerable resources to protect and

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[8]Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Mutual Fisheries Relations. 31 May 1988.

conserve fish stocks so that such stocks may benefit future generations. Furthermore, Canada allocates surplus stocks freely, through bilateral arrangements with a number of states, which depend on these allocations. These are NAFO member states which fully cooperate with NAFO and Canadian regulations. These states are also directly affected by the overfishing activities and the resultant decline of Canadian and straddling fish stocks.

Accordingly, the straddling stocks issue is an important problem for modern international law. This problem will, undoubtedly, test the very purpose of the new law of the sea even before it enters into effect. There is no doubt that the new law of the sea requires the conservation and protection of resources beyond 200 miles in the interest of the world community and its future. However, if international law is incapable of providing such protection, who can?

## DISCUSSION

*Thomas Clingan*: People came to me during the break indicating that they had questions or comments with respect to Professor Miles' paper. And I myself would like to ask him how his proposal would deal with the new entrants problem.

*Edward Miles*: Tom put his finger on a major problem. I thought I would let you digest what I said first before I came to this problem because my recommendation may upset some of you. But let me outline the problem as I see it.

In order to control new entrants, extensions of national jurisdiction are not particularly helpful unless you are the Soviet Union or the United States. For most countries of the world, this is a step that only brings with it more conflict. So what one wants to do, it seems to me, is to create incentives which propel new entrants to join multilateral arrangements to deal with straddling stocks. Frankly, one would be making new law here. We think about this in the following way. Since most coastal states of the world are signatories to the UN Convention, we begin with the obligation in Article 61 that parties to the Convention shall ensure that the maintenance of living resources is not endangered by over-exploitation. On the basis of scientific evidence that stocks are (a) indeed straddling stocks, and (b) in serious danger of over-exploitation, one therefore has a choice between an enforcement procedure that comes out of a multilateral solution or extensions of national jurisdiction. I don't see any other possibility.

I therefore think the application of the enforcement procedure to new entrants is an acceptable way to go in the circumstances. There's a tradeoff here, but quite clearly that alternative is a lesser evil than extending national jurisdiction. It works to provide an incentive for new entrants to be part of the arrangement, and this can be supplemented with other forms of diplomatic leverage.

One could also ask, as Tom did informally, why I restricted the role of the Tribunal to fact finding. I did so only because I thought it would make the proposal more salable. Obviously I have no objection to a stronger role for the Tribunal, were that acceptable to the parties. That's what I would like to say on the new entrants problem.

*Thomas Clingan*: Thank you very much, Professor Miles. Our copanelist this morning, Dr. Vylegzhanin, would like to ask a question.

*A. N. Vylegzhanin*: Professor Miles, in your report you used the term 'straddling stocks.' In the 1982 Convention, the term 'straddling stocks' is not used. But in international literature, in various documents such as those from FAO, this term is used widely. At the same time there's the term 'shared stocks.'

What do you think? Do these two terms reflect the same legal concept? If not, what is the difference?

*Edward Miles*: 'Shared stocks' is a term of art that relates to stocks that migrate between the jurisdictions of adjacent coastal states, but within 200 miles. The term 'straddling stocks' was coined by the Canadian delegation at the Conference, and it was meant to apply to stocks that migrate between one or more exclusive economic zones and the high seas area beyond. That's how the two terms came to be used within the Conference, and that is the usage I have stayed with.

*A. N. Vylegzhanin*: How do those definitions correlate with your statement to the effect that stocks in the central Bering Sea area are defined by the U.S. as straddling stocks? At the Sitka International Symposium, which you invoked, U.S. scientists emphasized that these stocks are found not only in the central Bering Sea area but also in the economic zones of both the U.S. and the Soviet Union. Could you explain this apparent contradiction?

*Edward Miles*: The question of pollock stock structure in the Bering Sea is a very complicated one. It appeared from the results of the early Japanese fishery that the fish caught within the so-called Doughnut Hole were quite old fish, four years or more, quite large, and their flesh had a yellowish tinge to it. Given their experience in other areas -- the Patagonian Shelf, Kamchatka, etc. -- the Japanese interpreted this to be a virgin population. And so the question of whether or not this stock in the Doughnut Hole was indeed a straddling stock would turn not only on migration but on recruitment into this stock from resources within both the U.S. zone and the Soviet zone. I do not know what data were presented at the meeting in Leningrad, but it was not clear from the meeting in Sitka that we were in fact dealing with straddling stocks in the strict sense that there was migration of stocks within the U.S. zone and to the central Bering Sea and back, and migration from the Soviet zone into the central Bering Sea and back.

What may have been more likely is a series of interactions between the various subpopulations without very extensive migration between exclusive economic zones, the international zone, and back again. The

Sitka evidence was not conclusive. I don't think the Japanese argument can stand that there is no interaction between the subpopulations. But I don't think the U.S. industry argument that these are straddling stocks can stand either, on the basis of the data I've seen. I would welcome any comments from the Soviet side on the basis of the Leningrad meeting if the data presented there indicate more clearly what is happening than the data presented at Sitka.

*A. N. Vylegzhanin:* My last question: Could you explain your understanding as regards Article 123 of the Convention? To avoid any misunderstanding, I will read it in English:

> States bordering an enclosed or semi-enclosed sea ... shall endeavor ... to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; ... and to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article.

My question is about this 'as appropriate.' Do you think that this might be interpreted as to invite or not invite, as appropriate, other interested states, or to invite other interested states or international organizations, as appropriate?

***Edward Miles:*** First, in the Conference negotiations, Article 123 was never intended to be applied to the Bering Sea. I would see no basis for the extension of Article 123 to the Bering Sea now as an enclosed or semi-enclosed sea. Second, some elements of the U.S. industry read into Article 123 not simply an injunction to coordinate management measures but an extension of management authority beyond the exclusive economic zone by the coastal state. This I find dangerous, because Article 123 as written does not provide to the coastal state any authority beyond that which is included in Articles 61 and 62. Those two points constitute my problems with Article 123.

I think one could deal with the Doughnut Hole problem without trying to extend to the Bering Sea provisions in the treaty which were not intended for such extension. In doing so, reliance on Article 123 buys neither the Soviet Union nor the United States any more protection than does reliance on Articles 61 and 62. So why pursue it?

***Thomas Clingan:*** Thank you, Dr. Miles. Professor Choon-ho Park wishes to make a comment.

*Choon-ho Park*: Thank you, Mr. Chairman. Before I make my comment on Professor Miles' presentation, I have something else to say. You can imagine what it took to bring a small South Korean to Moscow here. Professor Miles talked about the straddling species. I felt myself like a straddling fish because I had to go through four different jurisdictions or sovereignties to reach Moscow. I got my visa from the Russian Embassy in Peking and then went to Tokyo to board Japan Airlines with a South Korean passport.

Hasjim Djalal of Indonesia said that he and I are two participants from developing countries, but he hastened to add that South Korea is not a developing country any more. I know we are a developing country, because we are developing. As we say in South Korea, we are like a bicycle: unless we develop, we fall.

Professor Miles presented an excellent paper on a very current, very specific, very sensitive issue. My comment is not going to be on the substance of his paper but on why, you might wonder, people in north Asia -- Japan, Korea, and China, including Taiwan -- like pollock so much. This has to do with the dietary habit of the people in that small corner of northeast Asia, a population of slightly over 200 million. These people are really fond of pollock, particularly in winter. They don't bother about the price of salmon going up three times or four times, but if the price of pollock goes up, it's quite an issue there. If a thousand million Chinese are fond of pollock, its price becomes a global issue. Incidentally, someone said that if a thousand million Chinese on the mainland began to eat with spoons instead of chopsticks, the world would have a food problem, and this applies to pollock eating, too. The mainland Chinese haven't really expended much effort to catch pollock yet.

So, since pollock is a delicacy in these countries in winter, the fishing rights dispute in the North Pacific is not only a legal issue but also a political and even an emotional one. Without this knowledge, it will be difficult to see why Japanese, South Korean, and Taiwanese fishermen are dying to catch pollock in the North Pacific areas, in spite of the very sensitive political problems coming up with the coastal states.

In the 1930s, Japan and the United States had a very serious dispute over Japanese attempts to fish salmon in Bristol Bay. Japan gave in, and then the Pacific War came. Until the war ended in 1945, while human beings were fighting, the fish in the north Pacific enjoyed a period of peace. In fact, one of the two Truman proclamations of 1945 had a lot to do with the probable return of Japanese fishermen to the North Pacific.

Now of the pollock fishing in the Doughnut Hole, something similar to what happened between Japan and the U.S. in the 1930s is developing. But I support very strongly the formula suggested by Professor Miles, for something really has to be done to settle the issue here. If you have over 20 million people who are pollock-hungry, it is difficult to settle the issue solely from the standpoint of the law of the sea because it's a political and even an emotional issue, too. One cynical way to settle or avoid the issue is for the coastal state to wish Northeast Asians to become vegetarians. Just as Chairman Mao said, "If you cannot kill the tiger, just wish him to become a vegetarian."

*Thomas Clingan:* Thank you, Professor Park. I believe Professor Anderson also had a comment.

*Lee Anderson:* Ed, one significant gain from UNCLOS was the acceptance of 200-mile economic zones as customary international law. It is a gain because there is a stronger potential for management than with open access or with multinational fishing. If you follow that point with blinders on, you could come up with the argument advocated by the industry that if 200 miles doesn't work, why not extend the miles until you do include all of the stocks? What are we missing when we use these blinders and what is the rock that the siren song is going to hang us up on?

*Edward Miles:* I've had this discussion with fisheries people in the Pacific Northwest, and it always turns out to be acrimonious because their argument is that we, the State Department, the Defense Department, all opposed 200 mile zones prior to 1976, but once we did enact the Magnuson Act, the world didn't fall in. So why not extend to the middle of the Bering Sea and ask the Soviets to do the same so we shut out all the foreigners? Again, the world wouldn't fall in.

The problem is that fisheries interests or any specific sectoral interest does not adequately weigh the larger interests of the state in the making of policy. There are tradeoffs involved for the United States and the Soviet Union which are of a strategic nature. There are tradeoffs involved for nonmilitary navigation, there are tradeoffs involved for the conduct of marine scientific research. One needs some coordinated mechanism within each state that seeks to arrive at some notion of what is national net benefit relative to the uses of the ocean. From this point of view, it is not in the interest of the United States, the Soviet Union, most coastal states, and particularly the landlocked and geographically disadvantaged states to do things which

will hasten the approach of what we used to call, in the old days, 'the national lakes solution,' the carving up of the world ocean into separate national entities without any high seas areas in between.

If you will, this is the ultimate result of Craven's creeping jurisdiction dynamic. There must be some authority within the state that weighs this balance and makes an appropriate decision. Why should this be the issue that determines the outcome in the United States? Fisheries don't even show up in national income statistics. It's extremely difficult to understand why ipso facto one ought to give this weight to fisheries and a weight of zero to the strategic and other navigational and marine scientific research interests of the U.S.

If we look at the Soviet Union, quite clearly fisheries are far more important. But even so, does that mean that the strategic and navigational interests of the Soviet Union ought to count for zero? If you extend jurisdiction, that is what, in effect, you are saying.

This idea of balance is never acceptable to the fisheries industry in the United States, and I would assume that in the Soviet Union you would have equal difficulty. But somewhere there must be authority to decide and to implement that decision on the basis of what makes sense for the state as a whole. I think any other decision would be an abdication of responsibility.

*Thomas Clingan*: Professor Soons from the Netherlands had a comment.

*Alfred Soons*: I have a question for Ed Miles concerning the scheme that he proposed, which I think is very attractive. My question concerns the part of the scheme that includes the possibility for the coastal state to implement management measures. If no agreement is reached among the states involved within, say, four months, a question may arise as to which is the coastal state in a particular situation. For instance, if the states involved in the Doughnut Hole fisheries do not reach agreement, which of them would be entitled to implement these management measures, and in which part of the area? The same question could come up in other areas as well. In fact, you may run the risk of transforming one problem into another; you could have delimitation problems beyond 200 miles for this particular purpose, and that is just what this scheme was intended to prevent.

*Edward Miles*: In the case of the Doughnut Hole, I think one could deal with that problem in the design of the multilateral arrangement to require joint coastal state agreement prior to action. What worries

me, and where I don't have a satisfactory solution, is what would occur, say, in the southeast Pacific, if there were such an arrangement covering the area beyond the exclusive economic zones of Chile, Ecuador, and Peru. How far would coastal state authority extend and on what basis would one make such a distinction? The most rational basis for a solution might be the range of migration of the stocks in question, but that could encompass a fair proportion of real estate. At the moment, I don't have a solution in that event, but I see the problem.

*Thomas Clingan:* Thank you, Professor Miles. If you have no objection, I would like to delay further comments so that we can have our second presentation. I call on Dr. Vylegzhanin, who is going to present a paper prepared by him and Dr. Zilanov, both from the Ministry of Fisheries of the Soviet Union.

# MANAGEMENT OF MARINE LIVING RESOURCES: SOME INTERNATIONAL LEGAL QUESTIONS

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The contemporary contractual practice of states in the conservation and the utilization of the living resources of the world ocean, the documents of international organizations on marine living resources, and the materials of the Food and Agricultural Organization (FAO), testify to the active search at an international level for the adequate settlement of a problem common to all mankind -- provision of the present and future generations with sea products for food, medical, technical, and other purposes. A major event in such international efforts was the FAO World Conference on Fisheries Management and Development (Rome, 1984). Resolution I of the Conference states that "at present, under new requirements, national and international objectives, policies and strategies for fisheries management and development are being re-examined and adjusted." The Conference approved the text of the "Strategy for Fisheries Management and Development" which formulated, in particular, the "Principles and Practices for the Rational Management and Optimum Use of Fish Resources."[1] Reviewing the situation in world fisheries after the Conference, the FAO Committee on Fisheries at its 17th session agreed that "three basic possibilities existed to increase fish supply and, first and foremost, -- the fisheries management."[2]

The 1982 UN Convention on the Law of the Sea stipulates the interrelated rights and duties of states on the conservation and management of marine living resources. A new essential element of this Convention, as compared with the Geneva maritime conventions of 1958, are provisions concerning the management of marine living resources. They can be subdivided into two groups:

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[1] *Report of the FAO World Conference on Fisheries Management and Development*. Rome, 27 June - 6 July 1984, p. 22-40.

[2] FAO, *Report of the 17th session of the Committee on Fisheries*, No. 387, Rome, 1987, p. 3.

1. conventional provisions on the management of living resources in sea areas with different legal regimes: economic zone (Part V of the Convention), areas of the high seas beyond the limits of the economic zone (Part VII), enclosed or semi-enclosed sea (Part IX), and
2. provisions on the management of specific types of marine organisms (anadromous stocks: Art. 66; catadromous species: Art. 67; marine mammals: Art. 65).

Legal rules on marine living resources managed at an international level are typical of the contemporary contractual practice of states in fisheries, both bilateral and multilateral.

For example, under the 1978 Convention on Future Multilateral Cooperation in the North-West Atlantic Fisheries, an international organization was established whose objective is the promotion of "optimum utilization, rational management and conservation of the fishery resources of the Convention Area" (Art. II). The Convention Area consists of two parts:

1. areas in which coastal states exercise their fisheries jurisdiction, and
2. a "Regulatory Area" situated beyond the limits of the above-mentioned areas (Art. I).

The Fisheries Commission is responsible for the "management and conservation of fishery resources of the Regulatory Area." The Commission may refer to the Scientific Council any question pertaining to the "scientific basis for the management and conservation of fishery resources within the Regulatory Area." The questions of management and conservation of fishery resources in the other part of the Convention Area, which is under the fisheries jurisdiction of coastal states, are raised before the Scientific Council by coastal states. Taking account of the conclusions of the Scientific Council, a coastal state independently takes measures concerning the management and conservation of stocks in the part of the Convention Area under its jurisdiction in the field of fisheries. At the same time this state must inform the Fisheries Commission of such measures, and the Commission seeks "to ensure coordination" between the proposals concerning stocks of fish in the Convention Area and measures and decisions taken by the coastal state for the purpose of managing and conserving the biological stocks in the part of the Convention Area under its fisheries jurisdiction. The corresponding coastal state and the Fishery Commission ensure "coordination of such proposals, measure and

decisions" (Art. XI).[3] In this way the legal basis is ensured for the management of the bioresources of the North-West Atlantic, including those whose stocks' natural habitats are located in areas under the jurisdiction of states and beyond the limits of such areas.

The Agreement between the Governments of the U.S. and Japan on fisheries on the coasts of the U.S. signed on 10 September 1982 may be cited as an example of a bipartite treaty which discloses the legal mechanism for the management of marine living resources.

Enumerating the objectives of the Agreement, the Preamble especially points out the provision on "promotion of rational management." Art. IV reads, in particular, that the Government of the United States of America determines annually in compliance with the U.S. laws measures to be taken to prevent accidental catch by means of achieving on a long-term basis the optimum catch of each species of fish resources. Such measures are described in Addendum I, which is an integral part of the present Agreement. The Addendum is entitled "Measures for Management and Conservation." It provides that the measures determined by the U.S. government in line with the above-mentioned Art. IV may include:

1. designated areas where and periods when the fishery is allowed, limited, or effected by only certain types of fishing vessels, or by a certain type and number of fishing gear;
2. limitation of the fish catch depending on the area, species of fish, its size, quantity, weight, field, accidental catch, or other factors;
3. limitations on the number and type of fishing vessels which may engage in fisheries and/or on the number of days during which each of such fishing vessels may engage in the designated area in a certain type of fishing;
4. requirements concerning types of gear which may or may not apply; and

[3] Collection of International Agreements of the USSR on the Issues of Fisheries and Fish Industry Studies. Moscow, 1981. p. 46-71 (in Russian).

5. requirements for the enforcement of such conditions and limitations, *inter alia*, on the maintenance of relevant determination devices and the registration of the vessel location.[4]

In the contractual practice of the USSR, legislation on the management of marine living resources came into wide use in the 1970s-1980s. As examples, there should be noted such acts as the Agreement between the Government of the USSR and the Government of Japan on the Cooperation in Fish Industry (1985), the Agreement between the Government of the USSR and the Government of the Kingdom of Norway on Mutual Relations in Fisheries (1977), the Agreement between the Government of the USSR and the Government of Canada on Mutual Relations in Fisheries (1984), the Agreement between the Government of the USSR and the Government of the Chinese People's Republic on Cooperation in the Field of Fish Industry (1988), and others.

Neither the 1982 Convention on the Law of the Sea nor the other above-mentioned treaties define the notion 'management.' If this notion is sufficiently studied by municipal law,[5] international law does not give a precise theoretical assessment of this notion. Let us cite some of the typical definitions of the "management of marine living resources" notion offered by scientific literature:

- complex of biological, economic, social and political issues;
- measures on the conservation of the living resources of the sea and on the distribution of benefits from such resources;
- monitoring of fisheries and its adjustment to the optimum use of natural resources;
- instrument for obtaining maximum economic benefits from fish resources;
- distribution of resources and limitation of fisheries;

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[4] Agreement between the Government of the United States of America and the Government of Japan Concerning Fisheries off the Coast of the United States of America, Signed on 10 September 1982. - T.I.S. - U.S.T. - 1-4068-1.4078B.

[5] See, for example: B.M. Lazarev et al, *Management Procedures*. Moscow: Nauka Publishers, 1988, pp. 6-8 (in Russian); *The Encyclopaedic Dictionary of Law*. Moscow: Soviet Encyclopaedia, 1984, pp. 386-387 (in Russian).

- instrument for reconciliation of adversary interests and prevention of fishery conflicts;
- the same as regulation of fisheries;
- pseudoscientific term meaning the extent of rationality in the organization of fisheries and the control thereof;
- healthy and wise organization of marine living resources.[6]

According to the 1969 Vienna Convention on the Law of International Treaties, a treaty should be interpreted honestly "in line with common meaning" which should be imparted to the terms of a treaty. The Russian word *upravlenije* ("management," according to Dahl, means "to govern showing direction; to be in command, to be at the head of, to be the master, manager"[7] which is quite applicable to marine resources in terms of semantics. The same is true for the corresponding equivalents, for example, 'management' in English, *gestion* in French used in the texts of the 1982 Convention on the Law of the Sea. Common meaning is imparted to "the terms of a treaty in their context, as well as in the light of the subject and object of the treaty" (Art. 31 of the 1969 Vienna Convention).

Let us examine some provisions of the 1982 Convention whose essence allows us to specify the meaning of the term 'management' contained therein. In line with Art. 61 ("Conservation of the living resources"),

> The coastal State, taking account of the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over exploitation.

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[6] For details see: A.N. Vilegzhanin, "Review of Legal Literature on the Management of Marine Living Resources," *Proceedings of International Symposium on Management of Walleye Pollock*. Anchorage, Alaska, 1988, pp. 91-94.

[7] V. Dahl *Dictionary*. V.IV. Moscow: Gosizdat, 1955. p. 504 (in Russian). There is another viewpoint: "The term 'management' originates from the Latin word "administration." K.A. Bekyashev, V.D. Sapronov. *Intergovernmental Fish Industry Organizations*. Moscow: Pyschevaja Promyshlennost, 1984, p. 135 (in Russian).

Here the notions 'conservation' and 'management' are not equipollent; one does not include the other; at the same time they are interconnected: measures on conservation and management are directed towards a common normatively determined purpose: "to maintain or restore the population of harvested species at levels which can produce the maximum sustainable yield."

The same purpose is formulated in Art. 119 ("Conservation of the living resources of the high seas"). The afore-mentioned interconnection of measures on the conservation of marine living resources and on the management thereof is also manifested in Art. 118 ("Cooperation of the States in the management and conservation of living resources"). According to Art. 62 ("Utilization of the living resources") the purpose of the optimum exploitation of such resources is achieved, in particular, through appropriate regulation of the procedure of harvesting. The context of the article permits specification: the notion 'utilization' includes the notion 'harvesting.' Art. 67 reads: "management including harvesting."

The entire context of Art. 62 permits specification of the correlation between the notions 'management of the living resources' and 'regulation of harvesting.' Paragraph 4 of this article reads that harvesting in the economic zone presupposes compliance with "the conservation measures and other terms and conditions established in the regulations of the coastal state." Such laws and regulations "may relate, *inter alia*, to regulating seasons and areas of fishing, sizes and amount of gear, its type, and the number, sizes and types of fishing vessels that may be used" (para. 4, Art. 62). Therefore, according to the essence of the Convention, regulation of harvesting is one but not the only component of measures on the conservation and management of the living resources.

Another correlation between the notions 'utilization of the marine living resources,' 'management' and 'regulation' is offered by the literature: K.A. Bekyashev and V.D. Sapronov write that the utilization of such resources "should consist of two aspects: management (national aspect) and regulation (international aspect)."[8] It seems, however, that the management of marine living resources has not only a "national aspect": suffice it to refer to the fact that international law establishes rules for the management of the living resources of the high seas (Section 2, Part VII of the 1982 Convention). Moreover, the second part of the assertion also causes doubts because regulation of

[8] K.A. Bekyashev, V.D. Sapronov. Op. cit, p. 140 (in Russian).

fisheries has not only an "international aspect." For example, regulation of fisheries in internal and territorial waters can hardly be referred to as the "international aspect."

Acquaintance with the history of the formation of the 'management of marine living resources' notion and its international approbation would help to reveal the contents of this notion.

The notion 'management of living resources' got crystallized under the influence of scientific ideas synthesizing the achievements of marine biology, the technology of fish industries, and mathematics. Such was the first mathematical model of dependence between the biological processes of fishery stocks (replenishment, growth, mortality) and the results of fish harvesting published in 1918 by Soviet scholar F.I. Baranov. In discussion with this school, the "biological" school of N.M. Knipovich was developing. This is how the foundations of the manageable bioresources concept were laid down, whose essence is the determination of the optimum volumes of catch and harvesting seasons on the basis of the dynamics of specific types of marine organism populations.[9]

One of the first examples of the international approbation of the manageable bioresources model is the experience of the international management of halibut stocks in the northeast Pacific.[10]

The contractual legal basis for such management was the 1923 Convention on the protection of halibut harvesting in the North Pacific and the Bering Sea concluded between the U.S. and Canada. The report on this question at the 1955 International Technical Conference on the Conservation of Biological Resources of the Sea[11]

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[9] P.A. Moisseev, *Biological Resources of the World Ocean*. Moscow, 1988. *Theory of the Formation of the Number and Rational Utilization of Harvested Fish Stocks*. Moscow: Nauka, 1985, pp. 166-174 (in Russian).

[10] E.A. Keen. *Ownership and Productivity of Marine Fishery Resources*. Blacksburg, Virginia, 1988, pp. 32-40.

[11] G.A. Danlon. *Management of Halibut Harvesting in the North-East Pacific and the Bering Sea/Proceedings of the Scientific Technical Conference on the Protection of Fishery Resources and Other Marine Animals*. The P.M. Book, 1957, p. 54. It should be noted that the name of the Conference cited by the book compilers does not coincide with the name given in the documents of the Conference in English: Report

noted that the experience appeared to be so specific and successful that it became a model for the management of coastal industries. The Conference convened on the basis of the UN General Assembly Resolution 900 (IX) adopted on 14 December 1954. The Resolution points out, in particular, "the fact that the problem of conservation from the international viewpoint of fishery resources is associated with issues of a technical nature, which require consideration on a broad basis by competent experts."[12]

The Final Report of the Conference contains provisions lying beyond the framework of a traditional measure in fishery regulation: on increasing or, at least, maintaining at a certain level the average stable productivity of industrial stocks; on the need to collect scientific data concerning bioresources ("it is necessary that each country engaged in marine fisheries collects relevant statistical data on the intensity and catch; each such country should also conduct biological and other research on the basis of which it is possible to ensure the protection of the exploited resource"); on the list of such scientific data; on artificial fish farming; on international problems of protecting industrial stocks including the comparison of conventional areas limits and natural habitats of biological species.[13]

The Conference Report had impact on the work on the codification of the law of the sea carried on by the International Law Commission (ILC). In the light of this report ILC reconsidered at its VII session (1955) the draft articles on fisheries formulated at the III session (1951) and somewhat amended at the V session (1953). The ILC commentaries to the Draft are reminiscent of the conclusion of the International Technical Conference concerning the purpose of the conservation of the marine living resources: "to obtain the optimum stable catch in order to ensure the maximum of food products or other

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of the International Technical Conference on the Conservation of the Living Resources of the Sea. Rome, 1955.

[12] *Proceedings of the International Scientific and Technical Conference on the Protection of Fishery Stocks and Other Marine Animals*. Book II. Moscow, 1957, pp. 124-140 (in Russian).

[13] *Resolutions adoptees sur les rapports de la Sixieme Commission*, 900 (IX), le 14 decembre 1954.

sea products." In this document ILC uses for the first time the phrase "management of fishery resources."[14]

The idea of manageable bioresources of the sea was further developed at the First UN Conference on the Law of the Sea. The phrase "protection of the living resources of the sea" contained in the Convention on Fisheries and Protection of the Living Resources of the Sea adopted by the Conference means "the entirety of measures necessary for obtaining the maximum supply of food products and other sea products" (Art. 2). This Convention, however, (as well as the other three Geneva maritime conventions of 1958), does not use the term 'management' as applied to marine living resources. Nevertheless, the contractual orientation of marine fisheries not toward the maximum yield but toward the 'optimum stable catch' helped to establish the international legal basis for the management of marine living resources.

The impact of management on such resources, even in its simplified version (only through change in the commercial pressure, without taking into account the ecological, economic factors), is sufficiently complicated. This was noted, in particular, at the International Symposium on the Management of Fishery Resources (U.S., 1984):

> If heavy fishing on one species reduces its abundance, then the species that eat it, or is eaten by it, or compete with it for living space or for food, can be affected in one way or another. Sometimes the direction of the effect also seems clear: since cod eats a lot of herring, fewer cod would be expected to reduce the natural mortality of herring, and fewer herring to reduce the growth rate of cod...There can be a triangle of species. Cod eats whiting and herring while whiting eat herring. Fewer cod could mean more whiting, therefore more herring may be eaten altogether.[15]

The principles and major trends in the rational management and optimal exploitation or marine living resources were generalized at the FAO World Conference on Fisheries Management and Development (1984). The Conference addressed the states and the international organizations concerned with a request to take into account such

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[14] *Yearbook of International Law Commission*, 1956, Vol.II, p. 289.

[15] *Fisheries Management: Issues and Options.* University of Alaska Sea Grant Report 85-2. Anchorage, Alaska, 1985, pp. 39-40.

principles and main trends "while planning fisheries management and development," including the following:

- management should be conceived and understood "as an essential tool for the sound, sustained development of fisheries;"
- the formulation of management decisions should be made on the basis of the most reliable data and research;
- "although fishery resources are renewable, they are subject to over-exploitation, depletion and the influence of the environmental factors. Their management should be based on knowledge of their magnitude, of their distribution, variations in annual recruitment levels, and the interrelation between species;"
- "the governments should play a dominating role" in the fisheries management;
- for the proper development and application of "the systems of management legal and administrative basis is needed;"
- "where stocks lie within the jurisdiction of two or more states, these states should cooperate in the harmonization of the management regimes so that national regulations do not conflict with each other."[16]

In the system of measures on the management of marine bioresources, decisive importance is given, as a rule, to the measures on fisheries regulation. Depending on such measures, there are two systems of the management of marine bioresources: (1) the system of total allowable catch and quoting, and (2) the system of the commercial fisheries effort. At the traditional sixth meeting of scholars, fishery industrialists, and managers organized by the International Council on the Exploration of the Sea, the Commission on Fisheries in the North-East Atlantic, and the Commission of the European Communities ("Dialogue") it was proposed, as an optimum scheme for fishery resources management, to make use of the combination of the above-mentioned systems, which would provide major measures for regulating, besides the total allowable catch, "the minimum mesh size of gear, the minimum size fish passed over to the shore, the limited

[16] *The Report on the FAO World Conference on Fisheries Management and Development*, pp.22-40.

sea areas in which special regulations and seasons closed for harvesting are applied."[17]

Literature offers another classification of the measures for management affecting stock conditions:

1. measure of control over the total volume of the first harvesting pressure on the resource (quotas for catch; limitations on the participation in the catch; seasons and areas closed for fishing; control over the instruments of fishing, etc.), and
2. measures of control over "the characteristics of the fish caught."[18]

Another author adds to the enumerated measures of managing bioresources "limitations to accidental catch," to "the size of vessels," "the capacity of the power installation of the vessel," "cargo capacity," presence of inspectors on fishery vessels."[19] It was noted in literature that "instruments of management" aimed at the distribution of resources "are opposed more often than those used for the conservation of resources."[20]

A FAO study generalized the provisions of national legislation in this field. It emphasized that such widely-spread measures of management as minimum size of mesh and gear are usually incorporated into the basic laws and regulations on fisheries. In the majority of cases "management measures are based not on the system of quotas, but on the limitation of vessel number for which catch is allowed, and also on their harvesting potential." In a number of cases the measures on the management of resources provide for the limitation of the harvesting area ("windows") and for the protection of the interests of the coastal fisheries. For example, in line with Brazilian legislation the sea areas up to 100 nautical miles off the country's coast are reserved

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[17] *Cooperative Research Report*, No. 158, Copenhagen, 1968, pp. 21-23.

[18] *Fisheries Management: Issues and Options*, p. 33.

[19] Ibid., p.149.

[20] *Fisheries Management: Issues and Options*, p. 149.

for national fishermen, according to legislation of Ecuador up to 40 miles, Salvador and Uruguay 12 miles, etc.[21]

Besides the measures on the regulation of the catch, the system of marine bioresources management takes account of ecological factors (for example, changes in climate, upwelling systems of the California coasts, El Nino off the shores of Peru, the condition of the marine environment, natural anomalies, etc.). Literature considers as ecological such a fact as an artificial rise in the marine reservoir bioproductivity through both well-known means such as agriculture and the untraditional one: "Urban drains of toxic substances, notes one of the researchers, properly distributed in the ocean water, increase fishery resources."[22] The duty to take into account the relevant ecological factors at the determination of the maximum stable catch is stipulated by the 1982 Convention on the Law of the Sea (para. 3, Art. 61 for the economic zone; para. I, Art. 119 for the areas of the high seas beyond the limits of the economic zone).

The provisions of the 1982 Convention on the management of specific kinds of marine living resources are incorporated in Part V ("Exclusive Economic Zone"). Nevertheless, these provisions provide the international legal basis for affecting the overall management of the enumerated species in the whole of their natural habitat, i.e., possibly, beyond the limits of the economic zone. For example, the responsibility for the management of catadromous species stocks is carried, in virtue of para. 1, Art. 67 of the Convention, by a coastal state in whose waters these stocks "spend the greater part of their life cycle." In cases where catadromous fish migrate through the exclusive economic zone of another state, the management of such fish "shall be regulated by agreement between the State mentioned in paragraph 1 and the other State concerned. Such agreement shall ensure the rational management of the species and take into account the responsibilities of the State mentioned in paragraph 1 for the maintenance of these species."

The 1982 Convention links the provisions on harvesting, its regulation, conservation, and management of the stocks of such valuable species as anadromous ones. It also provides for cooperation with the state of origin in cases "where anadromous stocks migrate into

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[21] *Coastal State Requirements for Foreign Fisheries*. FAO Legislative Study 21, Rev. 3, Rome, 1988, pp. 10-11.

[22] E.A. Keen, op. cit., p. 57.

or through the waters landwards of the outer limits of the exclusive economic zone of a State other than the State of origin." These provisions are developed in the international practice of the management of the North Atlantic salmon. The Preamble of the 1982 Convention on the Conservation of Salmon in the North Atlantic provides that the participants in the Convention may promote, in particular, the rational management of salmon stocks in the North Atlantic "through international cooperation." One of the purposes of the international organization established on the basis of this Convention is promotion of "the rational management" of the North Atlantic salmon, taking into account the best available scientific knowledge (Art. 3). The key provision of the Convention is the prohibition of harvesting of the North Atlantic salmon in its natural habitat beyond the limits of twelve miles from the baselines, excluding the two designated areas.

The term 'rational management' used in this Convention, as well as in other treaties, raises a question: to what extent does this term correspond to the notion of 'management of living resources' which is more often used by the 1982 Convention on the Law of the Sea? Literature suggests that the notion 'management of marine living resources' (which allegedly only means 'choice and trend,' 'regulated approach') be distinguished from the notion 'rational management.' The latter means choice made on the basis of the reliable comprehensive knowledge of such choice consequences, as well as of the expenses to be incurred for the sake of benefits to be obtained.[23]

A number of complicated legal questions are associated with the interpretation of the 1982 Convention provisions on the management of living resources of enclosed or semi-enclosed seas (Part IX). Of substantial significance is the understanding of rights and duties of states washed by such seas "to coordinate the management, conservation, exploration and exploitation of the living resources of the sea" (Art. 123). These rights and duties are applicable to all parts of an enclosed or semi-enclosed sea: to territorial seas, economic zones and to the areas of the high seas beyond the limits of such zones. This conclusion is inevitable in comparing the word "sea" in the above-cited article and its definition given by the preceding article:

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[23] L. Juda, "The Exclusive Economic Zone and Ocean Management," *Ocean Development and International Law*, v. 18, no. 3, 1987, pp. 309-311.

'enclosed or semi-enclosed sea' means a gulf, basin, or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States. (Art. 122)

In this respect a question arises on the participation of third states (not adjacent to an enclosed or semi-enclosed sea) in the management of the living resources of such sea. It is deemed that the 1982 Convention answers this question: such third states are invited to cooperate with coastal states in such management whenever it is expedient. In fact, in virtue of Art. 123, the states bordering enclosed or semi-enclosed seas, endeavor:

(a) to coordinate the management ... of the living resources of this sea ...
(d) to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article.

The role of states coastal to such seas in the management of its bioresources is more significant than that of third countries. First, the Convention directly provides for the relevant rights and duties; for third states the right to participate in management is predetermined by the invitation from coastal states. There is a proposal for another approach to the settlement of this question. William Burke, a professor at the University of Washington, assumes that for the part of an enclosed or semi-enclosed sea situated beyond the limits of the economic zones the provisions of Part VII ("High Seas") are applicable and not those of Part XI ("Enclosed or Semi-Enclosed Seas"). This is why the protection of fishery resources in the Bering Sea from their depletion as a result of large-scale fisheries in its central part, beyond the limits of the Soviet and U.S. economic zones, must be affected, unless a multilateral agreement can be achieved, through the "unilateral extension of the coastal state competence on the management of fishery resources."[24]

Let us draw some conclusions.

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[24] W.T. Burke. *Memorandum on Legal Issues in Establishing Fishery Management in the Donut Area in the Bering Sea.* Seattle, Washington, 1988, p. 6 ff.

The objective of the states activities on the management of marine living resources determined by contemporary international law consists in preventing critical conditions among such resources stocks, the restoration of depleted resources, and the ensurance of maximum stable catch. The content of management measures mainly amount to the rational impact on specific biological stocks stimulating increased rates of their reproduction. In this respect, optimum measures for catch regulation are used and scientific data on stocks, marine environment, changes in climate, natural anomalies, the complex assessment of the interdependence of such factors and of each of them are taken into account. The basis for the management of marine living resources agreed upon at the international level creates favorable legal conditions for settling in concrete cases the problems of non-coincidence of the limits between the economic zone and the natural habitats of biological species. International practice is under way in the overall management of the bioresources in sea areas with different legal regimes, in the process of which prospective systems of management come to light.

*Thomas Clingan:* Thank you very much, sir. I believe Dr. Mirovitskaya has a comment to make.

# HIGHLY MIGRATORY SPECIES: PROBLEMS OF REGULATION

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Conservation and rational utilization of highly migratory species (HMS) is a problem touching interests of both coastal and maritime (distant-water fishing) states. The relatively high rate of utilization of these economically valuable resources along with the over-capitalization of fishing lay the foundation for eventual and potential international conflicts.

Specific biological characteristics of HMS such as the large range of their migrations and their low density in relation to the vast areas of the fishery grounds, necessitate a particular regime of exploration and regulation. Data needed to implement a scheme of optimum utilization should be provided by complete investigations in the areas where these species occur at various stages of their life cycles. Methods of regulation, to be effective, should be unique throughout these areas, which cover regions with different legal regimes. To date, the totality of these conditions has not been considered in any of the fishery regimes.

The vast majority of coastal states believe that HMS of all types are subject to coastal state jurisdiction in the same fashion as other living resources of the EEZ. This approach is one of the factors hampering the activity of specialized fishery bodies (for example, the IATTC and the ICCAT). The relative ineffectiveness of regional bodies is determined at the same time by their limited membership (as in the South Pacific Forum Fisheries Agency, for example) and the limits on their powers (as in the IOFC and IPFC). Attempts at international management of HMS stocks were to be taken by a body created by the San Jose Declaration. This body was supposedly authorized to determine the allowable catch and the size of fees, to license tuna fisheries in the high seas as well as in the EEZs of States Members, and to redistribute financial resources between its members in accordance with the catch. This agreement did not enter into force. Nevertheless, it represents a serious attempt at international regulation taken on a limited regional basis and may contradict the interests of other states fishing on the high seas.

In my opinion, this practice, as well as the approach of many coastal states to management in terms of EEZs, destroys the reasonable

balance of rights and interests of coastal and fishing nations achieved by the corresponding provisions of the 1982 Law of the Sea Convention. Article 64.1 states that

> the coastal State and other States whose nationals fish in the region for the highly migratory species ... shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone.

If such an organization does not exist, these states

> shall co-operate to establish such an organization and participate in its work.

A comparative analysis of corresponding Convention provisions (Articles 64, 56, 117, 119) permits us to define the sum of rights and obligations of all states interested in the conservation and rational utilization of HMS as follows:

- A coastal state has full authority to dispose of HMS within the EEZ. The provisions of Article 64 apply in addition to the other provisions of the Part V "Exclusive Economic Zone" and Article 56 confers sovereign rights on the coastal state over all living resources of the EEZ.
- The coastal state is obliged to "cooperate" with other states fishing for HMS;
- The aim of cooperation is not only conservation but also optimum utilization of these species both within and beyond the EEZ;
- The coastal state (as the obligation to cooperate relates to species within the EEZ as well as beyond) cannot make any final decisions on management within its zone until it takes measures to cooperate with other states interested in these stocks. If they fail to agree on appropriate measures, it is for the coastal state to decide upon measures within its zone;
- A fishing state also shall do its best to agree with the coastal state on the appropriate conservation or optimum utilization. If they fail to agree, the fishing state may decide upon measures subject to the obligations of Articles 117 and 119, one of which is to contribute and to exchange on a regular basis "available scientific information ... and other data relevant to the conservation of fish stocks" through competent international organizations;

## DISCUSSION

*Thomas Clingan*: Are there any questions or further comments?

*Unidentified Soviet speaker*: In his report, Dr. Vylegzhanin combined an analysis of biological relations with the legal superstructure that should follow that analysis. Dr. Vylegzhanin very often used in his report the term 'management of living resources,' and maybe only twice did he say 'regulation of living resources.' What is meant by 'international legal regulation'? Is that a synonym for 'international legal management' or administration? Or are these two different concepts? Since certain information is being fed to computers, we have to be very careful about our terminology; we must understand clearly what each term means. I understand the possible differentiation between these two terms, but I would be interested to know the standpoint of Dr. Vylegzhanin and Professor Miles in this regard.

*A. N. Vylegzhanin*: I will try to explain how I see the difference between these two terms. If we speak about international law at the macro level, that is to say, about interstate relations in the use of marine living resources, we use the term 'regulation.' We are saying that international law of the sea regulates interstate relations. But if we speak precisely about marine living resources, we have a more complex problem. 'Regulation' proceeds from Article 62 of the 1982 Convention. We mean regulation of harvesting, which is carried out by legal or physical persons, and it is included in the meaning of management or administration of the marine living resources. But 'management' also includes the duty to gather biostatistical information, the duty to take into account climatic anamolies, etc.

There are differing opinions in this regard. Bekyashev in his work spoke against the use of term 'management.' Khabirov, in one of his three volumes of the course of international law of the sea, saw as equal the notions of regulation and management. I think this is a disputable issue, yet comparing Articles 61 and 62 and comparing Parts V, VII, and IX, we can conclude that the term 'management' as a sum of obligations and rights of states, acting under qualitatively new conditions, reflects the new level of knowledge of law. Hence, we believe that the notion of management is broader than the notion of regulating harvesting activities.

*Thomas Clingan*: Professor Miles, do you wish to make any comments?

*Edward Miles*: There's no difference between my view and the view expressed by Dr. Vylegzhanin. I would agree that 'management' is a broader, more all-encompassing term. It includes conservation and the system for arriving at conservation measures, which are based on scientific research with respect to particular stocks. It includes allocation -- the way you divide up the stocks, how you set quotas -- the enforcement system, including surveillance. Regulation is simply one way of doing this, and it is therefore subsumed under the broader term. I think there's no difference between us on that point.

*Thomas Clingan*: I think Professor Oxman wishes to comment.

*Bernard Oxman*: Professor Miles, in realizing the objectives of the scheme you've set up, the end result must be that all of those fishing in the area adjacent to the exclusive economic zones have to be restrained in a parallel and equitable fashion. Addressing the problem of the so-called Doughnut Hole in the Bering Sea, there is a potential difficulty in getting all the relevant parties into the same room at the same time. One can imagine possible solutions to this problem. Apart from the two coastal states, the meeting could be composed of industry delegations with government advisors. One can also imagine a system of parallel bilateral intergovernmental agreements. I'm wondering how far your thinking has gone on this question.

*Edward Miles*: Not very far, I'm afraid. I have just been discussing this with Dr. Mirovitskaya. We noted the severe contradictions to which you so delicately alluded, and we did not have any solutions to offer. I find the potential solutions that you offer very instructive indeed. One would want to pursue these in some detail, because it is a serious problem.

*Thomas Clingan*: Professor Gold.

*Edgar Gold*: I have two questions for Professor Miles. In the arbitral tribunal that is going to settle the disputes under your system, would it not be possible, or even very likely, that there may already be disputes at the very beginning, related to your management standards, about the best available scientific information? That is one of the problems we have at the moment with the EEC. They do not always accept scientific information, including that from the FAO. They say that that it is too conservative, and that their own scientific information is better. Do you foresee that that tribunal will have to deal with

that basic issue, or would you have to go to another tribunal to establish the management standards upon which the whole premise is built?

***Edward Miles***: My expectation is that from time to time there would indeed be disputes over what constitutes the best scientific information and that the tribunal would have to deal with this. It would have to rely upon panels of experts, presumably nominated by States Parties with some additional participation as well.

When one looks at these kinds of conflicts, one finds that they aren't so often about the scientific information but about the management interpretation that is put upon that information, whether or not a particular stock can bear the level of effort argued by one party versus another party. It would be in the interest of all concerned to narrow the basis of the conflict to the extent possible. I don't see how the tribunal escapes the responsibility of doing so.

***Edgar Gold***: Thank you. The second question really relates to the answer you gave to Lee Anderson when he said to you, "If the state really thinks that it's important enough, that the jurisdiction ought to creep, then creep." And you referred to national net benefit. But what about countries such as Peru or Canada, where a major part of the national economy is dependent on fisheries? Then the national benefit of looking at other areas, in which you can keep the law of the sea debate open, is almost precluded when you have a very strong fishing lobby that purports to represent the highest or the second highest per capita economic income for the country. Then that national net benefit, as far as other ocean interests are concerned, will shrink very quickly.

***Edward Miles***: In the case of Canada, it is the weighting you give to the regional interest, one particular region versus the totality of Canadian interests in the ocean. In the case of Peru, or even Ecuador, which would be even more extreme, you have a much more pervasive attitude that the interests of fisheries constitute the interests of the nation. But one also has to weigh the complication for one's foreign relations that would ensue from extending jurisdiction. If one lacks significant enforcement capabilities, extension of national jurisdiction does not buy protection for stocks, it buys only international conflict. So it is no solution to say that, because we give the weighting to fisheries, we extend jurisdiction. I just don't see it.

*Thomas Clingan:* Are there any further questions for our panelists? Dr. Moisseev.

*P.A. Moisseev:* I have been studying biological resources for many years, and I took part in the Food and Agricultural Organization conference of 1985 that has already been mentioned here. I am happy to see that our workshop pays so much attention to the legal aspects of world fishing, the conduct of man on the seas and the oceans in terms of the use and management of biological resources.

We must be quite clear on the following point. At the present moment when the world catch amounts to 92 million tons, almost 90 percent is gotten on the basis of the provisions of the 1982 Convention. About 11 or 12 million tons are acquired in internal waters, not relying on the 1982 Convention. The rest is obtained in the ocean where all the provisions of the Convention apply. About 20 million tons are caught by expedition fleets from other states; in other words, the Convention applies here, too. About 30-35 million tons are caught in the coastal waters by fishing states; again all the provisions of the Convention apply. So a vast amount of the world catch amounting to 80 million tons is taken on the basis of the provisions of the Convention.

I would like to emphasize that at the present moment the effort of biologists or people involved in the fishing industry is perhaps less important in terms of increasing the world catch than the activity of international lawyers because much of what they do applies to increasing our activities in this field.

I am not quite in agreement with what was decided by FAO recently as regards the development of world fishing, which was couched in rather pessimistic terms to the effect that the resources of the seas and the oceans are rather strained, and there is little possibility for increasing catch. Energetic efforts should be made towards putting fishing under strict international control. Without diminishing the importance of all these considerations as regards traditional species, I believe that the world catch, and I emphasize traditional species, could reach 25 million tons. But, besides this, there are vast resources, other species that today are not practically used, and such species call for greater attention through the use of more sophisticated technology. This would make it possible to use marine resources for producing foodstuffs for domestic animals. Use of such resources makes it possible to double and perhaps even triple the general amount of catch. This is a new direction, and it calls for redoubled effort. Intensified research calls for new legal norms. I'm sure that activity in

this direction will develop in the future and increase the amount of resources we get from the ocean.

I listened with great interest to contributions made here dealing with the legal aspects of world fishing, and I realize that specialists, researchers, fishermen, are now faced with many new problems. This is mostly due to the fact that now that the 1982 Law of the Sea Convention is being implemented, our knowledge as regards biological resources of the sea is constantly increasing. It is quite natural; lawyers were not as knowledgeable about biological issues as they are today, and biologists were not quite at home with the legal aspects of the problem. Now the limits established by the Convention have provided for the management of fish with short migration periods in limited areas. This mostly applies to flatfish, cod, some other species which indeed fall neatly into the Bamboo or Iron Curtains that have been established.

A number of species that account for about 30-35 percent of the total world catch, such as mentai, salmon, Chilean jack mackeral, and Spanish sardine, poutassou, and other species are ignorant of the established 200 mile zones and travel wherever they want to. As a result, there are holes in the Bering Sea, in the Atlantic, in the South Pacific, and many other regions where such species travel, and they account for 35 million out of the 80 million tons that are caught today. Again this applies to species that ignore the established zones. This gives rise to a number of important issues, which have been mentioned in the previous contributions. They call for improvement of our methods and of our thinking in general. I believe that the most important thing to do in this respect is to establish vast scientific research associations or corporations that could give thought to these issues.

In the northern Pacific there is no such international forum to deal with such problems. Therefore, we could take a much broader approach than we do today. What was said dealing with the management of biological process in the world ocean is quite pertinent and important. Through fishing, which is considered as a negative factor mostly, and through the other factors I have mentioned, we are now in a position to manage bioproduction processes in the ocean.

Specifically, Professor Miles mentioned that in the central Bering Sea, the catch of mentai is of greater age. The more we catch, however, the greater is the stock. It turns out that this fish eats its own young; the more we destroy older ones who eat young, the more stocks we have as a result. This is one of the ways of managing bioproduction processes.

I would like to mention another direction of research and use of the seas: marine culture that is controlled and directed, planting of seaweed and fish. Now this produces up to five million tons but, in my view, the production can be raised to over 100 million tons, more than the present world fish catch. This is an important factor that should be considered in close relationship with the ecological systems, because if you increase the population of these species, they will inevitably affect the existing ecology, and therefore, we should also do some investigation into these matters before we set about applying marine culture on a wide scale. The seas and oceans have vast bioproductive possibilities. They are capable of producing much more, especially of non-traditional species. This calls for joint research effort, and it is necessary also to create new legal provisions to provide for these developments.

*Thomas Clingan:* It is certainly one of my purposes to be as politically balanced as I can be, and I note that we have had a number of speakers from the left of the room, so I think it's appropriate to invite a comment from the right. Please.

*Valery M. Khlystov:* I have several remarks regarding the last statement. No doubt the world ocean is a huge resource, yet the twenty species covered and regulated by the Convention and actively used for the last 150 years are, I believe, being pushed to the limit. They are on the verge of extinction. Correspondingly, the activities of international organizations are also at an impasse on the issue of economic and fisheries zones. The crisis of these organizations is not yet over; a way out can hardly be seen. In this regard, I would like to share some thoughts as to how international cooperation and international organizations could develop.

First of all, the process of forming new institutional mechanisms is either closed or semi-closed in nature. Only the organizations of the central Atlantic, some organizations of the northern Pacific, and IMO have an open nature. Other organizations in the FAO family and other narrowly regional organizations such as the South Pacific Forum are closed, contravening Articles 117, 118, and 119 in the Convention, which call on states to participate on an equal basis in exploiting living marine resources.

I would also like to note that, unfortunately, the activities of one of the more effective organizations, the Seals Commission, is suspended. Our distinguished colleagues know that Congress did not adopt the 1984 protocol, and a rather intensive and extensive harvesting of seals

has started, which does not contribute to stabilizing this resource.

Although international organizations are experiencing a crisis, functions and authorities that are not provided for by their charters are being increased. A vivid example is the fact that these international fisheries organizations started with ecologic issues, with preservation of the marine environment or the influence of pollution on the marine environment, but they are not very effective nor are attempts to coordinate them effective either.

Today, a dialogue was mentioned that can lead to a desirable institutional mechanism for insuring coordinated management of biologic resources of the world's oceans. Here I mean not the management mentioned here by Alexander Nikolavich [Vylegzhanin] and Piotr Alexeevich [Moisseev], the management of biological resources, but the management of activities of states in the world oceans. This kind of management would work through international legal mechanisms that would insure adoption of such regulations for the biology of every species of resource and for the biological situation of that resource in any given region. The most characteristic feature of such activity should consist in control over this activity, which which would include sanctions for violations of the Convention and of the recommendations and regulations worked out by this mechanism. In other words, excessively harvesting states would be limited to quotas and certain other measures would be initiated regarding activities of the state in this or that organization.

The only thing that can save international fisheries is coordination between international organizations and states. This idea has already been expressed in international legal documents by such scientists as Bekyashev.

The idea of a state mechanism is supported broadly neither in this country nor in the international community. But many international fisheries organizations, since they deal with economic activities, already have certain elements of such supranationality of which we are afraid. The system of international organizations should incorporate two more elements. The first is strict control. This was present in the Whaling Commission but it was not developed; there was mutual control of participants in harvesting. The system of control should consist of independent observers who can involve harvesters as well as other states. Nowadays, such a supranational organization is being formed in the form of the Fisheries Committee of FAO, but this is mainly a consultative body. Supranational activities in exploring biological resources move towards increasing the activities of economic fisheries organizations in regulating fisheries.

I have a short remark on highly migratory species, since I have dealt with that issue for some time. I would like to remind our American colleagues that both the Magnuson Act and the Reagan Declaration about the 200-mile economic zone emphasize the international nature of highly migratory species. Managing or regulating these resources should be based on an international legal basis. Coastal states have only some of the functional rights to these resources, since the 200-mile zone is still part of the open seas. The functional rights of a coastal state as regards highly migratory species are fewer than as regards other types of biological resources. It follows from here that the international system of managing harvesting should be closer to the Whaling Commission system, as Natasha Mirovestkaya mentioned.

*Viktor F. Tsarev:* I too would like to comment on Dr. Moisseev's statement, which was impressive. I would not like to dispel the impression he made, but I would like to express a few things about that statement. First, Piotr Alexeevich, you believe that harvesting of bioresources can be increased threefold. Do you take into account the harvesting of krill, and to what degree? Second, indeed the world ocean covers about 70 percent of the globe; that is a vast surface. You must know the number of regions in the world ocean with increased bioproductivity. And third, do biologists know of the role of biological resources in the ecosystem of the world ocean?

*P. A. Moisseev:* In my statement I said that an increase in catching the traditional fish that we are accustomed to harvesting and would like to continue to harvest is unlikely. The volume of the world catch, in our view, can be increased by 40 million tons. This is a considerable figure, but this is very far from the threefold increase I mentioned. The greatest increase in the catch can be achieved in species at a low trophic level, including krill, mesopelagic fish, and squid. These three groups, I repeat, can give a very considerable catch. The volume of the krill catch by modest estimates can amount to a minimum of 15 to 20 million tons. Mesopelagic fish can yield over 100 million tons. This is the opinion of FAO and other scientists. At present we have calculations showing that the volume of fishing of the high trophic level of traditional species amounts to about 800 to 900 million tons. Estimates of fishing of low trophic level species produce are much higher, over five billion tons.

I said that the world ocean is a wonderful resource which can be used, but at present we are only hunting there. We are doing nothing

to increase reproduction of the oceanic resource, but we should. Mariculture, this new kind of animal breeding in the ocean, can provide, according to the recent estimates, about 70 to 90 million tons.

Could you remind me of the next question?

*Viktor F. Tsarev*: The role of bioresources in the ecosystem.

*P. A. Moisseev*: This is a very important and correct question and it requires further profound work. American and Canadian scientists have created a wonderful model of the Bering Sea showing the interdependence of various parts of that system. Soviet scientists have created such an ecosystem for the Okhotsk Sea. They show that the present catch of two million tons can be increased to six million tons if we correctly use various elements of the system. The ecosystem of the Antarctic has been studied pretty well, but to say at present that the global ecosystem is well known is not possible. At least, what I have mentioned is based on research by many experts and scientists, including those who work with FAO and other organizations.

*Thomas Clingan*: Any others? Yes, please.

*Unidentified Soviet speaker*: I would like to comment on what was said by Piotr Alexeevich and in turn would like to share my views on this matter. First of all, I'd like to say that specific remarks made by Piotr Alexeevich are important. We see that an increase in catch of bioresources should be achieved through the development of mariculture, and that this will result in an increase of 100 million tons. Krill in the Antarctic was also mentioned.

But the resources of the world ocean are not inexhaustible. Far from it. They are indeed exhaustible, and this has become quite obvious. There are five fishable, highly bioproductive areas, and it so happens that they are in close proximity to major developed countries, both socialist and capitalist: the Soviet Union, the United States, some other countries -- Norway, for instance -- but especially the Soviet Union and the United States. These are limited regions.

One might also consider: why not go deeper? But to what depth? Down three thousand meters? What does it mean in terms of fishing? It means that you have to have new fishing craft, fundamentally new technology, new sources of energy, but that is not all. The point is that fish raised from that depth, upon reaching the surface, are found to be only three percent meat; the rest is water.

I do not know why, but neither in this country nor in any other countries is it mentioned what the Soviet scientist Bagorov did in the 1960s. He investigated the biomass of the world ocean and concluded that the 200-meter layer is purified in the course of six months by living organisms. Therefore, the condition of the ocean as a whole depends upon the activities of organisms in the surface layer, and we should safeguard the ecosystems existing in that layer. Also, remember that the ocean provides about 60 percent of our oxygen, so biologists and other specialists should give more thought to the condition of these organisms.

*Thomas Clingan:* I call upon Dr. John Craven of the Law of the Sea Institute.

*John Craven:* Ladies and gentlemen, first I want to make it clear that I am speaking in my personal capacity and not as the director of the Law of the Sea Institute. I am speaking from my experiences as the chief executive officer of the Natural Energy Laboratory of Hawaii, which has been developing deep ocean water as a major resource of the ocean.

I'm prompted to make this intervention initially by the remarks of Dr. Miles to the effect that any local solution made with respect to the Doughnut Hole problem will have a tremendous impact on the major corpus of the law of the sea, and a solution which derives therefrom should take that into account. Therefore, we should equally think about what is going to be the nature of the future regime of the ocean with respect to the acquisition of marine protein.

I am greatly indebted to Professor Moisseev for making my remarks for me in this regard by indicating that a very large percentage of the protein of the sea is going to result from ranching on the open sea, just as we get cattle on the open range, and that a different property regime will have to exist with respect to these maricultured marine protein items which will be ubiquitous throughout the ocean.

What is the problem? Well, marine protein holds a unique position in the production of protein for human consumption since, as Dr. Moisseev has mentioned, it is the only form of protein which is primarily harvested by hunting in the wild. We don't acquire our beef by going out on the open range and looking for venison. We don't acquire our poultry by harvesting birds that fly through the air. To date, the mariculture of marine protein consists of a very tiny fraction of the total. That which does exist is small scale, it is labor intensive,

it is in pond and bay culture, and I know of very few operations that take place on the high seas.

As we look to the future, one cannot predict the demise of fishing in our lifetime, but one can predict the appearance of maricultured species on the open ocean in very substantial quantities. Why do I say this? There are a number of dramatic new technological developments which are making the cost of production of marine protein by farming and ranching substantially less than the cost of acquisition of marine protein by fishing, which is becoming an increasingly expensive operation as the cost of fishing boats goes up and as the yield goes down.

Let me describe a few of these developments, some which have taken place at our laboratory in Hawaii. The big breakthrough we have achieved has been an artificial upwelling in the tropical ocean. It is bringing the water from the deep part of the tropical ocean, from a depth of 600 meters or more, up to the surface. Water at a depth of 600 meters has wonderful characteristics as a mariculture fluid. It is cold, and therefore, brought to the surface in the tropical ocean, it is an isolated environment that creatures at the surface will not approach because they seek a certain temperature profile. And because it is cold, it can be used for cold water species. It is biologically pure because it comes from below the photic zone where photosynthesis takes place. It doesn't have any disease organisms and it doesn't have any competitor organisms as far as growth is concerned. So it's clean and it's cold and it's biologically pure.

Now we have brought this water to the surface, and we have been doing experiments in ponds and tanks. At the present time we have no pond larger than four acres, but four acres is quite a substantial area. We have been developing pilot commercial operations for a large number of species and are now successful in the production of salmon, steelhead trout, a particular flatfish of importance to the Japanese called hirami, oysters and mollusks, nori (*Grassolaria*), and many other algaes. We have had very little trouble in growing almost any species because we now have absolute control of the temperature since we can allow the water to warm up. We have a very heavy nutrient content in the water.

How will this show up in the open ocean? Several developments are already moving in that direction. The Japanese are now starting a project in which they intend to fertilize artificial reefs in the ocean with deep ocean water. The fish on those artificial reefs have some of the characteristics of fish in the wild but, in point in fact, should be the property of the people who put the artificial reef in and provided

the deep ocean cold water for the fertilization of those reefs. Another development in Japan that, if successful, promises to produce many installations in the ocean, is the piping of photons below the photic zone. That is, the ability to pipe light at a very low cost for long distances is now with us as a result of fiber optic technology. The concept here is to carry the photons down to the deep ocean and illuminate a large area and then populate that area with appropriate species to produce a total ecology. One has created one's own private fish farm, which is limited only by the extent of the illumination in the deep ocean.

In addition, a lot of work has been done, as you know, to develop fish attraction devices. If we make a fish attraction device that also has a deep ocean pipe 600 meters long that pipes water up to the surface, we have the ability to both attract and hold in the vicinity of this device the appropriate amount of fish.

In this world of ours, we always wonder why new developments come upon us, apparently by surprise. Most new developments take a long time to bear fruit. The experiments we have been doing in Hawaii were initiated in 1974, and we are just now arriving at the first successful pilot commercial operations. It will be perhaps ten years before the world at large recognizes the significance of these developments or adapts them and moves them further along. But we can be sure that twenty years from now, which is a short time with respect to legal documents and their significance, we will certainly have production on the open ocean of the order of magnitude of 10 to 20 or 30 million tons per year. By that time, our legal regime will have provided a property right to those particular species, those wild fish that have now been domesticated as a result of these devices in the ocean.

***Thomas Clingan:*** Thank you, John. We will now hear from Dr. Bekyashev.

# THE PROBLEMS OF MARINE FISHERIES MANAGEMENT AND THE THIRD COUNTRIES

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I wanted to speak in today's discussion about fisheries for two reasons. First, our scientific research institute deals with fisheries, and second, it is Thursday, and every Thursday in this country is fish day.

I would like to say a few words as regards both the official, fundamental reports by Professor Miles and Doctors Vylegzhanin and Zilanov and the reports of our talented young researchers Mirovitskaya, Khlystov, and other comrades. Besides that, we have here the subject for discussion: there are no fish, there are only problems, at least in this country. The problem is that both lawyers and politicians have brought fisheries to an impasse. There's nothing to catch and no way to catch. We have to find a way out. Professor Moisseev said that we were to blame. He said that fish are starting to eat each other and we are not still catching. He said that fish ignore the right to living quarters, and they migrate, and they eat each other, so there are a lot of problems. With your permission I would like to dwell only on two issues. I've decided to choose one idea from the very interesting report of Professor Miles and another idea from the joint report from Drs. Vylegzhanin and Zilanev.

The problems of marine fisheries were discussed in detail at the Third UN Conference on the Law of the Sea and at the FAO conferences on fisheries management and development (1972 and 1984). Specifically, the 1984 conference noted that management is a necessary basis for the reasonable and quick implementation of fisheries development plans.[1] Resolution I of the Conference notes that it is as a result of fisheries management that achievement of social and economic aims and accomplishment of tasks of food supply became possible.[2]

The legal basis of fisheries management in the high seas is stipulated in Section 2, Part VII, of the 1982 UN Convention on the

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[1] *Report of the FAO Conference on Fisheries and Management.* Rome, 1985, p. 36.

[2] Ibid, p. 8.

Law of the Sea. It is also dealt with by regional fisheries conventions which are, as a rule, institutional acts of Intergovernmental Fisheries Organizations (IGFOs). However, not a single international legal document contains a precise definition of such a phenomenon as "management of marine resources" or reveals its structure.

Management of marine fisheries is exercised through social and technological rules. In the complex of social rules regulating relations arising from management, legal rules play a leading role.[3] It is legal rules that regulate to a maximum possible degree states' activities with regard to the harvesting of the living resources of the world ocean.

By management of the social aspects of marine fisheries we mean purposeful, volitional impact on harvesting, the organization and coordination of activities relating to protection, reproduction, and optimal use of resources, studies and taxation of them, and prevention of marine environmental pollution.

Legal management of marine fisheries can be exercised directly by states or within IGFOs. The first method of management is stipulated, for example, by the Agreement between the Governments of the USSR and Japan on Fisheries of 12 May 1985. Article 1 of that document considers that the Contracting Parties develop mutually beneficial cooperation in the field of fisheries, including cooperation in conservation, reproduction, optimal use, and management of living resources in the northwest Pacific.[4] Art. 118 of the 1982 UN Convention on the Law of the Sea provides for cooperation of states "in the conservation and management of living resources in the areas of the high seas."

However, states can also manage marine fisheries by establishing relevant IGFOs. Lately, this means seems to be effective because, as G.I. Tunkin justly emphasizes, "an international organization is likely to draw off to itself a considerable number of questions on which, formerly, the relations between states had a direct bilateral or

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[3] Omarov A.M. *Social Management. Some Questions of Theory and Practice.* Moscow, 1980, p. 247 (in Russian).

[4] See the text in *Collection of Bilateral Agreements of the USSR on the Questions of Fish Industry, Fisheries and Fisheries Research.* Moscow, 1987, p. 293-300 (in Russian).

multilateral nature."[5] Having certain competencies and autonomous will, IGFOs are becoming a kind of a managing force. They search for ways to optimize the management of fish and their reproduction and to determine methods of such tasks' accomplishment and enforcement. An IGFO is authorized to adopt managerial measures to carry out its institutional mandate. As in any intergovernmental organization, the actions of member-states within an IGFO are regulated, in the first place, by the rights of such organization based on its charter.

Soviet literature, as a rule, identifies management of fisheries with its regulation (T.V. Bakradze, N. Ya. Russina, M.I. Savchenko, T.V. Spivakova, I.G. Timoshenko, V.P. Khlestov, and others). In our opinion, such a viewpoint is unacceptable. M. Starr rightly notes that the term "regulation" is used to describe the most divergent situations. To make this term useful in such cases, it is necessary to specify the private meanings ascribed thereto.[6]

To our minds, the difference between 'management' and 'regulation' mainly lies in the following.

Firstly, 'management' in comparison with 'regulation' is a category of a *general* nature and consists of separate elements. It comprises measures on the protection (sometimes they use the word 'conservation' which is just the same) and reproduction of resources, assessment of stocks, their protection from pollution and contamination, etc. Regulation, being a *concrete* (individual) category, is an element of management. The link between these categories means that management cannot take place outside its constituent element (for instance, measures on regulation of fisheries, reproduction and assessment of stocks, etc.). At the same time, each constituent element contains elements of management as its major quality. According to I.I. Lukashuk, "international legal regulation is one of the basic components of the whole system of international relations management."[7]

Secondly, transfer from simple regulation to other forms of management occurs where and when the relations arising from the use

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[5] G.I. Tunkin. *Theory of International Law*. Moscow, 1970, p. 343 (in Russian).

[6] M. Starr. *Management of Production*. Moscow, 1968, p. 162 (in Russian).

[7] I.I. Lukashuk, *International Legal Regulation of International Relations*. Kiev, 1975. p. 22.

of living marine resources are complicated and more extensive measures, such as breeding and acclimatization of fish and protection of resources from pollution, are needed. The utmost complication of intergovernmental relations with regard to uses of resources gives rise to the organization and introduction, according to V.I. Lenin, of "an extremely complicated and nice network of new organizational relations."[8]

Measures on fisheries regulation are applied, as a rule, at the initial stage of the managerial process and are aimed at the regulation of harvesting and prevention of voluntarism in the exploitation of resources. In a number of IGFOs (e.g., NAFO,IBSFC, ICSEAF, NEAFC, NPFC, ICC) regulation is an element of a fisheries management system, and in others (e.g., GFCM, IPFC, CESAF, WECAFC, The Black Sea and Danube Commission) a major means (element) of regulation of harvesting.

Taking into account the trends in marine fisheries development, the most important elements, to our mind, may be the following.

1. Elaboration by states (within and outside the IGFO's framework) of effective measures on regulation of harvesting; in particular, the establishment of technical legal measures with regard to regulation of harvesting, determination of total quotas of catch and their distribution among states concerned, limitation of fisheries intensity, etc.
2. Establishment of international control over appropriate compliance with fisheries regulations, etc.
3. Conclusion of international conventions concerning cooperation of states in marine fisheries, which would provide for exercising by states and IGFOs (existing and under elaboration) necessary measures with regard to the rational use of marine living resources.
4. Extension of the IGFO's competence concerning both perfection of the existing rules and elaboration of new harvesting regulations (codification of the IGFO's managerial functions).
5. Adoption of joint measures on reproduction of fish resources (acclimatization, transplantation, aquaculture, etc.).
6. Implementation of measures on protecting the marine environment from pollution and living resources from contamination.
7. Institution of a universal mechanism for the implementation of measures provided for by Section 2, Art. VII of the UN Conven-

[8] V.I. Lenin. *Complete Works*, v. 36, p. 171.

tion on the Law of the Sea (measures regarding fisheries management in the high seas).

However, the international legal system of marine fisheries management can be effective only if all states conducting fisheries in the world oceans or in their specific areas will be participants in this system. Unfortunately, in practice when a group of countries voluntarily (within or outside the IGFO's framework) reduces its harvesting efforts and catch a smaller amount of fish, other countries carry on fishing without taking account of limitation rules in a specific region or with regard to a specific commercial species. As it was justly noted by the famous French oceanologist Jacques-Yves Cousteau, "We are already exceeding the catch limit ... we are seeking to catch more and more fish." In his opinion, "International administration is needed which could, for example, completely close this or that area."[9] Establishment of an international administration or organization[10] is an effective but slow step towards the settlement of the fisheries management issue. Adoption by IGFOs of fisheries regulatory rules binding on all states can become a more radical means of ensuring the effectiveness of the fisheries management system.

The thing is that the unregulated activities of states that are not parties to IGFOs may have a negative bearing on stocks' conditions. This is why the institutional acts of ANTCOM (Art. X), NAFO (Art. XII), IBSFC (Art. XIII) and other organizations incorporate a provision stipulating that IGFO members agree to draw the attention of a non-party state to any aspect of harvesting or other activities of such states which, in their opinion, has negative bearing on the achievement of the Convention's purposes (i.e., an IGFO's institutional act). Moreover, states parties agree, when necessary, together with states not parties to an IGFO, to discuss measures aimed at the overcoming of such negative influence.

On the basis of these provisions of institutional acts, a number of IGFOs (for instance, ICNAF, INPFC, ICSEAF, and MMC) approved

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[9] *Pravda*, 13 January 1990.

[10] According to the opinion of B.G. Khabirov, the 1982 Convention impliedly recognizes the possibility of establishing a world fisheries organization. B.G. Khabirov, "Some International Legal Issues of Fisheries Regulation in the High Seas," *Soviet Yearbook of International Law, 1988*. Moscow, 1989. p. 222.

the resolution regarding limitations of non-party states' commercial activities in the conventional area. Such limitations may be expressed in providing them with a catch quota for certain species (the so-called other countries), in recommendations not to place vessels in certain areas, to strictly comply with the regime of areas closed for fishing, not to use interdicted fishery tackles, etc.

A question arises here whether such limitations are compulsory for non-party states, that is, for third countries. As we see it, a positive answer will be lawful here. The reason is as follows. In virtue of Article 2 of the 1958 Convention on the High Seas and Article 87 of the 1982 UN Convention on the Law of the Sea, *all* states enjoy the freedom of fisheries in the high seas. However, these Conventions emphasize that while exercising the freedoms of the high seas, all states must take due account of other states' interests in using the freedom of the high seas. The interests of IGFO member-states in rational use of the living resources are stipulated by a preamble of each organization's institutional act. IGFOs themselves are established to ensure the interests of states in rational exploitation of the riches of the sea. Next, Article 2 of the 1958 Convention on the High Seas and Article 87 of the 1982 Convention on the Law of the Sea directly impose on all states an obligation to comply with the regime of fisheries established by both universal and *regional* conventions. Therefore, states not participating in regional conventions must also comply with the IGFOs' rules of harvesting elaborated on the basis of these conventions if, of course, they exercise fisheries in conventional areas.

It should be remembered, however, that not all states (about seventy only) are contracting parties to the 1958 Convention, and the 1982 Convention, as is known, has not yet entered into force. Nevertheless, it seems possible to speak about the compulsory nature of the above-cited provisions also for states non-parties to the 1958 Convention.

The thing is that these provisions (i.e., rules stipulated by Article 2 of the 1958 Convention dealing with marine resources protection) can be regulated now as a customary rule of international law.[11] Let

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[11]The Convention mentions several times the expressions "all states" and "any state." According to L. Lee (U.S.) such expressions emphasize the customary nature of the rules stipulated by such conventions and their comprehensive compulsory nature. Lee, L.T., "The Law of the Sea Convention and Third States," *American Journal of International*

it be recalled that the 1958 Convention codified the *customary* rules of international law of the sea (see the Convention's Preamble). Let's also pay attention to the fact that the rule on the protection of the living resources of the high seas is generally accepted and is an integral part of the international legal principle of environmental protection.[12]

At the UN Conference on the Law of the Sea, represented by more than 150 states (i.e., by the overwhelming majority of the contemporary world's states), the above-mentioned provision did not meet any opposition or substantial remarks. Indeed, delegations of many countries urged the establishment of extremely tough harvesting regulations that would be compulsory for all states. It is not by chance, therefore, that the provisions of the 1958 Convention on the High Seas with respect to fisheries and protection of the living resources of the high seas were incorporated in the 1982 Convention practically without any amendments, which witnesses to their general recognition.

Naturally, the above-stated is a general prerequisite for substantiating the need for all states to comply with fishery regulations established with the purpose of protecting the living resources of the sea.

Now there are some arguments in favor of the compulsory nature of regulations, adopted by IGFOs with the aim of regulating fisheries in the area of their activities, for third countries.

It is quite admissable that in certain cases local regulations may bind a third state to commit certain actions. In particular, binding regulations may be appropriate where commercial activities take place in certain areas with regard to which a particular agreement has been concluded (for example, international rivers for navigation), if a third state would like to receive the benefits ensuing from this agreement.

As a rule, the elaboration of the IGFOs' regulations concerning fisheries is carried on by the overwhelming majority of states fishing in the area of the organization's activities. By their legal nature, fishery regulations are a result of coordinated wishes of the *overwhelming majority* of states having interests in the conservation of fish stocks. However, besides these countries (i.e., contracting states), fisheries in the area of the IGFO's activities is also exercised by

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*Law*, vol. 77 (1983), no. 3, pp. 556-557.

[12]N. S. Ivanchenko. *Environmental Aspect of the International Legal Problem of Disarmament*. Moscow, 1984, p. 54.

certain other states not parties to the IGFO, which did not officially accede to the acts containing the above-mentioned regulations. Sometimes there are four to six such states. It would be unjustifiable if the overwhelming majority of states comply with the fisheries' regulations (considering limiting their harvesting possibilities), while three to four states are engaged in unlimited fishing (i.e., poaching). This would weaken the concerted efforts of states with regard to the protection of living resources and incur substantial damage to the resources themselves.

Of course, all this is fair with respect to rules which do not run counter to the major principles of international law, are really aimed at the protection of the living resources of the sea, and are not discriminatory in their form and essence with regard to states which are not contracting parties to IGFOs. This is why it is very important for IGFOs to strictly comply with the conditions of lawfulness of decisions adopted by them and concerning the introduction of fishery rules binding for all states.

What are these conditions? They are, to our mind, the following:

a. All or almost all countries fishing in a corresponding area should participate in the adoption of fisheries regulations (both member-states of IGFOs and non-participating parties are meant).
b. Such regulations should not run counter to *jus cogens* regulations and, first and foremost, to the major principles of international law. It should be emphasized once again: they should be actually aimed at the protection of marine resources.
c. The IGFOs' competence with regard to elaboration and adoption of fisheries rules directly ensues from the institutional act of the organization.
d. Fisheries rules should be adopted in strict compliance with the internal right of this organization (procedural requirements are meant here).
e. Fisheries rules should not be discriminatory with regard to third countries and should be equally extended both to IGFO member-states and non-participating states.

Taking account of the above-stated, it seems expedient to introduce in the IGFOs' institutional acts (including articles dealing with the commission's competence with regard to third countries) the following addition:

Fisheries rules are also applicable to the ships of states which are not parties to the Convention in order not to create more favorable conditions for such ships and to ensure an optimum management of fisheries in the conventional area.

# MARINE SCIENTIFIC RESEARCH

# QUESTIONS CONCERNING THE REGIME OF MARINE SCIENTIFIC RESEARCH

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## Introduction

I believe it may be useful to describe my background to those in the audience at this first conference on the law of the sea, jointly sponsored by Law of the Sea Institute, the Soviet Maritime Law Association, and the Soviet Peace Fund. Although I helped found the Law of the Sea Institute at the University of Rhode Island in 1966, I am not an expert in international maritime law. I am an oceanographer, and my previous two visits to the USSR have been to discuss issues of marine science and not the law of the sea.

However, I have spent some time during the past twenty years attempting to represent the interests of the marine science community on those aspects of the law of the sea that directly affected them. As such I have been both an observer and an adviser on marine science issues to the government of the United States during the negotiations leading up to the 1982 United Nations Convention.

I have framed this presentation as a series of questions, and I have done so for two reasons. The first is that I would hope to generate some discussion. The second is that I am unsure of the answers, and as a marine scientist, I believe I would benefit from your views.

## Status of the 1982 MSR Provisions

Those familiar with the details of the four Conventions of 1958 and the 1982 Convention know that marine scientific research is treated much differently in the two. Until the treaty is widely ratified, are we living under the 1958 rules as they effect marine scientific research or are we living under the 1982 regulations? Or is marine scientific research being subjected to some combination of both regimes, and if so, what combination? It is one thing for international lawyers and others to suggest that most of the 1982 Convention is emerging customary international law. For those of us whose professions take us to sea, it is important to know in some detail which parts are and which parts are not. I am concerned that there is yet no common agreement on the status of the 1982 Convention as it pertains to the marine science research articles.

Some of the differences between 1958 and 1982 appear more important in reading than they are in practice. For example, freedom of marine scientific research is not one of the four freedoms of the high seas explicitly listed in Article 2 of the 1958 Convention on the High Seas, but it is a freedom of the high seas in the 1982 Convention. In practice marine scientists have always assumed that freedom of marine scientific research was a recognized freedom of the high seas and have acted accordingly. To the best of my knowledge no protests have ever been lodged during this period against a bona fide marine scientific research program conducted on the high seas.

There are, however, differences between 1958 and 1982 that can be important. I wish to note two. The first is Article 252 on "implied consent" and the second is Article 254 on "rights of neighboring land-locked and geographically disadvantaged states."

The implied consent provision of the 1982 Convention was introduced to resolve a problem with which marine scientists were occasionally faced. At times a researching State would ask for permission to conduct research on the continental shelf of a coastal State as required under Article 5 paragraph 8 of the 1958 Convention on the Continental Shelf and the coastal State would not respond, or it would not respond until the last moment (and a last-minute response often meant the program had to be either abandoned or severely modified). Article 252 simply states that if the researching State requests permission at least six months in advance of the planned program and the coastal State does not respond within four months of the request, the research State can "imply" that consent has been given and go forward with the planned program.

In the years since the Reagan proclamation on the Exclusive Economic Zone, the United States has not, to the best of my knowledge, exercised the rights of the "implied consent." Alfred Soons, however, in a paper presented at the 22nd annual conference of the Law of the Sea Institute (June, 1988), reports that a number of European countries have done so. Perhaps one reason for the hesitancy on the part of the United States is that we are not signatory to the Convention, and the major European researching States are, of course. However, the fact that at least some researching States are exercising their rights under Article 252 suggests that this part of the convention may indeed be part of emerging customary international law.

The situation with respect to the rights of the land-locked and geographically disadvantaged States (LLGDS) under Article 254 appears to be different. I expect there was no great enthusiasm for Article 254 on the part of either researching or coastal States at the time of the negotiations, but Article 254 was part of a package of

LLGDS articles accepted by the Convention. Article 254 works in the following way. When a researching State applies for permission to work in the EEZ or on the Continental Shelf of a coastal State it is required to inform the adjacent LLGDS of the proposed program of work. After the consent of the coastal State has been received, the researching State must send all relevant information to the LLGDS, and if the LLGDS wishes to, and the coastal State does not object, the LLGDS can participate in the program of work in a manner similar to that of the coastal State as spelled out in Article 249 paragraph 1a.

To the best of my knowledge the United States has not complied with this article; nor, according to Soons in his presentation at the 22nd annual LSI Conference, has any European researching State. This article would not appear to be a part of the emerging customary international law. In the absence of any protests from land-locked or geographically disadvantaged States, I question how well this article will be adhered to once the Convention receives widespread adoption. At the minimum it is going to require some agreement as to the definition of 'neighboring' land-locked and geographically disadvantaged States. The term 'neighboring' would seem to suggest somewhat broader meaning than 'adjacent.'

The question of what part of the marine science research articles of the 1982 Convention are part of the emerging customary international law is not a trivial question to those of us attempting to conduct marine scientific research. At least ninety coastal States have claimed jurisdiction over marine scientific research in the exclusive economic zone and on the continental shelf. The United States State Department is proceeding in excess of 300 requests a year, up from less than a hundred in 1982. A similar increase can be found amongst the other major researching States. In the meantime it would appear that it will be some years yet before this Convention enjoys wide enough ratification that it can transfer from the category of "emerging customary international law" to that of "accepted international law."

**Conditions for Denying Consent**

One of the most important differences between the 1958 Conventions and the 1982 Convention for practitioners of marine scientific research concerns the conditions for denying the consent to do marine scientific research in areas over which the coastal State exercises jurisdiction. Article 5 of the Continental Shelf Convention reads in part, "The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless the coastal State shall not normally withhold its consent

...." Article 246 of the 1982 Convention expands the area of jurisdiction of the coastal State to include the exclusive economic zone as well as the continental shelf, but after stating that the consent of the coastal State is required for research undertaken there, goes on to say, "Coastal States shall, in normal circumstances grant their consent ...."

Is there a difference between 'normally' and 'in normal circumstances'? Apparently 'normally' is a more inclusive term. Although 246 does not explicitly define 'in normal circumstances' it seems to suggest that the phrase refers to normal diplomatic relations since paragraph 4 of 246 reads in part, "normal circumstances may exist in spite of the absence of diplomatic relations between the coastal State and the researching State."

The most interesting difference, however, between 1958 and the 1982 Conventions concerning consent for MSR is that the 1982 Convention lists four reasons why consent can be denied. They are given in Article 246, paragraph 5. Three are explicit; the fourth is more general. Consent can be denied if

(1) the proposed research "involves drilling into the continental shelf, the use of explosive or the introduction of harmful substances into the marine environment";
(2) "involves the construction, operation or use of artificial islands ...";
(3) "the actual research plan is different than that in the plan submitted when the request was made, or if the researching State has unfilled obligations from a previous research program in the area."

Although differences can arise in the interpretation of these three reasons for denial, I expect the range of disagreement is relatively minor compared to the range of interpretations possible in the fourth reason. Article 246 paragraph 5 also states that the coastal State may withhold its consent if the proposed project "is of direct significance for the exploration and exploitation of natural resources, whether living or non-living." Although the term 'direct significance' puts bounds on what can be denied, it still leaves the coastal State with some range of interpretation, and the researching State apparently has little recourse under the dispute settlement section of the Convention since Article 246 is one of those explicitly excluded from this process under Article 297, paragraph 2.

I believe it is quite clear that the range of circumstances under which the coastal State can deny consent for marine scientific research within its EEZ or on its continental shelf is much constrained over

what it is allowed under the 1958 Continental Shelf Convention. Most importantly, Article 246 would appear to give the researching State the opportunity to request the reason for denial. If the coastal State denies consent it must either inform the researching State that "normal circumstances" do not exist or it must list one of the four reasons enumerated above. Given the limited scope of the first three, the most likely candidate is that the research is of *direct significance* for the exploration or exploitation of the natural resources of the area. The researching State may have limited recourse, but in the many situations where experts would agree that the proposed work was of tangential importance at best to research exploration or exploitation, the researching State could file formal protests.

Unfortunately, we in the United States are not presently taking full advantage of the opportunities under Article 246. We accept coastal State jurisdiction of MSR in the EEZ and the continental shelf, but we have not yet attempted to exploit the more limited scope the coastal State has for denying consent. Under the 1958 Convention consent was not made explicit. The reasons for denying consent are both limited and explicit in the 1982 Convention.

Again, the reason for the United States reticence in exploiting fully the opportunities under the 1982 Convention may in part be because we are not a signatory to the Convention. I do not know whether other researching States are insisting that coastal States give explicit reasons for consent denial. I would hope they are, and I hope the United States will soon do likewise. Given the vast new areas for which the coastal State exercises jurisdiction, it is important to the marine science community that Article 246 become part of the "emerging customary international law."

## What is Marine Scientific Research?

I believe most marine scientists would have little difficulty in agreeing upon a definition of marine scientific research; thus perhaps you may think it strange for an oceanographer to raise the question in a room full of legal experts. However, the 1982 Convention does raise some questions about what is and what is not MSR. The first thing to note is that nowhere in Part XIII of the Convention that purports to regulate MSR is there a definition of what is being regulated. MSR was defined in the first and second negotiating texts of the Convention but was dropped from the 1977 Informal Composite Negotiating Text and never reappeared. For those of us championing the widest range

of freedom for marine scientists, this lack of definition might be an advantage. Let me give a few examples.

*The difference between hydrography and MSR*

Article 21 on the territorial sea lists activities for which the coastal State may establish rules and regulations. Amongst them are "marine scientific research and hydrographic surveys." I can find no mention of the term 'hydrographic survey' in any of the articles concerning the continental shelf or the EEZ. Does this mean that ships not belonging to the coastal State are free to 'survey' in any of the articles concerning the continental shelf or the EEZ? Does this mean that ships not belonging to the coastal State are free to conduct hydrographic surveys in those areas without requesting consent, or even without notifying the coastal State of its intentions? The answer may be, yes. That at least was the opinion expressed by Rear Admiral J.R. Seesholtz, the Navy Oceanographer, in a speech before the Center for Ocean Law and Policy in October of 1986. A hydrographic survey generally connotes observations made to insure safety of navigation, and is generally limited to the production of accurate and detailed bathymetric charts. Such surveys and the resulting charts are of great value to marine geologists attempting to decipher the geologic history of the region. Should one assume that when such surveys are made by marine scientists for purposes of understanding the geology of the region, they are MSR, and the research programs require coastal State consent, but if they are made by an organization charged with performing hydrographic surveys no consent is required? I would further note that if one is concerned about the navigational safely of submarines, the depths of the bottom topography of interest are much deeper than if one is concerned about only the navigational safety of surface ships.

*Environmental data for engineering purposes*

Can one make a distinction between the purposes for which information about the ocean is collected? Let me give two examples, the first hypothetical, the second real. From time to time in the past decade there has been discussion about building large submersible oil tankers or submersible barges to bring the oil out from the north slope of Alaska. One of the more interesting problems in the design is how one ballasts such craft in order to maintain near neutral stability under water. If this project were ever to get beyond the initial design stage, one would need far more detailed data than is presently available on the temperature, salinity, and density structure of an area that includes the Canadian, and perhaps Danish (because of Greenland), EEZ. Does

the collection of such information constitute MSR and thus require permission, or is it better defined as the collection of environmental data for engineering purposes which is not covered in the Convention, and for which, therefore, no permission is required?

I expect my second example is less hypothetical. All military powers including the United States and the USSR continue to develop new military equipment that must be tested in the environment for which it was designed. For example, a "bottom bounce sonar" designed to detect submarines in the Mediterranean or the Indian Ocean must be tested there. The engineers who designed the equipment require information about the temperature and salinity structure of the water column as well as information about the acoustic properties of the bottom sediments. I expect all military powers collect such information on a routine basis and seldom request the permission of the coastal State. Such observations might be relevant to oceanographers studying the circulation of the ocean, and a similar set of data might be collected at another time as part of an MSR program; but for the engineers interested in the effectiveness of their equipment, such observations are simply part of the suite of environmental data they require to evaluate their equipment. To them, it is not MSR and is not subject to the provisions of Part XIII of the 1982 Convention.

*Atmospheric Science from Research Ships*

My third example is atmospheric science done in the ocean from a research vessel. The ocean covers 70 percent of the earth, and the islands of the ocean are not distributed equitably. Thus those interested in studying atmospheric phenomena on a global scale are on occasion forced to deploy ships throughout the ocean in order to make the necessary set of observations. Often those vessels are used at other times for MSR. Does the collection of atmospheric observations in the EEZ of another State require the consent of the coastal State? I believe the answer is no.

*Collection of Surface Temperature Data*

The Gulf Stream flows up the east coast of the United States at speeds in excess of three knots (5 km/hr). Much of the year its position can be determined by measuring the surface temperature of the water. Many commercial ships routinely record the surface temperature of the water to keep their ships in the Gulf Stream while steaming north, and out of the Stream while going south. Are these ships engaged in MSR? I believe most of us would say no, but I point out to you that observing the meandering and movement of such currents as the Gulf Stream and attempting to understand why they

behave as they do is a subject of considerable interest to oceanographers today. In fact I have a student who is using sea surface temperature data to study the movement of the Gulf Stream, and both he and I assume we are engaged in MSR. His data, however, comes not from ships but from satellite, and satellite observations of the oceans are not covered in Part XIII of the 1982 Convention or anywhere else in the Convention.

**The Facilitation of Marine Scientific Research**

The last issue I wish to raise does not concern the legal interpretation of the LOS Convention as such. The question I wish to raise is what can national and international institutes do to facilitate marine scientific research under the Convention? I believe that marine scientific research is more important now than ever.

We have already heard from Soviet colleagues at this meeting about some of their concerns for the environment. Although scientists and concerned citizens from around the world may disagree on details, there is little disagreement on the broad aspects of the problem. The recent evidence of increased carbon dioxide and methane in the atmosphere which will lead to a warming of the earth, the decrease in ozone over the polar regions, the increased evidence of pollution in coastal waters and marginal seas, all point to what man can do to perturb the ecological balance of our planet. These concerns are coupled with the exciting evidence that we may be coming closer to our dream of being able to predict seasonal and yearly changes in our climate. The ocean plays a key role in all of these processes, controlling the rate at which carbon dioxide is removed from the atmosphere and acting as a giant fly wheel whose perturbations strongly influence the year to year changes in our weather.

Scientists in the United States, the USSR, Europe, and elsewhere are planning a massive international program to grapple with these issues. In the United States, the program is simply called "global change." In the lexicon of the United Nations it is the International Geosphere Biosphere Program. Those developing the program believe we now have the instrumentation, the large computers, the satellite sensors, and sufficient theoretical understanding of the processes that a concerted attack on these issues will be fruitful. The program is in some ways similar to the International Geophysical Year of thirty years ago; but to those of us who were involved in that magnificent effort, the scope and scale of this new program is mind boggling. It is both larger and can be expected to continue for a much longer period.

It is important that this program succeed; not simply for the increased understanding that we will gain of the physical processes that govern our planet, but because of the hope that such understanding will let us better cope with the changes in our environment that we are introducing. The human population is now five billion. Barring a nuclear war or similar catastrophe, most experts do not expect to see a leveling off of the world's population until it reaches about ten billion. My personal view is that this planet was designed to accommodate about one billion comfortably. There is little point in resolving our political differences if the world our grandchildren inherit is so polluted and has so few resources that life has little future. If the earth is to sustain a population of ten billion at a reasonable level of culture and comfort, we must understand much better than we do today the dynamics and workings of this earth and its ecosystem. I expect it will also require a bit of luck. And to repeat, the ocean is the key to much of this understanding.

What can we do to facilitate ocean research? We can attempt to breathe new life into such UNESCO organizations as the Intergovernmental Oceanographic Commission. We can depoliticize it so that once more it has the confidence of the marine science community it was designed to serve.

We can track problems that research ships have in securing clearances to work in coastal nation's EEZ and in making port calls. I and others have attempted to do this for the United States and Europe. (See, for example, reports by Knauss and Katsouris in the 19th and 20th Proceedings of the Law of the Sea Institute and Soons in the 22nd). He and I believe it would be useful to have one or more representatives in each country who would track these matters. Perhaps the Law of the Sea Institute or some other nongovernmental international group could publish the reports of these rapporteurs. I believe it is important that such activities be outside official governmental channels, because I believe it is important that difficult situations not be glossed over. It has been my experience in reviewing the record of the United States that not all of the problems are with the coastal State. On occasion the difficulties can be traced to the researching organization and the researching State.

A third suggestion is that the United Nations Office of Ocean Affairs and Law of the Sea (OOALSI), publish national legislation and regulations concerning marine scientific research in waters over which they exercise jurisdiction, and that it update this material on a regular basis. It would also be helpful if the office could periodically publish detailed information concerning disputed areas, those oceanic regions where the line of delimitation between adjacent or opposite states with

respect to their respective EEZ's or continental shelf has yet to be resolved. The United Nations OOALSI is planning a workshop sometime in 1989. Perhaps these are some of the issues it might address.

## Conclusions

This report has little in the way of conclusions. Rather it is an attempt to raise issues which can and should be discussed. Marine scientific research is an important ocean activity. Its importance to the well-being of this earth is growing. It is important that we do what we can to facilitate bona fide marine scientific research however it is defined. The restrictions that are being applied to marine scientific research appear to be in a transition phase between the vaguely defined ones found in the 1958 Convention on the Continental Shelf and the more detailed, but at the same time, more limited ones, that are found in the 1982 Convention. It would be helpful to the marine science community if the 1982 regulations became the standard.

# LEGAL REGIME OF MARINE SCIENTIFIC RESEARCH ACCORDING TO THE UN CONVENTION OF THE LAW OF THE SEA: PROSPECTS

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## Introduction

The new regime of marine scientific research stipulated by the 1982 UN Convention on the Law of the Sea substantially extends the prerogatives of coastal states regarding regulation of scientific research in sea areas under their jurisdiction. The traditional control over scientific research in territorial seas and on the continental shelf was supplemented with the right to control scientific research in archipelagic waters and in the EEZs. The need to receive consent from the coastal state for conducting marine scientific research in EEZs resulted in substantial reduction of sea areas subject to the principle of the freedom of scientific research. In compliance with the conventional regime, marine scientific research in the vast spaces of the world ocean, over one-third of the earth's surface, may be conducted subject to a number of conditions reflecting the interests of coastal states.

Very often the establishment of the fact that the sphere of applying the principle of the freedom of scientific research has been reduced becomes a point of departure for criticizing the relevant provisions of the Convention. Such attitudes do not take into account the fact that to a considerable degree the Convention has only reflected those changes in the traditional regime of marine scientific research which had taken place in states' practice. The international legal principles and rules of conducting marine research in the economic zone and on the continental shelf, formulated by the Convention, emerged and developed in the legislative practice of

coastal states associated, in particular, with the appliction of para. 8, Article 6 of the 1958 Geneva Convention on the Continental Shelf.

Before the adoption of the 1982 Convention certain states already enacted special national regulations concerning research activities of foreign states in zones under their sovereign rights of jurisdiction. Other states incorporated the relevant provisions into the laws of a general nature on the status of sea areas contiguous to their shores, which were adopted during the work of the Third UN Conference on the Law of the Sea. First of all, provisions were developed regarding the procedure of gaining consent for scientific research projects, the volume of necessary information to be provided to the coastal state with regard to the contents of the scientific program, and the duties of researchers. These and some other elements of the scientific research regime were stipulated by the UN Convention on the Law of the Sea. In this context the major question is not whether it is possible to restore the regime of scientific research in the coastal areas which existed before the Third UN Conference on the Law of the Sea, but on what basis the cooperation of states in marine research should be developed in the existing political and legal context. It should be decided, in particular, whether the future regime of marine scientific research will go on to be shaped mainly on the basis of unilateral acts of states, or if there is a possibility to develop such regime, first and foremost, on the basis of conventional provisions agreed upon as a result of long negotiations.

**Major Elements of the Conventional Regime**

The provisions of the Convention on the questions of conducting marine scientific research in coastal areas were the result of a compromise between the states standing for free conduct of scientific research and the countries that endeavored to establish strict control over research in sea areas under their jurisdiction. The compromise is based on the combination of rules determining the prerogatives of coastal states and provisions aimed at promoting the development of marine scientific research.

The countries that favored the limitation of the freedom of marine scientific research managed to have included in the Convention the provisions stipulating that marine scientific research in the EEZ and on the continental shelf is conducted only with the consent of coastal states (para. 2, Art. 246). Coastal States were empowered in their discretion to withhold their consent to the conduct of marine scientific research projects of other states or competent international organizations if such projects: are of direct significance for the exploration and

exploitation of natural resources, whether living or non-living; involve drilling into the continental shelf or the use of explosives or the introduction of harmful substances into the marine environments; or involve the construction or operation of artificial islands, installations, and structures. Consent may also be withheld if the information provided is inaccurate with regard to the nature and objective of the project, or if there are outstanding obligations to the coastal state from a prior research project.

The Convention also stipulated specific conditions for the conduct of marine scientific research in the EEZ and on the continental shelf that cater to the interests of coastal and land-locked states (Articles 249, 254).

The provisions of the Convention aimed at the promotion of marine scientific research have become an element of the compromise agreements reflecting the interests of developed countries favoring the more extensive conduct of marine scientific research. In this respect, of principal significance are the general provisions of the Convention, stipulating, on the one hand, the right of all states and competent international organizations to conduct marine scientific research (Article 238) and, on the other hand, the duties of coastal states to promote scientific research and create favorable conditions therefore (Articles 239, 243). Coastal states should, in particular, endeavor to adopt reasonable rules, regulations, and procedures to promote and facilitate marine scientific research conducted, in accordance with Article 255, "beyond their territorial sea", *i.e.*, in their economic zones and on their continental shelf included.

The above-mentioned provisions are supplemented and specified by a number of rules, which determine the limits of the coastal states' competence in the regulation of marine scientific research. First of all, the Convention stipulates the basic principles providing that a coastal state shall not withhold its consent for the conduct of marine scientific research in its economic zone and on its continental shelf. In compliance with para. 3, Article 246 of the Convention,

> coastal states shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organizations in their exclusive economic zone or on their continental shelf ...

To this end, the states are given the duty to establish rules and procedures ensuring that "such consent will not be delayed or denied unreasonably".

To promote the conduct of marine scientific research, the Convention also provides for certain simplified procedures for receiving consent from a coastal state for conducting scientific research in the EEZ or on the continental shelf. Article 247 establishes a special, somewhat facilitating procedure for receiving consent of the coastal state for carrying out marine scientific work by a competent international organization or under its auspices. If the coastal state approved the conduct of such scientific research project within the framework of a competent international organization, such project is carried out through notification by such organization to the coastal state, if the state has not expressed any objection after the notification of the project. Of great importance in this respect is also Article 252 of the Convention, which provides for implied consent of the state for conducting scientific research in its EEZ or on its continental shelf. According to Article 252, a state or a competent international organization may proceed with a marine scientific research project upon the expiration of six months from the date upon which the application was made unless within four months of its receipt the coastal state expressed no objections.

The critics of the Convention usually point out that the elements of the compromise aimed, on the one hand, at the stipulation of the exclusive rights of the coastal states and, on the other hand, at the promotion of marine scientific research, are of different weight. The states concerned are not given any concrete rights and advantages through which they can ensure their interests in the field of marine scientific research. Unlike this, the rules determining the prerogatives of coastal states provide them with concrete and directly implementable rights. Coastal states are also given broad competence in deciding on the admissibility of conducting marine scientific research in the exclusive economic zone and on the continental shelf. The rules which, to this or that degree, are conceived as limiting the states' competence in the process of issuing consent are often vague.

For example, the Convention does not contain a definition of marine scientific research and, as a result, does not expressly differentiate between fundamental research and research for resources. However, the Convention distinguishes between scientific research projects conducted exclusively for peaceful purposes and for the benefit of all mankind (para. 3, Article 246), and projects which are of direct significance for the exploration and exploitation of natural resources, whether living or non-living (para. 4, Article 246).

The criteria "peaceful purposes" and "for the benefit of all mankind" mentioned in the Convention cannot practically assist in differentiating between fundamental research and research for

resources. References to the difficulties in defining and differentiating between marine scientific researches are certainly understandable, but they must be surmounted because states will have to address this question permanently and settle it practically in each specific case of considering and assessing the applications of other states and international organizations for the conduct of marine scientific projects in their economic zones and on their continental shelves.

The basis for such differentiation is contained in Article 248 of the Convention, which stipulates the provision of information on the purposes and objectives of the scientific program. Moreover, an analysis of the conventional provisions allows us to single out a legal criterion. It seems that the legal aspects of this problem can be coordinated with the legal classification of natural resources of the seas, as the Convention deals with the natural resources of the economic zone, continental shelf, seabed and its subsoil outside the limits of national jurisdiction.

That is why, from the legal viewpoint, research for resources is research that is conducted with respect to natural resources as legally defined for a given sea area. The Convention does not also specify the meaning of "normal circumstances", in which, according to para. 3, Article 246, the coastal state must grant its consent for marine scientific projects. The only specifying provision to this effect is that "normal circumstances" are not obstructed by the absence of diplomatic relations between the coastal state and the researching state (para. 4, Article 246).

In accordance with para. 5(b), Article 246, the coastal state may withhold its consent if the research project involves drilling into the continental shelf. But the meaning of the term 'drilling' is not given. It is not clear in this connection whether this notion covers selection of samples from the surface deposits for purposes not linked with research for resources.

Similar complexities may arise at the interpretation of what is meant by harmful substances also mentioned in this article.

Para. 5(d), Article 246 does not establish manifestly expressed criteria for assessing the completeness and accuracy of the information which researching states must submit to the coastal state. Moreover, it is not clear whether the inaccuracy of information, provided in accordance with Article 252, is meant here.

The Convention does not contain a list of allowable methods of marine scientific research, although evidently the application of methods enumerated in Article 246 is allowed.

The Convention does not also specify what is meant by the final results of a research which must be provided to the coastal state and what is "any major change" in the research program.

It follows from the above-stated that a coastal state, honestly complying with its duties ensuing from the Convention, may honestly be deluded in its interpretation of the conventional provisions, unless supplementary general criteria and guidelines are established and adopted (Article 25) with the aim of uniform interpretation of the conventional provisions.

Usually, on the basis of the above-stated, it is concluded that, in spite of a number of conventional provisions aimed at facilitating the process of conducting marine scientific research, actually the question of giving access to any kind of scientific research in the EEZ or on the continental shelf depends, in the long run, on a coastal state.

It is hardly arguable that concrete provisions of the Convention provide a coastal state with broad rights not to allow in its economic zone or on its continental shelf the conduct of those scientific research projects which it, for these or those reasons, considers as not complying with its national interests. At the same time, it would be a mistake to underestimate the general provisions of the Convention directed to the promotion of marine scientific research. Concrete conventional provisions regarding marine scientific research should be interpreted and applied in the light of the aforementioned general rules. These rules also establish a certain framework for states' policies in the sphere of marine scientific research. Coastal states, in particular, may not use their prerogatives in a way that actually denies the right of all states and international organizations to conduct marine scientific research, as proclaimed by the Convention.

### The Convention and the Legislative Practice of States

Although the legal acts of many states are mainly based on the provisions approved during the Third UN Conference on the Law of the Sea, they stipulate, as a rule, only such conventional provisions that concern the prerogatives of coastal states. The elements of the conventional regime aimed at the promotion of marine scientific research are either not stipulated by national legislation or stipulated in a very unsubstantial degree.

It should be noted, first of all, that in their national acts states consistently follow such principles according to which the conduct of scientific research in sea areas under their sovereignty or national jurisdiction requires the consent of a coastal state. At the same time, as a rule, these national acts do not contain provisions regarding the

promotion of international cooperation in the field of marine scientific research for peaceful purposes.

Of importance is the degree of competence stipulated by national laws and rules on the regulation of marine scientific research in the economic zone and on the continental shelf. National legislation knows three formulas determining the volume of their rights: jurisdiction with regard to scientific research", "exclusive jurisdiction with regard to conducting scientific research," and "exclusive jurisdiction to grant consent, regulate and control scientific research." These formulations were based on the interim documents of the Third UN Conference on the Law of the Sea and do not reflect the important changes which were introduced thereto in the process of the subsequent work. The opinion seems quite justified that the substitution of the phrase 'marine scientific research' for 'scientific research' means not merely a formulational improvement of the Convention's text but in essence limits the competence of the coastal state exactly to marine research.

In virtue of para. "e", Article 17 of the *Malayan Law* No. 311, the government may withhold its consent for the conduct by any state or competent international organization of a scientific research project if it has grounds to believe that the project will hamper the activities exercised by Malaysia in accordance with its sovereign rights and jurisdiction.

At first glance this provision looks quite justified. In actuality, the simultaneous concentration in a certain sea area of different kinds of lawful marine activities may result in the emergence of conflicting uses that, although justified by each user, cannot be completely ameliorated by legal means.

Evidently, the authors of the Convention have proceeded from this circumstance when they provided in para. "c", Article 240 that marine scientific research must not unjustifiably interfere with other legitimate uses of the sea. This is why in the legal sense marine scientific research conducted with appropriate scientific methods and means, compatible with regulations adopted by the Convention (paras. "c" and "d", Article 240), cannot be regarded as research hampering other uses of the coastal sea areas.

Moreover, to eliminate possible collisions between scientific research and other uses of the seas, the Convention prescribes that states adopt reasonable measures, regulations, and procedures to promote and facilitate marine scientific research, conducted in accordance with its provisions, beyond their territorial sea (Article 255).

Legislative acts of certain coastal states do not differentiate, as is established by the 1982 Convention, the regime of scientific research of the continental shelf beyond 200 miles, provided for by para. 6, Art. 246 of the Convention.

The Convention confines the time for considering the inquiries by the coastal state to four months. In accordance with Article 252, the inquiring state may proceed with research upon the expiration of six months unless within four months the coastal state withholds its consent or informs the inquiring state of the circumstances enumerated in this article. This formula, known as 'implied consent,' is transformed by the laws of certain states into a procedure which can, in fact, be characterized as 'implied denial.' The Argentinean law proceeds from the assumption that absence of an answer for six months should be regarded as denial of the inquiry.

The situation is equally complicated with regard to the compliance of national legislation provisions with conventional requirements concerning the volume of information which should be provided to the coastal state regarding the contents of the scientific research project. For example, unlike the conditions stipulated by Article 248 of the Convention, the Spanish law provides that national specialists get acquainted directly with the research project and the means of its realization in the scientific center of the inquiring state. However, the requirements of Article 248 of the Convention to this effect are limited to the duty to inform the coastal state of methods and means to be used in the process of research, including the class of the scientific research vessel and the scientific equipment and devices.

As one of the preliminary conditions for obtaining consent for a scientific project, beyond the conventional requirements, certain countries (Argentina, Brazil, Mexico) require an indication of the financial sources and the scientific establishment of the program. Article 248 of the Convention does not contain any special indications to this effect.

Guyana, the People's Democratic Republic of Yemen, and Indonesia have legislated the compulsory requirement to communicate the biographies of scientists participating in the project and a list of scientific works published by them.

In a number of cases, it is necessary to submit to the coastal state information on prior research programs or consents.

National law knows provisions which, unfortunately, cannot safeguard the successful completion of scientific work according to the program. For instance, the Italian regulations read that scientific research may be suspended if there are serious grounds to this effect. Such a requirement is practically devoid of any legal definiteness and

provides the coastal state with competence uncontrollable by international law. The presumably full list of grounds for the suspension and cessation of scientific research projects is given in Articles 248, 249, and 253 of the Convention.

Scientific research in the economic zone and on the continental shelf of Spain can be suspended if the conditions of its conduct, determined by national laws and regulations, are not followed. This provision can be construed rather widely and it meets no objections as long as it conforms to the provisions of the 1982 Convention.

The question of providing the coastal state with research materials, data, and results is also settled differently by different national laws. For example, limitation of the time by which all data and results should be submitted, from the moment of the vessel's departure from the area of research, is stipulated by the Chilean Decree No. 711 of 22 August 1975 and may create obstacles to honest compliance with this requirement.

According to the regulations of Trinidad and Tobago, all samples received during research are considered as property of this state. The possibility is not excluded that compliance with this regulation may result in collision between the duties of the researching state towards the coastal state and the duties towards the international community, which should be informed of the data and results of the projects having immediate significance for the expansion of knowledge about the marine environment.

Comparison of the Convention's provisions with national practice allows us to conclude, probably without exaggeration, that the conventional regime, in spite of the above-mentioned shortcomings, on the whole is of a balanced nature. Such conclusion is also confirmed by other considerations. The unilateral national acts of coastal states are characterized by the absence of appropriate uniformity, especially with regard to specific conditions of marine scientific research, which substantially complicates the planning and conduct of marine scientific research. In this respect, the conventional regime has considerable advantages. The Convention limits the states' jurisdiction and establishes uniform conditions for obtaining consent. It also determines uniform and mandatory terms for issuing consent to conduct scientific research. Prerequisites are thus created for the establishment of a more stable legal regime which, in compliance with international law, will prevail over any domestic prescriptions not complying therewith.

These and other arguments speak in favor of the assumption that despite the shortcomings of the compromise achieved at the Third UN Conference on the Law of the Sea, the Convention, in general, meets

the interests of marine scientific research to a greater extent than the unilaterally adopted legislation of coastal states reflecting, as a rule, their own specific interests. It is not by chance that many specialists come to the conclusion that the Convention's entry into force would favorably affect the development of cooperation between states and the establishment of a stable legal order in the field of marine scientific research.

The development of legislative practice after the adoption of the UN Convention on the Law of the Sea shows that the right of states to give consent and regulate the conduct of marine scientific research in their EEZs becomes part and parcel of customary practice in this sphere of relations. The requirement to receive the consent of the coastal state has gained general recognition and may be considered as part of customary law. The situation is not that clear with regard to more specific rules regulating marine scientific research that were approved by the Third UN Conference on the Law of the Sea.

Evidently, governmental practice has not acquired the necessary consolidation with regard to the application of specific provisions of the consent regime. The report of the UN Secretary-General notes in this connection that researching states have informed him of unjustified denials of consent for the conduct of certain research projects, even when the Intergovernmental Oceanograpic Commission (IOC) has officially approved of the expedition, and of refusals to allow marine scientific vessels to visit ports for the purpose of changing the crew, transferring equipment, and replenishing food supplies.

The coastal states, on the other hand, have met with difficulties in getting access to the entire volume of the data on the approved projects.

A number of rules, determining the limits of the coastal states' rights and jurisdiction and establishing the conditions and procedures for obtaining consent from the coastal state, are of purely treaty nature. Customary law, as a rule, has a common nature and is not capable of accepting specific, detailed treaty prescriptions. Moreover, governmental practice with regard to a number of specific rules stipulated by the Convention has no such uniform nature with regard to the recognition of the states' basic rights to regulate scientific research in their economic zones.

### Ways to Further Improve the Marine Scientific Research Regime

If the Convention enters into force, the basic directions in improving the regime of scientific research for states members are determined by a number of provisions already stipulated by the

Convention. The Convention contains a number of rules prescribing the bilateral and multilateral cooperation of states in promoting marine scientific research.

In compliance with Article 243, states must cooperate in creating favorable conditions for the conduct of marine scientific research through the conclusion of bilateral and multilateral agreements. Concluding such agreements, states evidently may establish simplified procedures for obtaining the consent of the coastal state for marine scientific research, or even provide for a notification regime. They may also coordinate more favorable conditions in terms of duties to the coastal state that are imposed on the researching state. The range of states participating in such agreements can be most broad. In particular, conclusion of agreements on promoting the conduct of marine scientific research in specific areas of the world ocean can acquire great significance.

In terms of policy and law, the conclusion of such bilateral and multilateral agreements can be favorably affected by the coincidence of interests of these or those states in facilitating the conduct of marine scientific research, by the need to regulate regional cooperation, and by other factors. For example, the problem of promoting marine scientific research can be settled not only through special agreements relating exclusively to this question, but also through incorporating relevant rules into broader agreements on scientific and technical cooperation. In this last case facilitation of the scientific research vessels' access to the sea areas under the jurisdiction of coastal states may be stimulated by providing such states with certain advantages or privileges in other spheres.

Another direction of cooperation is determined by the duty of states parties to the Convention to establish general criteria and guidelines in the field of marine scientific research within the framework of competent international organizations. Article 215 of the Convention provides that the purpose of such general criteria and guidelines is to assist states "in ascertaining the nature and implications of marine scientific research." Elaboration of such criteria and guidelines will be very important for the establishment of greater predictability in the functioning of the marine scientific research regime on the basis of the Convention, particularly in the application of a number of notions used by the Convention. For example, specification of what marine scientific projects are "of direct significance for the exploration and exploitation of natural resources" will make it possible to substantially concretize the limits of states' competence in settling the question of grounds for withholding consent for the conduct of marine scientific research in their economic

zones or on their continental shelves (para. 5, Article 246). Similar purposes will be pursued by a more precise definition of such notions as "normal circumstances" (para. 3, Article 246), "full description" of the scientific research project (Article 248), "major change" in the research project (Article 253), etc. The elaboration of general criteria and guidelines within the framework of competent international organizations will become one of the major means of achieving a more balanced regime of marine scientific research, stipulated by the Convention. It will also discourage coastal states from making subjective interpretations of research projects and will create favorable conditions for ensuring global observation and exploration of natural processes in the marine environment, to the benefit of mankind.

The political and legal situation around the Convention now allows us to assume with a substantial degree of certainty that if the Convention enters into force, it will bind all states. Countries with a significant marine scientific and technological potential may remain outside its limits. In this connection it is important to discuss the prospects ensuring such states' interests in the field of marine scientific research.

It is evident that states non-parties to the Convention will not be able to make use of privileges provided thereby, in particular, of the simplified procedures of receiving consent from coastal states. However, nothing prevents such countries from achieving agreements on the introduction of similar or even still more simplified procedures on a bilateral or multilateral, including regional, basis. The non-participating states will presumably endeavor to conclude such agreements with states parties as well.

Although the bilateral and multilateral cooperation of non-participating states will eventually promote the settlement of practical problems, the decisive improvement of conditions for conducting marine scientific research projects with regard to the long-term perspective can be achieved only through relevant universal agreements. Despite possible conflicts in the relations of states parties and non-participating states, they will be able, as before, to discuss the problems of marine scientific research within the framework of the existing universal international organizations that have competence in this area. The activities of such organizations, IOC UNESCO first and foremost, should be aimed at bringing the attention of the scientific public to the fact that comprehensive and free research into the phenomena and processes taking place in the world ocean is a necessary prerequisite for the effective and rational use of its riches, as well as for the protection and conservation of the marine environment.

To promote the further development of marine scientific research under the conditions of only partial participation in the Convention, IOC UNESCO could begin to consider the expediency of adopting the International Code of Conduct in the field of marine scientific research. Such Code could stipulate a number of general and specific standards for states' conduct in the sphere under consideration, including promotion and facilitation of marine scientific research. Following the example of other international codes of conduct under elaboration, the code of conduct in the sphere of marine scientific research will not be given mandatory jurisdiction. Nevertheless, as a generally-accepted international document, it could substantially influence the practice of states, including their legislation. If relevant agreements are achieved, the Code could promote the unification of rules with regard to general conditions of conducting marine scientific research in sea areas under the jurisdiction of coastal states, procedures preventing unjustified delays or denials of consent to the conduct of scientific research, and regulations concerning the access of scientific research vessels to foreign ports.

## DISCUSSION

***Anatoly Kolodkin:*** Will there be any questions to Professor Knauss or Dr. Andrianov? Mr. Major, please, have the floor.

***Philip Major:*** Let me say how pleased I am to be here and thank you very much for your hospitality. For those of you who are not familiar with New Zealand, may I tell you that we are noted for our commitment to peace by banning nuclear warships from our shores and also by the fact that we have 63 million sheep and only 3 million people. So you'll bear with me then if you find my thinking a little woolly.

We have some difficulties with Professor Knauss's speech because it is very difficult to criticize research. There's a truism that all research must be good, and certainly with problems that he outlined such as population pressures and pollution, research can provide some answers. But that attitude has to be contrasted with the adage that a little knowledge can be a dangerous thing. Particularly with regard to fisheries, offers of research generally have an impact on the management by the people that the research is conducted for. Consequently, the nations that are receiving the offers of research are suspicious of the reasons for those offers. Often there are legitimate scientific findings from that research; no one can dispute that. But the point is that often these scientific findings come from work that has taken place over a very short time period, so there are wide confidence intervals on that research. The findings can be very broad, and consequently it is suggested that there may be more resource available for harvesting than is truly the case. That miscalculation, combined with industry pressures from distant water fishing nations, can create great difficulties in negotiations for the coastal state.

There have been some suggestions that this circumstance can be controlled by placement of observers on vessels, and by the coastal state's being involved in the planning of the research itself. But a lot of coastal states are developing nations or they are not wealthy nations, and they don't have the people available to place on board the vessels or to be able to make useful inputs into scientific planning.

Equally there are no guarantees on the interpretation of the results of the research. In the case of New Zealand, for instance, we have been involved in the planning of research by foreign nations coming to our shores, and we have found that the research that took place was not as it was planned. So again it poses a problem.

Section 246 is sufficiently broad to allow the exclusion of most research by a coastal state if that is its wish, because it can be inter-

preted in a range of different ways. But the question I have is really a practical question: how does a coastal state overcome the problems and the suspicions and the difficulties in obtaining legitimate research, rather than research which has self interest as its cause?

*John Knauss*: I think the best way to overcome suspicion is to cooperate with the legitimate scientists in the country in whose area you wish to do the research. That is common practice amongst most of us. I agree that there can be bad research; we're not perfect and sometimes some of us have ulterior motives for the work we do. But Article 246 was indeed specific on the issue you raised having to do with the development or estimates of fisheries stocks for negotiations with distant water fishing nations, namely, that you can indeed exclude that kind of research if you do not want it. That kind of research is a very small part of the research that is being done around the world in the EEZ waters of coastal nations by researching states. My concern is the very broad interpretation of that clause to refuse to allow research that does not have that end in view.

How do you relieve the suspicion? I think the best way to relieve the suspicion is essentially to find scientists in the coastal state who are used to doing the work the researching state wants to do and who will cooperate with them and develop the program together. A country like New Zealand, although it may have only three million people, has an extraordinary number of first class marine scientists. There has never been any difficulty in finding such colleagues in New Zealand, I can assure you.

*Anatoly Kolodkin*: Professor Visotsky.

*Professor Visotsky*: Several days ago, I spoke in Sevastopol at a meeting of hydrophysicists and other marine scientists on the issue of the legal regime of marine research. Among other issues discussed there was space oceanography. The data that you require permission from the coastal state to collect, we can receive without much effort, without much difficulty, and without any permission from the coastal state. Professor Knauss and Dr. Andrianov, how would you comment on such a question or such a statement? Thank you.

*John Knauss*: If I understand your question correctly, and I'm not sure I do, you asked, if you had information from satellites, what about permission? It may be that I should allow the legal expert on my left to make the definitive comment on this, but as a scientist it is my

understanding that satellite reception of information from the ocean is not covered in the marine scientific research articles of the Law of the Sea Convention and therefore permission is not required. At least, that is the practice, regardless of what the law is.

***Valery Andrianov***: Although I am a lawyer and understood the question quite clearly, my response would be very similar to the response given by the non-lawyer, because this is again a question of what constitutes marine research. From the point of view of technology and environment, marine research consists in the use of the necessary vessels and of certain methods which are typical. Besides, research conducted from a satellite does not pollute, does not require drilling, and gives no basis upon which a coastal state can refuse.

***Anatoly Kolodkin***: Professor Tarkhanov.

***I.E. Tarkhanov***: I have a question for Professor Knauss. What is the U.S. practice as regards access to the research vessel for foreign scientists in whose economic zone the vessel is conducting research?

***John Knauss***: The question of access to the U.S.?

***Anatoly Kolodkin***: No, no. Your ship is in the economic zone or on the continental shelf. What is your practice towards scientists of this coastal state on board your ship?

***John Knauss***: Our ships request permission in excess of 300 times a year to do research in the exclusive economic zones of foreign nations. I do not have the most up-to-date figures, but when I last looked at them two years ago, the percentage of denials of research was about 7 percent. That is, 93 percent of the time we were able to get permission to do research. However, scientists do not apply for research very often in areas where they know they will be denied. Therefore, for example, over the ten year period that I looked at the data, there were only four requests for the United States to work off Cuba. All were denied. Now we do not have diplomatic relations with Cuba, but Cuba is only 50 miles from our shores and the Gulf Stream runs right along its shores. We would like very much to work in those waters. I am certain that if our scientists had not known that they would be refused, there would probably have been an additional twenty-five or thirty requests over that period of time to have worked in Cuban waters, and the number of denials would not have been four but

thirty-four. So the fact that we have had only 7 percent denials has something to do with self selection. However, there are very few countries where we have had significant difficulties.

*[Coffee Break]*

***John Knauss:*** I apologize for not understanding the question as asked. I was told at coffee that I gave a brilliant answer to the wrong question. Of course, according to the treaty, one must invite foreign observers or participants to partake in all of our research cruises that take place on the continental shelf or the exclusive economic zone, and we do this. We regularly expect to have such persons aboard. The coastal state does not always accept our offer to have persons aboard. I have no record of how often they do, and how often they do not. During the coffee break, I got together with Professor Wooster from the University of Washington, and our best guess based upon our own research vessels is that that offer is accepted about 50 percent of the time. The important thing is that 100 percent of the time they are invited to come aboard and participate.

***Anatoly Kolodkin:*** Professor Miles.

***Edward L. Miles:*** I have a question for Dr. Andrianov, whose talk I listened to with great interest. I was closely associated with the IOC through the 1970s and into the early 1980s but not since that time. At that time, the United States informally pursued the option of splitting off IOC from UNESCO for a variety of reasons in order to increase efficiency. This idea was opposed very strongly by the Soviet Union and by some developing countries, in particular, Brazil and Argentina. If I understood Dr. Andrianov correctly, he mentioned the possibility of maybe conceiving of an IOC separate from UNESCO.

In addition to the opposition of certain states in the early 1970s, there were other problems, problems we couldn't see any way around; in particular, funding. UNESCO does provide IOC with a significant amount of secretarial and other support, and we did not see where this funding would come from. So I wonder if that very intriguing statement in Dr. Andrianov's presentation represents a rethinking of the whole problem by the Soviet Union and an indication that what appeared to be problems before could now be resolved.

***Valery Andrianov:*** When I spoke about the withdrawal of the IOC from UNESCO, I had in mind its increased effectiveness as regards marine

research. As far as financing is concerned, withdrawal would call for an independent budget for this organization. Taking into account the Convention's provisions to the effect that all marine research should be carried out for the behalf of all mankind, I believe that all communities should take part in providing funds for the IOC, which the IOC will pay back with fruitful marine research. Of course, this is not the final answer. What I had in mind primarily was the more appropriate position for the IOC within the new legal framework.

***Anatoly Kolodkin:*** Dr. Barabolya has a question.

***Piotr Barabolya:*** Professor Miles asked what I wanted to ask of Professor Andrianov. But I have two questions to put to Professor Knauss, and I would like to say that I liked both papers very much because they advanced new proposals. And my question is as follows.

First, you said that hydrographic research, if carried out by hydrographic vessels, can be carried out without the consent of the coastal state, at least as far as the economic zone is concerned. This is the way I understand you and I believe that this is correct. But the coastal state should be told that this is purely hydrographic research.

Secondly, will the representatives of the coastal state be admitted to the vessel so that they can see for themselves that this is not marine research but purely hydrographic research?

***John Knauss:*** I think you're correct, sir, that if a hydrographic survey ship was to do such a survey on a continental shelf or the exclusive economic zone of a coastal state it should indicate to the coastal state that it is doing this work and should indeed invite observers aboard to insure that it is indeed a hydrographic survey. I'm not sure that there's any legal requirement that they do so, but I think it would make good sense for future relationships between the countries involved.

***Anatoly Kolodkin:*** Philomène Verlaan wants to ask a question.

***Philomène Verlaan:*** I have three questions for Dr. Andrianov. First, what has been the Soviet experience in applying for permission to do marine scientific research in waters of countries other than the United States? Second, has the Soviet Union used Article 252, the implied consent provisions, when you have not received an answer within the four month period? And third, if you have received denials of permission from other coastal states, were those reasons among the four reasons listed in Article 246?

*Valery Andrianov:* As far as I know, Soviet researchers have had to overcome considerable difficulties in conducting research projects in the area of southwest Asia. These difficulties relate not only to research activities but also to the entry of Soviet research ships in ports. Unfortunately, I'm not in a position to give you detailed information concerning the steps that were taken in such instances when no permission was granted. This brings us again to the point that the researching state is practically defenseless in legal terms in such a situation when it considers that the refusal to grant permission is not legally grounded. I invite Dr. Skalova to add to this answer.

*Dr. Skalova:* I would like to come back to the use of space technology for ocean research, which I believe is very important, perhaps not now but in the near future. The question relates to the legal regulation of the use of space research for ocean research. At the present moment, this research is done without the permission of the coastal states because it is regulated by the norms of space law, and as you know, they provide for the freedom of space research. However, there can be no control or no need to get the permission of the coastal state for such investigations.

A question arises at the stage when the images resulting from such probing are distributed. In discussion of the problems of distant probing, certain states believe that coastal states receive for free the data relating to the space probing of their coastal waters. At the present moment, we have a sufficiently strict regime of marine research within the zones, and this makes states look for alternative ways to carry out such research. As you know, we cannot insure the effective preservation of living resources within the zone without such research data. Some hold the view that remote sensing of the ocean will somehow diminish the effectiveness of the present regime of marine research within the zones. On the other hand, we know that Sputnik, our information satellite, cannot be considered as a true alternative for conducting marine research. It is effective only when we use space data alongside data obtained through marine research. Here we have an interesting phenomenon, because coastal states, especially among developing countries, should be interested in obtaining such precise data that gives scientifically proven information about the bioproductivity of the specific part of the zone.

It is difficult to say that the Convention regulates the conduct of marine research through the use of space technology. Indeed, the Convention does not explicitly mention this point. As we know, in the part dealing with contamination of the environment, aircraft are

mentioned, but no mention is made of spacecraft. In the course of discussions at the Third UN Conference, the use of space technology was also broached, and the Group of 77 tried to spread pertinent provisions about space technology, too. In the legislation of a number of countries, among the means that can be used for carrying out marine research, aircraft are mentioned. I would like to emphasize that not only aircraft but a more general category involving space technology might be used, too. A possible approach to solving this issue is as follows.

The conduct of research in exclusive economic zones through the combined use of space technology and marine research methods could be controlled by provisions of the 1982 Convention and the agreement on remote sensing of 1986. As you know, according to the principles of remote sensing, information about the territories under jurisdiction is provided to the interested states for some fee, not for free. But if the state conducting the remote sensing is also interested in investigating specific areas of the ocean, it could provide this information free, on the condition that its research vessels freely operate within the area of the specific coastal state.

*Anatoly Kolodkin:* Dr. Nikitina, do you wish to add something?

*Elena Nikitina:* Dr. Skalova spoke about the possibility, while using remote sensing, of exchanging data on a foreign currency basis. I believe that it is not quite correct to speak about such an approach to this issue, since this is a violation of the international data exchange which exists traditionally. This is the principle by which countries that provide data can also receive data free of charge.

*Dr. Skalova:* WMO practices the free exchange of data, but remote sensing scientific data is regulated by principles that require payment for such data.

*Anatoly Kolodkin:* Dr. Tsarev, do you have a question?

*Viktor Tsarev:* Marine research and its findings are of interest to developed and developing countries. But as far as the United States and the Soviet Union are concerned, our interest in making universally binding legal solutions is obvious. It was said that the 1982 Convention contains terms calling for further clarification. I would like to draw your attention to the terms 'peaceful uses' and 'fundamental marine research'-- research carried out in the interests of all. When we use

the term 'peaceful uses,' we remember that, when the Convention was drafted, no distinction was made between fundamental research and applied research. Perhaps the practice of past years makes it necessary for us to come back to this term, 'fundamental marine research' and in our subsequent efforts to rethink it once more, clarify it. I would ask the speakers, including Professor Visotsky, to speak on this matter.

*John Knauss*: If you're suggesting that we need another convention to rethink the rules on marine scientific research, I would hope we could postpone that for some years. I think we have enough to do trying to live with what we have inherited in the 1982 Convention. As to the question of fundamental versus applied research, my colleagues have enough difficulty with that definition in our own university; it becomes even more difficult when you try to deal with it at an international level. I guess I'm not very enthusiastic about your suggestions that we should reopen this particular question.

*Anatoly Kolodkin*: I would like to add that Article 240(a) says that marine research shall be carried out exclusively for peaceful purposes and to remind you of our discussion of Professor Dekanazov's statement earlier. What we have in mind are the provisions in effect in the Antarctic today.

Professor Visotsky?

*Professor Visotsky*: At the present moment not all the possibilities created by the 1982 Convention as regards marine research have been implemented. We should give more thought to how best we can use what we have already agreed upon. I have read through the Convention once more and I have discovered that perhaps this is the first treaty to consider a research vessel as a legal entity. But in speaking about research vessels in the Convention, certain limitations are also introduced.

*Anatoly Kolodkin*: Dr. Shinkaretskaya has a comment.

*Galina Shinkaretskaya*: Dr. Andrianov's contribution is very interesting. When he mentioned the competence of international organizations, he said that perhaps IOC could perform the function of interpreting the Convention. Perhaps I misunderstood him. The Convention is the fruit of the joint effort of states, and the IOC is only one of the organizations.

*Valery Andrianov:* The Convention says that the states, through international organizations, should take necessary steps for detailing conventional provisions. If an organization takes part in this work, it will inevitably interpret the provisions of the Convention in order to make it clearer, and so on. There will be no problem if the IOC charter is changed in that direction, because international organizations, as you know, have the same status in interpreting the 1982 Convention as states participating in the Convention.

*Anatoly Kolodkin:* Professor Oxman?

*Bernard Oxman:* When President Reagan declared an exclusive economic zone off the coast of the United States, he declared sovereign rights over the commercial exploration of resources, but he expressly declined to assert any jurisdiction over marine scientific research. Similarly, the statutes of the United States dealing with the continental shelf do not restrict marine scientific research. They do, of course, regulate commercial exploration.

It seems to me that the policy reasons behind the President's decision not to assert jurisdiction over marine scientific research are equally applicable to all major oceanographic states. As we well know, the greatest contributions to oceanography these days are being made by the countries with the largest oceanographic capabilities, which include the scientific institutions of the Soviet Union and the United States.

Is it not worth thinking about measures pursuant to which the Soviet Union, as a major oceanographic power, could itself try to set a similar, perhaps not identical, good example for the practice of other coastal states? It should indicate its own conviction that, assuming adequate cooperation, there is nothing to fear from scientific research and everything to gain. My question is whether one could think about a policy that paralleled the policy adopted by the United States. A modest step would be to require notification and participation, but to dispense with the consent part of the regime for purposes of setting a good example for other countries, with an important qualification. While both of our countries have environmentally sensitive areas in the north, the Soviet Union has a much larger area there. Therefore, one could imagine a policy in which the conduct of research in the economic zone and on the continental shelf was liberalized but was expressly subject to the powers of the coastal state under Article 234 of the Convention, which deals with environmental controls in ice-covered areas.

*Valery Andrianov*: Well, of course, we can think about that. The question is, what will it lead to? The international community at present finds itself at a stage when coastal states are mostly drawn by the benefits they received from the Convention. There is little criticism for the drawbacks linked to these benefits. Such a trend might exist, and mutual renunciation of the rights and privileges under the Convention obviously may exist, but I'm not sure that such an agreement between the USSR and the United States will be supported by other states.

*Anatoly Kolodkin*: Professor Miles, please.

*Edward L. Miles*: Mr. Chairman, I apologize for taking the floor again, but I'm troubled by Dr. Andrianov's response to Dr. Shinkaretskaya's question on the issue of whether or not the IOC has a role in interpreting the Convention. I'm troubled because I think this kind of proposal is likely to generate much more conflict than either of us would be prepared to deal with.

I have in mind two kinds of difficulties. In Article 319(a), the Office of the Secretary General assumes, and has in fact informed other UN agencies that it regards itself, as the only player in the interpretation of the Convention, as far as the agencies are concerned. If you now propose that IOC take on this role with regard to marine scientific research, Part XIII, then I think you will set in motion a significant conflict between UN headquarters and IOC/UNESCO which will not be productive from our point of view.

The second problem is that, if you propose that IOC undertake this kind of role, the developing countries are likely to see this as a ploy in which you are simply trying to water down the provisions of the Convention through the back door. As a result, this too is likely to generate conflict. The only potential utilization of IOC that seems to me to make sense here is on a regional basis, in which developing countries and advanced maritime countries participate in regions of interest to them. In their participation, say, in Project WESTPAC in which I have been involved, it is clear that the developing country coastal states have primary interest in coastal, biological oceanography, and pollution studies. The advanced maritime countries have primary interest in physical oceanography. One can effect a trade there in which both sets of interests are satisfied without any symbolic conflict over the interpretation of the Convention and prolongation of that issue which occupied us for so long. So I would hope you would rethink that proposal.

*Anatoly Kolodkin:* Are there any more questions? No? I give the floor to Dr. Nikitina from the Institute of World Economics and International Relations of the USSR Academy of Sciences.

# IN SEARCH OF POSSIBLE MECHANISMS OF STRENGTHENING SOVIET-AMERICAN COOPERATION IN MARINE RESEARCH

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The selection of mechanisms for the interaction of states is of principal importance for the improvement of USSR-U.S. cooperation in marine research and data exchange. Obviously, it is necessary to use the complex of already existing mechanisms of cooperation in this field and at the same time to find new forms of deep and stable ties for the nearest future. With the consolidation of bilateral relations, we ought to benefit widely from the opportunities opening up for us via international organizations concerned with marine research and data exchange. Participating in solutions to multilateral problems within these organizations, our countries, which have great opportunities in science and technology, joint interests, and a history of cooperation in marine resesarch, can coordinate our views and reach agreement on these problems and further plan joint activities for strengthening ties in oceanographic research. In our experience, international organizations usually serve as an adequate means by which national interests can be correlated with the interests of mankind.

After these general considerations, I would like to touch upon some concrete problems. An analysis of the activities of international organizations from the standpoint of their real practical possibilities in marine research and oceanic data collection and exchange and in strengthening Soviet-American relations in this field reveals that the effective instrument here is the World Meteorological Organization (WMO), together with some other governmental and nongovernmental international organizations (for example, IOC, which has competence in marine research).

WMO is the oldest specialized agency of the UN system. Besides meteorology and climatology, it deals actively with marine research and coordination of international investigations of oceanic processes and marine monitoring. In the middle of the 1980s, WMO expenditures on marine activities equaled one fifth of the regular budget for all its scientific and technical programs. In comparison, the financing of marine activities of some other organizations totaled 11 percent in UNEP, 8 percent in FAO, and 4 percent in UNESCO. The USSR and the U.S., which have high scientific and technical marine potential and

which actively participate in the majority of WMO's programs in the oceans, together finance approximately 37 percent of its regular budget. To them, this international organization is of great importance, and its approaches to marine activities correspond mainly to their oceanic interests. The WMO now helps to solve several important problems. WMO has created an infrastructure to aid in the effective collection, processing, and exchange of regular and timely information in a global context, and it arranges and coordinates joint large-scale scientific programs.

WMO's marine activities have some important characteristic features. Firstly, WMO has organized the highly developed system of international operational collection and dissemination (in real time) of oceanic and marine meteorological data through World Data Centers in Moscow, Washington, and Melbourne. The data include, for example, parameters of salinity, temperature, currents, and results of marine meteorological observations, in some cases -- waves, sea level, ice conditions, and so on.

The daily international flow of marine observations from different states totals six thousand, and the USSR and U.S. contribute a significant number of them. WMO's operational oceanic activities include also processing and exchange of oceanographic and marine meteorological services, which are so necessary for marine economics and securing the safety of life. Thereby it aids the national services of our two countries in forecasting weather, marine conditions, providing ice services, in prediction of storms, tropical cyclones, and so on. Actually the regular international collection and exchange of oceanic data is today a unique phenomenon. Not a single other international organization dealing with oceanic activities realizes such programs on a worldwide basis.

That is why the USSR and the U.S. should enforce, on the basis of the already developed infrastructure, their participation in WMO activities in collection and exchange of oceanic data to coordinate more closely their interests in this field. Primarily they should maintain further development of the Integrated Global Ocean Services System by accelerating the frequency and density of marine observations on global scale, by enlarging them through new types of monitoring, by supporting the development of the observation system in the countries of the Third World, by organizing the collection of information in polar regions, and by further improving marine services.

Secondly, WMO coordinates international investigations in the oceans, particularly in one of the most modern directions of marine research today -- the study of the interaction between ocean and

atmosphere, the role of oceans in the formation of weather and climate on our planet, and the prediction of marine conditions. These branches of research are of a great importance for the USSR and U.S., and our countries have been actively carrying out such investigations for some years.

In 1981 USSR began to develop the large national program RAZRE-ZI, connected with the study and modelling of the energy exchange between the ocean and atmosphere in five principal energoactive zones of the ocean. One of the major tasks of this program -- the construction of a joint model of the circulation of ocean and atmosphere -- coincides with the aims of the World Climate Programme of WMO. The USSR is now considering our country's options to cooperate internationally in this field, particularly in the coordination of joint efforts with other countries to organize regular monitoring in the energoactive zones of ocean. That's why the coordination of joint investigations with U.S. scientists and elaboration of common approaches to such WMO programs as the Tropical Ocean and Global Atmosphere (TOGA) and World Ocean Circulation Experiment (WOCE) would be of special interest and have important perspectives. The additional motive for making our points of view closer and for improving our mutual ties is that a certain part of investigations, realized by our countries in WMO, are very closely connected with the directions of research fixed in the Soviet-American intergovernmental agreement on the investigation of oceans.

Thirdly, nowadays WMO marine activities have become of primary importance for our two countries because of recent changes in the international legal regime of marine research and the collection of oceanic information. This regime has set certain limits on the process of ocean studies, but due to specific features of WMO marine activities, influences it to a lesser extent than other international organizations competent in marine research. Such features include the fixed national and territorial responsibility of certain states in collecting and disseminating several types of marine data from their "areas of responsibility," covering practically the whole ocean. WMO has begun to play a more vital role in providing different states with regular oceanic information from marine areas of different functional jurisdictions, including coastal regions, using the procedures of international data exchange. WMO is also able to facilitate the development of international marine projects in regions under the jurisdiction of coastal states.

Thus WMO can be considered as an important element in the process of forming and developing the system of multilateral intergovernmental regulation of marine scientific and technical activities. On one

hand, it serves as an adequate interntional mechanism for marine research and data exchange, and on the other hand, it is a necessary part of the contemporary international legal regulation of a certain part of international marine relations concerned with some aspects of marine studies.

The USSR and U.S. play an active part in this process; their interest in solving these problems under the auspices of the UN confirms the practical benefits of participation by our countries in WMO activities as well as their intent to develop further international cooperation on matters of interest to the majority of states.

Finally, I would like to dwell for a moment on the question put by Professor Oxman at the end of his intervention about the possibilities of organizing data collection. The question, if I understood it correctly, was whether it is possible to eliminate the consent regime, in our mutual interest. I believe that one should seek mutual mechanisms of cooperation, particularly in organizing data in polar areas. Practical steps have been taken in this direction, which are confirmed by the Murmansk initiatives of Mikhail Gorbachev. The initiatives propose increasing broad cooperation in the Arctic regions to study the Arctic environment and to collect data in those areas.

# MARINE SCIENCE COOPERATION IN THE NORTHERN NORTH PACIFIC: THE PICES PROPOSAL AND INSTITUTIONAL INTERACTIONS

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What I want to talk about is the establishment of a new regional organization for marine science in the north Pacific. You may wonder why that is relevant to our discussions on the law of the sea. I see its relevance in the way that marine scientific research must develop in the years after the creation of the Law of the Sea Convention, the constraints imposed on research or, another way of looking at it, the opportunities presented for cooperative work. I also consider the urgency of the need for scientific knowledge on a variety of questions, scientific knowledge that can only arise through cooperative work.

Let me give you a few examples of the kinds of questions that arise now in relation to implementation of the law of the sea. Professor Miles mentioned one of them the other day. What is the population structure of pollock in the Bering Sea? It clearly impinges directly upon the management of that fishery. Are they indeed straddling stocks, or is each population intensely patriotic, staying exactly within its own economic zone? The extent of mixing is a scientific question, and it's one we don't have an answer to, but we could have. More generally, the so-called stock recruitment question, the basic question of fishing management is: how many fish can you take without impairing the possibility of their being reproduced? That's also scientific question and one you can't really answer without cooperation amongst the scientists in all the areas where that population exists. One has to look at that question in the light of the environmental conditions that pertain to the population, because whether or not we have straddling stocks, we have a straddling environment that extends across national boundaries without regard to them.

Another question that arises in these post-UNCLOS years: is global warming taking place? And if it is taking place, what will its effects be on, for example, the distribution and abundance of fish stocks? That's another important scientific question; we don't know the answer, and we have to work together to get it.

As we've heard today, there are already in existence a number of international organizations concerned with marine science in one form or another. For example, the Intergovernmental Oceanographic Commission is the only global organization that deals exclusively with

marine science at the present time. The World Meteorologic Organization is concerned with meteorology, the Food and Agricultural Organization is concerned with fisheries, the UN Environmental Programme is concerned with pollution. There's a whole family of nongovernmental organizations, mostly within the framework of the International Council for Scientific Unions. One of the best known of these in the marine field is SCOR, the Scientific Committee on Oceanic Research. These are part of the mix, in my view, of organizations that are needed to do research in this end of the twentieth century. I want to talk about one of the elements in that mix, namely, the regional intergovernmental organizations.

An example of these, of course, is the International Council for the Exploration of the Sea, ICES, which is well known in the north Atlantic and of which both the United States and Soviet Union are members. The so-called PICES proposal is to establish such an organization for the northern North Pacific, a regional body somewhat analogous to ICES. The name PICES means nothing more than a Pacific ICES -- this organization doesn't have a name yet, but it's a convenient way to talk about it.

The purpose of this organization is very broad; its very breadth of the purpose explains the problem that I want to discuss with you. Its purpose would be to advance scientific knowledge of the northern North Pacific with respect to the ocean environment, its interactions with the land and the atmosphere, its role in and response to climate change, its flora, fauna, and ecosystems, its uses and resources, and its response to human activities. So it is proposed to have a pretty broad look at all of the ways that the ocean interacts within the region. The area of proposed activity is the northern North Pacific, including the Bering Sea, generally north of 30 degrees North, although there's no specific boundary. The initial discussions have involved five countries, Canada, China, Japan, United States, and the Soviet Union, although the intention is that membership would be broadened to other countries that are interested in scientific work in the area.

The proposal implies that there are functions required to be carried out in the region that are not now adequately performed. In other words, the existing international organizations can't really cope with these functions. These functions relate to the general objective of promoting scientific investigation and information exchange on the oceanography and fisheries of the northern North Pacific. These problems extend not only across the region, regardless of national boundaries, but across disciplines and across institutions, because no single institution deals with such a broad set of issues. A number of functions have been proposed for this organization:

a) Promoting and enhancing the exchange of available scientific data and information including key time series data;
b) Reviewing research plans and programs of international interest;
c) Identifying critical research problems and methods appropriate for their solution;
d) Planning, developing, and coordinating cooperative investigations of problems of common interest;
e) Evaluating and interpreting available scientific data and information.

These functions relate not only to marine science in general -- what was referred to earlier as fundamental research -- but also to the applications: studies of climate change and its effect on fisheries, the changes in the environment, the evaluation of marine pollution. Though it would deal with scientific information that is relevant to management, the organization is explicitly not to have any management functions. This separation of science from management is like the separation of church and state; it insures objectivity on both sides.

Let me tell you the status of this proposal today. The proposal has been discussed informally since the 1970s and reached the level of intergovernmental consultations in December 1987; a second such meeting has just taken place in mid-November 1988. At the 1987 meeting, there was general agreement that the proposals contained in the Canadian Concepts Summary (attached) provide a useful basis for further discussion.[1]

As I noted earlier, the solutions to the scientific problems require an effort that is both interdisciplinary and interinstitutional. The interinstitutional aspect of these problems may not be widely appreciated, but in my view they are at the heart of many of the difficulties encountered nationally, of course, but in the present context internationally, in cooperative scientific ventures. Let me explain why. I think that these problems are so broad that they require the attention of scientists of different kinds: atmospheric scientists, fisheries scientists, oceanographers of the biological, chemical, and physical specialties.

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[1]Establishment of the North Pacific Marine Science Organization, PICES, was agreed to in December 1990 by representatives of Canada, China, Japan, the Soviet Union, and the United States. After three of these countries have ratified the Convention, the first meeting of the Governing Council will be convened, probably in 1992.

For example, here's a scenario that is, I believe, quite likely. The change in wind circulation over a period of several years affects the ocean circulation, and that in turn affects the success of larval fish in reaching their feeding grounds, thereby leading to unusually small (or large) year classes. Conversely, changes in the distribution or abundance of organisms or of pollutants could reveal otherwise unsuspected changes in ocean circulation driven by the atmosphere.

The difficulty that arises is that, in most countries, fisheries, oceanographic, and pollution investigations are conducted in different agencies and university departments, in different places within the country. These various centers of activity are not very well coordinated nationally. This lack of coordination at the national level carries through to the international institutions that support cooperative scientific ventures.

Let me tell you a story about one organization and the kind of difficulties that arise because of this problem. In the International Council for the Exploration of the Sea, ICES, the breadth of interests are very similar to those that are proposed for this new organization in the Pacific, which is in many ways an analog of the Atlantic organization. There are eighteen member governments in ICES and each of them has two delegates. In a few countries -- three of them come to mind: the Federal Republic of Germany, Norway, and the United States -- the pattern is that one of these two delegates comes from a university department and the other comes from a government agency, thereby attempting to bring together the diverse interests at the national level. In most countries, however, the representation is entirely from fishery departments. For example, from the United Kingdom the two delegates are the Director of the Fishery Laboratory in Scotland and the Director of the Fishery Laboratory in England. The principal oceanographic and atmospheric science centers in Britain are not represented, and in general the participation from those laboratories is very small. The same situation is to some extent true in the Soviet Union, where the delegates and nearly all the participants in ICES matters are from the fisheries side, and the major oceanographic and atmospheric science laboratories, for example from the Academy of Sciences, are not represented.

In most ICES countries, the national contact agency is the source of funds for participation in the work of that organization, and it is rare for one agency to pay travel expenses for a scientist from a different agency. This has led to serious problems in organizing the work of ICES in the field of marine pollution, because ICES has an advisory role to the Oslo, Paris, and Helsinki Commissions on the assessment of pollution problems and an advisory body, ACMP, to

discharge that responsibility. Unfortunately, in many countries the major effort in pollution studies (and regulation) is in agencies other than fisheries agencies. Thus the pollution agencies are not represented at ICES meetings, their scientists are not sent (at national expense) to ICES working groups, and the quality of ICES advice in this field is potentially weakened.

The problem is not unique to ICES. It has been said that the marine programs of UNESCO and FAO suffer from domination of the former by pedagogues (and their Ministries of Education), the latter by farmers (and their Ministries of Agriculture). Other examples include WMO (weather bureaus) and the International Hydrographic Organization (hydrographic offices). As the holistic nature of scientific questions in the ocean becomes more apparent, so does the inadequacy of present institutional arrangements, especially as they reflect lack of coordination at the national level.

What then can we do about it? It seems reasonable that national lead agencies be designated for contact with one or another international organization. Which agency leads in a given country is a function of the structure of the government with regard to the activity of the organization and the nature and degree of specialization of that activity. What is needed is a mechanism within each country, linking the agencies concerned with key elements of the international organization's program. In the case of PICES (and ICES), these would include academic and government research in oceanography, fisheries, atmospheric science, and marine pollution. The mechanisms should ensure appropriate participation in the organization's activities so that its goals can be met and the government's interest thus served.

## NORTH PACIFIC AND BERING SEA SCIENCE ORGANIZATION CONCEPTS:

1. The organization would promote cooperation and the free exchange of scientific information in the field of marine science by the following means:
   - exchange of scientific and technical information;
   - organization of workshops and symposia;
   - other forms of cooperation which may be agreed to;
   - encouragement and facilitation of direct contacts and cooperation between institutions and organizations, universities, government and private sector;
   - joint development and implementation of multi-national projects.

2. The area to which the organization applies would be the Bering Sea and the North Pacific Ocean north of 30 degrees N latitude.

3. The organization would seek to establish and maintain working arrangements with other international science organizations with related objectives.

4. Contracting parties would comprise Canada, Japan, the People's Republic of China, the Soviet Union, and the United States of America. Participation of other countries would be possible under the rules developed on this subject.

5. The organization would meet in ordinary session once a year.

6. Contracting Parties would contribute annually their share of the Budget adopted during the Annual Meeting.

7. Each Contracting Party would be represented on the Governing Council by a maximum of three delegates. Each Contracting Party would have only one vote. No limit would be set on the number of technical experts and advisers.

8. A President and Vice-President would be elected from the national delegates and would hold office for one year. On assuming office, the President would cease to be a delegate.

9. The Agreement would enter into force on signature of the Contracting Parties and remain in force for five years, after which it could be extended for successive five-year periods.

10. Contracting nations could withdraw six months after formal notification of intent to terminate.

11. The organization would be governed by procedures determined and agreed at the first meeting. Changes to procedures would require the unanimous agreement of all Parties through the national delegate.

[Referred to as *Canadian Concepts Summary*]

*Thomas Clingan*: Are there any comments upon Dr. Wooster's paper? Yes, sir, please.

*V.M. Khlystov*: I understand that Dr. Wooster sees the need for establishing PICES to meet the national interests of the countries of the northern Pacific. Would it be correct to put it this way? Out of the nine international organizations that have convention areas in the Pacific and three international organizations in the northern part of the Pacific, PICES could be the core of the future legal regulation mechanism for the formation of a future ecosystem organization to manage the resources of the northern Pacific? Perhaps it is in this direction and for these purposes that it would be necessary to establish such a mechanism, because there are sufficiently powerful organizations dealing with tuna. There is a convention and mechanism for its implementation that concerns the northern part of the Pacific and involves Japan and Canada. The Seals Commission has also gathered considerable scientific knowhow. Therefore, this scattering of international organizations and mechanisms have prevented us from establishing a more united mechanism for international cooperation. I believe it is precisely PICES that should adopt the role of a coordinator of a future mechanism. Here we have mostly developed coastal states, and the volume of scientific research, I understand, fully meets their requirements. I have in mind the developed countries that have access to the northern Pacific. These organizations have their own powerful national scientific structures. Therefore, if this PICES organization is to be established at all, I believe it is precisely for this purpose to serve as a coordinating center. What do you think on that matter?

*Warren Wooster*: I agree with much of what you say. There exist now several international organizations in the north Pacific. They are for the most part concerned with the management of one or another resource -- The International North Pacific Fishery Commission, for example, or the International Pacific Halibut Commission. There are three or four on the western side of the north Pacific. Each is specialized in its membership and in the resource with which it deals, so none of them is in a position to take a broad view at the total scientific question, the answers to which are the basis for ecosystem management of those resources. So I would agree with that part of your remarks, that I don't see any other way to bring all the scientific attention together to solve these problems for the whole region.

I would hope that that information could be mobilized by this organization and then transferred to the organizations concerned with management. My worry is that when you have management and the mobilization of scientific information in the same organization, there's a very good chance that the scientific information will get contaminated by national interests. It will then be less than fully objective. In ICES, decoupling management from collecting the scientific information has made it possible to get scientists to pool their information in a completely apolitical and objective way. That combined information then goes to the management people who do with it as they will, because they have other than just purely scientific pressures on them for their decisions.

*Thomas Clingan*: Are there any other questions or comments on this subject? I see none. Then thank you, Dr. Wooster. We will next hear from Dr. Karassyov.

# INTERNATIONAL LEGAL QUESTIONS CONCERNING THE ACCESS OF STATE-OWNED NON-COMMERCIAL VESSELS TO FOREIGN PORTS

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The legislation of the majority of coastal states in the 1970s and 1980s shows a tendency towards not only the substantial limitation of the conduct of scientific research by foreign states and of the navigation of state-owned non-commercial vessels (hereinafter referred to as SONCV) in the coastal sea areas, but also towards the introduction of significant limitations with regard to such vessels' call at the ports of the coastal states. These limitations are naturally at variance with the idea of international cooperation in the exploration of the world ocean. It is appropriate to note that the international legal literature[1] pays little attention to studying the legal conditions for admitting foreign vessels to the coastal ports despite the fact that there are many questions to be settled in this field and that with every recurring year the regime of SONCV access to foreign ports becomes tougher.

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[1]Y.I. Karassyov, V.V. Zdorovenin, "The Issues of Scientific Research," *Soviet Yearbook of Interntional Law 1984*. Moscow: Nauka, 1986. pp. 201-211 (in Russian). Y.I. Karassyov, "Some Questions Concerning the Procedure of Scientific Research Vessels Calls at Foreign Ports," *Soviet Yearbook of International Law 1977*. Moscow: Nauka, 1979. pp. 263-268 (in Russian). V. A. Kisselyov, "Some Aspects Concerning the Regulation of the Acess of Foreign Vessels to Ports," *Maritime Law and International Navigation. The Compilation of Scientific Works*. edited by A. L. Kolodkin. Moscow: Transport, 1985. 159 pages (in Russian). M. A. Guitsu, "Legal Position of Vessels in Foreign Internal Waters and Ports," *Contemporary Maritime Law and Its Implementation*. Moscow: Soyuzmorniiproekt, 1985. pp. 62-73 (in Russian). *Contemporary International Law*. Moscow: Nauka, 1978. pp. 17-26 (in Russian).

The legislation of the coastal states and international law doctrine lack a universal view concerning the procedure of SONCV calls at foreign ports, which results in the unlawful practice of establishing "special" national conditions for regulating such calls.

Moreover, besides the fact that in a number of cases SONCV are conferred the same status as warships, which runs counter to the provisions of international law, is groundless, and may cause undesirable effects[2], a number of substantial limitation measures are taken to prevent the calls of vessels. With regard to state-owned vessels operated for non-commercial purposes, many countries introduced new requirements and terminology for such vessels and, allegedly for the purpose of "security," introduced tough limitations -- authorization procedure for the calls of "non-military," "state-owned," "non-commercial," "vessels with special characteristics," "scientific research expeditional vessels," "vessels of special designation" at their ports.

It is appropriate to note in this connection that although Article 255 of the 1982 Convention proclaims the obligation of the coastal states, in the spirit of international cooperation, to adopt measures "to facilitate, subject to the provisions of their laws and regulations, access to their harbors and promote assistance for marine scientific research vessels," it does not contain effective enforcement safeguards with regard to such obligations. The Convention Concerning Facilitating International Maritime Navigation adopted in 1965[3] does not touch upon the questions of regulating the access of foreign vessels to ports, as it only unified the requirements concerning documents to be presented in a foreign port.

During the many years of navigational practice, a customary rule of international law has been shaped, whereby sea ports open for foreign vessels remain open for SONCV as well. Up to 1960 the ports of foreign states did not distinguish in any way between merchant and non-commercial vessels, allowing both types to visit their ports on equal conditions. This was the golden age of oceanographers, when they could freely plan their future actions knowing that they could freely enter this or that port to replenish supplies of water, food, and establish direct contact with the scientists in this or that country.

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[2]*Convention Concerning the Facilitation of International Maritime Navigation 1965*. Moscow: Transport, 1970 (in Russian).

[3]Entered into force on 5 March 1967. The USSR became a contracting party to the Convention on 30 September 1966.

However, beginning with the 1960s a number of states showed a tendency towards tougher conditions for the calls of state-owned vessels used for non-commercial purposes. More often than not, the question of such vessels' visits to foreign ports is solved for a great number of vessels through diplomatic channels, and in this connection difficulties of a political nature are added to technical difficulties arising from the exploration and exploitation of the ocean. It is more difficult to plan and organize the conduct of scientific expeditions, to supply vessels with fuel, water, food, and to repair vessels and specific scientific equipment. The legislation of states, as a rule, authorizes emergency calls for the purpose of rendering emergency medical aid to the crew, for casualties or natural calamities. For example, the Danish Decree concerning access of foreign vessels dated 27 February 1976 includes a provisions stipulating that vessels suffering calamities do not need authorization or notification. However, such vessels, on their arrival in the port, must inform the local authorities of this call as soon as possible.

The questions of foreign, state-owned, non-commercial vessels' calls at open ports are settled differently by the legislation of the each coastal state. They can be subdivided into three groups.

1. Free access of non-commercial vessels to open foreign ports. Usually a state declares a list of ports open for the calls of foreign vessels proceeding from its national interests. The legislation of Bulgaria, Argentina, Guinea, Djibouti, Romania, Uruguay, and Ethiopia allows free access of SONCV to their ports.

2. A notification procedure for the calls of SONCV at foreign ports. A small number of the coastal states (Algeria, Benin, Egypt, the People's Democratic Republic of Yemen, Mauritania, Nigeria, New Zealand, Sierra-Leone, etc.) have preserved a notification procedure for the access of research vessels. Notification is given through various channels (through the Ministry of Foreign Affairs, agent companies, radio) within the period of 1-15 (or more) days prior to the time when the call is to occur. In our opinion, this the most acceptable variant, which must be stipulated by the 1982 Convention.

3. An authorization procedure for the calls of SONCV at foreign ports. By now, the majority of coastal states have established an authorization procedure for SONCV calls at their ports. The inquiry for such authorization should be submitted to the Ministry of Foreign Affairs or to another official authority of such states through diplomatic channels, with due account taken of the terms established

by such states. The 'terms' mean the time from the moment of submitting the inquiry up to the planned date of the call. Such terms differ with different states, are very divergent, and usually take from eight days (Denmark, Mozambique, etc.), up to six months (for example, in Australia). The call is authorized upon the receipt of an official authorization from the competent bodies of a state. The captain of a SONCV must also get permission from the port authorities irrespective of the authorization obtained through diplomatic channels. For the vessels of the third group, it is necessary to make a prior official inquiry to the Ministry of Foreign Affairs of Papua New Guinea through the Ministry of Foreign Affairs of the USSR or through the Embassy of the USSR in Australia, with an indication of all data required for the vessels of the second group.

I will illustrate these difficulties with an example relating to Australia. The government of Australia has three times changed the rules, making it even more difficult for ships to enter their ports. Six months in advance it is necessary to give lots of information. They even ask for a color picture of the vessel, with its name clearly visible. As you know, there are different rules as regards painting ships in different countries, but the Australian government insists that a specific coat of paint must be worn by the vessel. How can Australia interfere in the rules for giving Soviet vessels a coat of paint? If this continues, perhaps the Australian government will require that the Soviet vessel be painted in a zebra pattern to make them easier to detect and follow! And all would know that such a zebra-colored vessel is a research vessel. As you know, we have a very effective system of verification, and our confidence-building measures are being promoted. Perhaps this same approach could be used as regards research vessels.

Certain coastal states have established arbitrary discriminatory regimes for scientific research vessels (SRV) flying certain flags. For example, the Japanese authorities have introduced an authorization procedure for the calls of Soviet SRV and other state-owned vessels and prohibit a simultaneous sojourn of two or more Soviet SRV in a Japanese port. To obtain an authorization for the call of a Soviet vessel at a Japanese port it is necessary to submit an inquiry to the USSR Embassy in Japan not later than twenty days before the date of the call (see Verbal Notes of the Ministry of Foreign Affairs of Japan No. 25 of 28 February 1969 and No. 166 of 6 October 1971 concerning the establishment of an authorization procedure for Soviet SRV and other state-owned vessels).

Another group of states (Canada, Peru, Mauritius, Senegal, and the Philippines) established for SRV a procedure still tougher than for

warships. Some states (Canada, Colombia, Fiji, Jamaica, India, and the Seychelles) demand that the inquiry for an authorization should be submitted in the form of a note. In order to visit the ports of India, Peru, Australia, Brazilian Gabon, Greece, Iceland, Yemen, Poland, Finland, Philippines, Ethiopia, Fiji, Indonesia, etc., besides standard information, it is necessary to inform the country's authorities of the fact of the vessel's call and the itinerary in the territorial waters and in the 200-mile exclusive economic zone, with an indication of time coordinates for entrance and departure and the itinerary, which is actually a violation of the provisions of applicable international law and the 1982 UN Convention on the Law of the Sea. Article 50 of the UN Convention on the Law of the Sea clearly stipulates the principle of the freedom of navigation for all vessels. It is generally accepted that the exclusive economic zone remains an area of the high seas where the international community realizes the freedom of navigation. The wish of a number of coastal states to limit the freedom of navigation for SRV through the requirement to comply with their compulsory measures of prior notification for passage through the exclusive economic zone is deemed unlawful.

The above-cited examples of national legislation that introduces divergent legal rules regulating the procedures for access and the regime of SRV navigation vividly illustrate the difficulties experienced by ship-owners while coordinating the programs of expeditions, the visits of vessels to foreign ports, and compliance with the applicable regional agreements and national legislation.

The unilateral adoption by a number of states of legal acts preventing the free access of non-commercial vessels to their ports is associated with the lack of a uniform international convention concerning the calls of such vessels to foreign ports that meet contemporary requirements. Unfortunately, the 1982 UN Convention on the Law of the Sea has not paid due attention to this problem. Article 255 only declares that the states must adopt "reasonable rules, regulations, and procedures" to facilitate compliance with their laws and regulations.

While staying in foreign ports, vessels must strictly observe the laws, resolutions, instructions, and various home regulations established by relevant authorities of the coastal state concerning the technical condition of the vessel and marine environmental pollution. The concept of port jurisdiction over the vessel call does not guarantee an objective attitude of the port authorities with regard to proceedings instituted against the vessel's master and crew, nor with regard to the conservation of civil rights with regard to the vessel. At the present time there is no multilateral international convention that could

regulate the conditions and the regime for sea-going vessels' calls at foreign ports.

Paragraph 2, Article 255 of the 1982 Convention reproduces in principle the provisions of paragraph 2, Article 16 of the 1958 Convention on the Territorial Sea and the Contiguous Zone concerning the rights of a coastal state to adopt measures to prevent any violation of the conditions for access of foreign vessels to a port. Appealing to these provisions of the Convention, a number of coastal states for the last five years have systematically inspected all foreign vessels calling at their ports and have made known their national requirements concerning the construction and the equipment of the vessel, the manning of the crew, the navigational documents, the sanitary condition of the vessel, etc.

On 26 April 1982, the maritime authorities of fourteen European states (England, Belgium, Denmark, Portugal, Holland, Greece, Ireland, Spain, Italy, Norway, Finland, Federal Republic of Germany, and Sweden) signed in Paris the Memorandum on the Control over foreign ships in their ports (hereinafter referred to as PM). Subject to control are all vessels irrespective of whether a flag state is a contracting party to specific international treaties mentioned in the Memorandum. The officials of the ports exercising control make inspections to the extent stipulated by the recommendations of the International Maritime Organization (IMO) and by Supplement 1 to the Memorandum.

Starting in 1983, American authorities in the Panama Canal Zone have inspected Soviet vessels, making requirements similar to those proclaimed by the 1982 PM.

The PM provides for the implementation of systematic control by the maritime authorities in the port to ensure compliance of the vessel with universal international treaties concerning the safety of navigation, protection of human life and the marine environment, conditions of labor, and the lives of seamen. All vessels are subject to control irrespective of whether the flag state is a contracting party to international conventions.

When a vessel is determined to be substandard, based on evidence of its unseaworthiness, the port authorities, in accordance with the Memorandum, may prohibit the vessel from sailing until all discrepancies have been eliminated. To avoid exceeding or abusing the rules by the authorities in times of stress between states with different social and economic systems, it is expedient to formulate the basis for a legal regime of sea ports and the rules regulating such inspections.

In our view, new political thinking, the processes of detente and confidence building between states, requires the introduction of

decisive changes in the national legislation of a number of states concerning legal doctrine and SONCV activities.

## DISCUSSION

*Thomas Clingan:* I call on General Barabolya.

*Piotr Barabolya:* My statement will be very short. I do not want a reproach made that the military have taken over the rostrum, so I will speak about peaceful rather than military things. We have discussed at length scientific research in the oceans, and I must say that the statements made were very interesting and very useful since we have come to understand the position of our American colleagues, which is not very different from our position. There are many areas of agreement between Soviet and American positions, but what real outcome can there be? What proposals can be made? I will try to do the impossible, putting forward one concrete proposal.

What if the Soviet Maritime Law Association and the Law of the Sea Institute and the Commission on the Oceans, which is based on the Soviet Peace Fund, worked together on establishing a joint Soviet-American scientific research vessel? This vessel would have a joint crew, would sail under two flags, Soviet and American, and would have joint scientific personnel. These are not just empty words; such cooperation exists, invitations have been sent to numerous U.S. scientists from Soviet vessels. In the Bering Sea, a long voyage of a Soviet scientific research vessel has just ended, and about twenty American experts in oceanography and hydrography participated in that voyage. That was mutual cooperation between the Soviet Union and the United States. But what if we go further and work on this issue in both our countries? As for me, I am ready to participate very actively in such a group, which may be created within our commission, to find funds, to build such a vessel, to make arrangements with other organizations. Maybe that will take not one or two but three or four years, but if we all engage in it, that will be very useful.

*Thomas Clingan:* Professor Molodtsov?

*S. V. Molodtsov:* I did not want to speak, but the debate caused me to do this. Many people believe that the provisions of the 1982 Convention as regards marine research are insufficient. This attitude is indeed correct. The convention might be better, but it is as it is. And we know that it cannot be changed unless we want a complete disaster as regards its entering into force.

Secondly, I believe that there are possibilities for international cooperation in marine research that we can use right now to create a

more liberal regime in the interests of science, programs envisioned by the Convention and worked out in international organizations. Several speakers, including General Barabolya, have made some quite reasonable proposals. If we -- the Soviet Union, the United States, and other states -- are able jointly to introduce into practice our understanding of the 1982 Convention, our efforts will lead to positive consequences.

*Thomas Clingan*: Professor Lukaszuk?

*Leonard Lukaszuk*: I would like to inform you of some steps being taken in Poland now as regards national legislation on marine research, especially in view of the new Convention provisions. Also, I would like to say a few words about the participation of Poland in marine research.

My first item deals with the adaptation of the existing domestic legislation in Poland to the new provisions of the 1982 Convention. We have started work on marine research and its practical application, with the participation of experts and representatives of pertinent authorities. As is known, many countries have expressed their readiness to dovetail their domestic legislation with the provisions of the Convention. The Soviet Union, the United States, the GDR, among others, have done this. The new drafts of pertinent legislation in Poland are aimed at bringing it in agreement with the provisions of the Convention and the protection of the marine environment. The draft calls for permission to conduct marine research and designates authorities responsible for the marine environment.

Second, participation of Poland in practical marine research. Poland is an member of the Preparatory Commission and is preparing to take part in efforts towards research in this respect. In 1982, Poland entered the Interocean Metal Organization, situated in Stetten, which conducts its exploration and exploitation of metal deposits on the seabed. Poland also takes part in efforts to prospect for marine resources and to protect the marine environment. Specifically, this work is done by the Polish Institute of Oceanology of the Polish Academy of Sciences. The scientists of this institute take part in the international long term research program known as the Greenland Sea Project. As is known, scientists from Norway, Canada, United States, and FRG also take part in it. It includes projects dealing with biology and marine physics. Poland has been assigned to carry out research in three subarctic regions, one of which occupies a territory equal to that of our country.

The central program of marine research, coordinated by the Polish Institute of Sea Fishing in Gdansk, is carried out with the joint participation of scientists from the Soviet Union and other socialist countries. It deals with oceanographic marine research, and protection of the marine environment and its living resources. Work will be done with the participation of all Baltic countries, and this will reflect the participation of Poland in the Gdansk and Helsinki Conventions, which we have ratified.

As far as fishing is concerned, Poland cooperates with many countries, taking part in the implementation of international conventions, conducting fishing operations and research in specific areas.

*Thomas Clingan:* Thank you. Captain Knyazev?

*V. S. Knyazev:* I would like to make three remarks about the statements made here. First, I disagree with what was said, mostly by my Soviet colleagues, to the effect that Part XIII of the 1982 Convention is bad and is not instrumental to marine research and, in general, that the Convention might have been much better. We could accept this argument if from 1973 to 1982 we were busy drafting only Part XIII and had in mind only our two countries, but that would be a mere legal exercise. We were conducting a complicated legal process, and this was part of the package. We supported some of the provisions of the Group of 77 proposal regarding peaceful uses, and if we hadn't done that, perhaps we wouldn't have this Convention as it is today. The same goes for the Mexican proposals concerning the use of space methods for marine research, which would have sounded the death knell for Part XIII.

Of course, there are certain difficulties, but they are not accountable to the Convention but rather to national legislation, to the laws that were adopted perhaps before the Convention. We cannot say that those who did not ratify or did not sign the Convention are guilty; they are just not party to the Convention. Moreover, marine research, just as everything in international life, is a two-way street, and if one of the users does not help promote general traffic, others will follow suit.

I would like to agree with what was said by Professor Oxman; it was good food for thought. But today it is hardly possible to follow his suggestion. In the compromise text of Part XIII, it is not only marine research that is in question but also the interests of different countries, which have different means of controlling their economic zones, and national legislation is following these interests.

Another point I would like to make deals with the legal management of fishing. Why is this question of concern to me, a military man? The reasons is as follows. The existing tendency towards leaving the agreement on fishing and going into unregulated fishing harms those who follow the rules and, as far as anadromous species, those who have to follow these rules and agreements. The note of concern sounded by Dr. Bekyashev is quite understandable and close to me. The situation that he described leads to a specific reaction on the part of those who suffer, and consequently, to attempts to establish one-sided control over fishing on the high seas, that is, to extend jurisdiction beyond national boundaries. For instance, under existing law in the United States on this point, fish inspectors are allowed to take any measures to punish those who disregard existing rules as regards salmon migration. There are attempts on our part, too, with the same effect. Though not officially so, we are putting to best use the willingness of both our states to follow the principle of the freedom of the high seas and its practical implementation.

Finally, I would like to remark upon our future work. In this respect, I would like to support Professor Van Dyke's proposal regarding joint research in our field of law. I believe this is a promising idea and it will help us arrive at joint views, at least at the scientific level.

Moreover, this symposium itself, as I understand it, should be organized as a workshop to identify problems. Papers on these problems should be drafted well ahead and distributed among the participants, so that we get more information than is contained in the report itself. We can read the papers ourselves. We should be engaged in a discussion, a debate, not in a big hall like this, but rather in more comfortable premises, in a less official atmosphere. Of course, that calls for additional organizational effort and I understand that there might be some problems of translation, but I believe that international lawyers should have knowledge of more than their native tongue. This is what I have to say.

*Thomas Clingan:* Will there be any more comments? I give the floor to Professor Moisseev.

*P. Moisseev:* One idea that was supported by many examples ran through all our discussion. It deals with the primacy of scientific knowledge of fishing. Many examples that were cited here point to the fact that in some instances legislation is lagging behind the require-

ments put forward by life and identified through the new findings of biology and the practical implementation of existing laws.

Some of the speakers gave us interesting information showing that in some instances it is very difficult indeed to conduct marine scientific research in the right way. Specifically, in the vast space of the Pacific, in which there are many fishing species, the control and defense of those species now leans on certain laws and provisions that are lagging behind some fresh, recently obtained information. A military man spoke before me, and he said that measures taken to provide protection for salmon now are not fully supported by the existing legislation. In this connection, I believe that it is very important to support the view expressed by Professor Wooster concerning the need to establish and carry out activities of a scientific council for the northern Pacific that would include the representatives of the countries concerned in the region. And through exchange of information, data, scientific and ideas, they could find common ground for subsequent steps aimed at wise exploitation of the existing resources in the region and also for prompting lawyers about what should be done in this respect. The North Atlantic does have such a council for marine research, which was established way back in 1901, with the participation of a representative of Russia for the many years it has been in action. As for the northern Pacific, we don't have such a council, although the potential biological opportunities in this region are most important. Here and now we could increase the catch by 30-35 million tons. I have in mind traditional fishes, which in the Atlantic have reached their limit.

Therefore, I believe it would be advisable, taking into account the exchange of views we've had at this symposium, to include in our resulting recommendations a provision to the effect that it would be desirable to set up such a council. The United States, Canada, Japan, and the Soviet Union have already taken some preliminary steps toward its establishment, but they have not yet reached fruition. To prompt resolute steps toward that end, I have prepared a draft of such a resolution. I will not read it out, but it says that it is advisable to have such an international body for the region in the North Pacific above 35 degrees North.

*Thomas Clingan:* Dr. Merivikov?

*Y. V. Merivikov:* I would like to discuss a matter of ecology and international law. Unfortunately, members of the legal profession know little about ecology, and this is is mainly due to lack of

information. Our organization, Soyuzmorniiproekt, has experience in the exchange of legal information. We have carefully studied a number of American legal systems, especially the global system based in Washington, Lexus/Nexus. This system makes it possible to get complete texts of scientific research at three stages: initial, implementation, and final stages. Jurists who make use of this system can have knowledge of all the latest developments. But access to the system costs a pretty penny, and it is not always accessible to individual researchers and jurists. Therefore, I would like to raise the question of communication among marine researchers and propose the establishment of a Soviet-American computer club so we could maintain contacts among ourselves at any time and make use of centers of communication in major cities in the Soviet Union and the United States. We could exchange information about what is being done or what is proposed.

Such a club would help us cut down expenses and time necessary for developing projects and would make it possible for scientists all over the world, especially for Soviet and American scientists, to know each other directly and even personally at international conferences promoted through such a club. This notion is now being considered by the Soviet Peace Fund and the Soviet Peace Committee.

The club needs initial financing both in rubles and in international currency. Such a club could be based on the already existing global system of scientific and technological information that is available in any country of the world. This system is known as InfoTerra. The InfoTerra system is one of the most important programs of UNEP. One hundred twenty-six countries have joined, including the Soviet Union and the United States. Participating in it are over a thousand research institutes and laboratories. Through them, scientists can get free information and give their own information dealing with marine research. Although the system is oriented towards transferring information about the protection of the environment, it is a multifaceted and comprehensive program of use to all scientists, lawyers, politicians, specialists in transport.

The infrastructure for such an international club is already in existence, and it remains for me only to wish that you will look in greater detail into this question.

***Thomas Clingan:*** Thank you for your comments. I believe we will now hear from Dr. Vartanov.

# REGULATION OF INTERNATIONAL MARINE RESEARCH IN THE LIGHT OF THE UN LAW OF THE SEA CONVENTION AND SOME PROBLEMS IN SOVIET-U.S. COOPERATION IN THE STUDY OF THE WORLD OCEAN

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The UN Law of the Sea Convention of 1982 provides the basis for international legal regulation of research activities in the world ocean. The Convention and, in fact, the legal practice of states which had existed before its adoption in this field gave coastal states vast powers in determining the conditions regulating access to marine scientific research both in the territorial sea and in the economic zone and on the continental shelf. As a matter of fact, under the Convention, marine scientific research in the territorial sea can be conducted only "with the express consent of and under the conditions set forth by the coastal state," whereas when the research is carried out in the exclusive economic zone and on the continental shelf such conditions may be established only in accordance with the Convention. However, as consideration of the provisions of the Convention concerning access to research demonstrates, these provisions, basically speaking, give the coastal state the authority to restrict or even prohibit the scientific and research activities of any state in its exclusive economic zone and on the continental shelf.

For instance, under Article 246, para. 2, marine scientific research in the exclusive economic zone and on the continental shelf can be conducted only "... with the consent of the coastal State." Furthermore, in certain cases the administrative authorities of coastal states under the pretext of the letter and in spite of the spirit of the Convention through formal use of certain provisions of the Convention (primarily Articles 246, 248, 249) can obstruct implementation of research or even entirely prohibit its execution.

However, it is perfectly apparent from the text of the Convention that it is called upon to ensure a comprehensive study of the world ocean. A number of its articles urge and even make it incumbent upon coastal states to provide assistance in the sphere of marine scientific research. For example, under Article 239 states and competent international organizations "... shall promote and facilitate the development and conduct of marine scientific research in accordance with this Convention." Furthermore, Article 246 stipulates that coastal

states "shall, in normal circumstances, grant their consent for marine scientific research projects in their exclusive economic zone and on their continental shelf."

Nonetheless, one cannot but note the fact that these articles are characterized by a certain degree of declarativeness. As a result they do not provide the states or even international organizations with guarantees ensuring unimpeded conduct of research, including fundamental scientific research. Thus it appears that with respect to regulation of marine scientific research in economic zones the Convention does not balance the rights of two different sides and even actually resolves the issue in a decisive manner in favor of the coastal state.

Out of all the states of the world, the USSR and the U.S. have by far the largest scientific interests in the world ocean in terms of their content and geographic coverage. The Soviet Union and the United States, to a greater extent than any other scientifically and technologically developed nations, are interested in ensuring access to scientific research in the economic zones of coastal states. Therefore, it is objectively advisable to maintain contacts between the two countries in achieving a solution to this problem. Exclusion of the Soviet and U.S. scientific research fleets from the vast sea areas subject to the jurisdiction of coastal states has a negative impact on the development of scientific and technological progress in the study of the world ocean, taking into account the enormous scientific and technological potential of the two countries.

In the near future when provisions of the Convention are translated into specific national legislations of different states and at the international level (for example, in the decisions of intergovernmental scientific and technological marine-oriented organizations such as the IOC of UNESCO, the WMO, etc.) proceeding from the interests of world science and its development, it is imperative to translate into practical life a policy line aimed at establishing the practice which would facilitate unimpeded conduct of fundamental research as well as research in the field of developing safe conditions of marine use, weather forecasting, etc. This author holds the opinion that it is worthwhile to give consideration to the following mechanism for solving the problem of scientific research in economic zones, which could be formed in the future during the implementation of the provisions of the Convention. To be exact, in those cases when a coastal state is approached with a request (by another state or, all the more so, by an international organization) concerning the need to conduct the above-mentioned scientific research, be it of fundamental, meteorological or other nature, in its zone, this state should, at its

discretion, either grant consent to this request or provide those scientific data which can be obtained as a result of research which could not be carried out due to the refusal of the coastal state to conduct it. In this case the coastal state would apparently have the right to compensation of expenditures (or part thereof) related to the conduct of the research in its zone, with respect to which it provided full scientific information on the subject in question. Naturally, the amount of this compensation should not exceed the expenditures required for the implementation of the research project. Such a provision would help to overcome possible negative consequences (partial curtailment of the research in the zones) resulting from the formal application of the rules of the Convention to regulation of marine scientific research for the benefit of progress in the sphere of ocean sciences.

It is in line with the interests of the Soviet Union and the United States that international legal and national legislative practice of states in the course of their evolution ensured such development of the provisions of the Convention concerning regulation of marine scientific research in the 200-mile zones and on the shelf that would guarantee a balance between the rights and duties of coastal states with respect to the enhancement of scientific knowledge of the ocean. The problem essentially is to ensure greater legal coverage of the responsibility of the coastal state as regards the scientific use of its exclusive economic zone and continental shelf.

Taking into account the available experience and corresponding scientific potential of the USSR and the U.S., as well as the great fundamental importance of present-day scientific research for developing the process of studies of the world ocean, large-scale Soviet-U.S. cooperation becomes an objective necessity serving the interests of our two countries and the world community as a whole.

Soviet-U.S. cooperation in the study of the world ocean rests on available positive experience. For instance, the 1973 Agreement on Cooperation has been revalidated on many occasions.

It is worthwhile to call attention to one specific feature of the organization of work under international programmes aimed at resolving a number of contemporary global problems. This feature is particularly typical of the sphere of world ocean studies. It concerns the long-term nature of the implementation of specific objectives of such programs. For instance, as regards marine scientific research, schedules of their implementation may span a period ranging from two to ten years, or even more. Therefore, when joint activities of states in studying the world ocean are subjected to the active impact of or are contingent on the processes of interstate political relations,

development of cooperation in this case cannot be stable. It is particularly difficult in such circumstances to plan major joint programs whose implementation may stretch for five or more years. The experience of Soviet-U.S. cooperation in the study of the world ocean only proves this statement. This has a particular relevance with respect to the late 1970s and 1980s.

In this connection, it is only appropriate to raise the issue concerning the establishment of a mechanism of guarantees for stable scientific cooperation in developing the resources and spaces of the world ocean.

# CONTROL OVER COMPLIANCE WITH INTERNATIONAL LEGAL ECOLOGICAL RULES

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The establishment of an international regime of ecological security is one of the most pressing objectives of international legal regulation. It is not by chance, therefore, that in its resolution 42/93 concerning the comprehensive system of international peace and security, adopted on 7 December 1987, the UN General Assembly pointed out that the interrelation of states in the ecological sphere "must become an integral part of comprehensive international security." To this end, a complex of measures for ensuring international security should be used: peaceful settlement of disputes, collective security (universal and regional), disarmament, measures for suppressing acts of aggression, threat to peace (self-defense, activities of international organizations), neutralization and demilitarization of certain territories, establishment of zones of peace, measures for enhancing confidence between states, international control, etc.

An important direction in ensuring ecological security is the question of control over the compliance by states with international legal ecological rules. We shall only dwell on one aspect of this problem -- control over the ensurance of ecological balance in the world ocean, which has insufficiently been studied in the literature, is rather complicated for settlement, presents a significant scholarly and practical interest, and needs new legal consideration.

International control means a system of divergent methods and procedures intended for the verification of discharge and compliance with relevant obligations with regard to international law.[1]

The applicable rules of international law establish certain requirements for international control. Firstly, all of the control activities effected by states for ensuring the ecological security of the world ocean should be strictly in line with the main principles of contemporary international law. Secondly, the forms, methods, and

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[1]V.P. Kirilenko, "International Control as a Form of Ensuring the Protection of the Marine Environment from Pollution, " *Izvestiya Vuzov. Pravovedeniye*, 1987, no. 2., p. 37.

scope of control and the rights of the control bodies should meet the tasks stipulated by specific international agreements in this field. Any forms, methods, and scope of control and the rights of control bodies should be lawful and avoid any interference in the internal affairs of other states. Thirdly, the methods of control (observation, verification, exchange of information, conduct of consultations, presentation of reports and papers, etc.) should be adequate to the international situation, aimed at the establishment of a comprehensive system of international security, and depend on the overall international situation, the level of confidence-building measures between states, and specific political realities. Fourth, the functions and the rights of the control bodies must be clearly provided for by relevant international agreements. At the same time, the international community must elaborate in this field legal decisions to meet the needs common to all mankind, express the concerted will of interests of the majority of countries, and be more dynamic in the spirit of new political thinking.

The purpose of control over compliance with international legal rules concerning ecology is verification of the discharge of, and compliance by states with, their commitments in the field of international law. Effective control activities, as justly noted by G.V. Ignatenko and S.A. Malinin, are predetermined by an array of various factors directly characterizing legal activities.[2] (There can also be included here the degree to which the interests of states are met, definiteness, precision of legal provisions, interconnection of their rules, their concerted impact on the relations under regulation, timeliness of concluding an agreement, etc.)[3]

At present, the positions of states, especially on the problems of disarmament and elaboration of rules concerning the protection of the world ocean from pollution, show certain trends directed at the achievement of a higher level of control system formulation. Such trends are clearly expressed, for example, in the 1987 Agreement between the USSR and the U.S. on the Elimination of Intermediate-Range and Shorter-Range Missiles and other joint Soviet-American documents, which are an example of new political thinking. Indeed, the INF Treaty, as it was emphasized by V.F. Petrovsky, Deputy

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[2]G.V. Ignatenko and S.A. Malinin, "New Tendencies in International Legal Activities," *Soviet Yearbook of Maritime Law, 1986.* Moscow, 1987, p. 36.

[3]*Ibid.*

Minister of Foreign Affairs of the USSR, has no analogues either in the in-depth elaboration of the procedures for eliminating nuclear systems or in the specific forms and methods of verification. It provides for six variants of on-site inspections alone.[4]

It is appropriate to note that the international law-making processes regarding control, including the protection of the world ocean from pollution, have a tendency to extend the forms and methods of control and the measures of their implementation. They include establishment of control bodies within international organizations (in particular, within IAEA); improvement of mutual verification measures with regard to obligations undertaken in accordance with international agreements (for example, according to the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, etc.); direction of attention to promoting control by national means (for example, in accordance with MARPOL 73/78).

In our opinion, the new political thinking can be promoted by means of a stricter approach to the problem of control over the conservation of the world ocean's ecological balance. The wider and the more divergent the measures adopted by the states for preventing the pollution of the world ocean, the stricter the control should be.

The contemporary situation in the ecological balance of the world ocean needs an intensification of efforts of the states in this direction, the establishment of a stricter international regime, including that in the field of control, for the prevention of pollution in the world ocean. Control should be in strict compliance with the measures for its implementation agreed upon by the states. But at the same time one should not be in a hurry to first exercise control and then take measures. Control measures come into force from the moment measures are taken against pollution. The more complicated the measure taken, the deeper and more divergent the control must be. For example, the competent authorities of the coastal state may inspect the following documents of a foreign vessel that is within such state's ports: oil record book (regulation 20, para. 6, Supplement I, the 1978 Protocol to the 1973 International Convention for the Prevention of Pollution from Vessels; para. 5, Art. IX, International Convention for the Prevention of Pollution of the Sea by Oil); international certificate

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[4] *Bulletin of the Ministry of Foreign Affairs of the USSR, 1988*, no. 6, 1 April 1988. Moscow, 1988, p.11.

for the prevention of pollution by oil (regulation 4, Supplement I, the 1978 Protocol to the 1973 International Convention for the Prevention of Pollution from Vessels); safety certificates (passenger ship safety certificate, cargo ship safety construction certificate, cargo ship safety equipment certificate, cargo ship safety radiotelegraphy and radiotelephony certificate (Art. 19, Chapter 1 of the Supplement to the 1974 International Convention for the Safety of Life at Sea), etc.

It is also appropriate to note that the right of control is provided for the coastal state in accordance with the requirements of Art. 219 of the 1982 UN Convention on the Law of the Sea,[5] when a foreign vessel violates the applicable international rules and standards relating to the seaworthiness of vessels and thereby threatens damage to the marine environment. In this case the state has the right to take administrative measures to prevent the vessel from sailing. The right of the coastal state to "physical inspection", institution of proceedings, and detention of a foreign vessel that violated the international legal ecological rules while navigating in the territorial sea is stipulated by para. 2, Art. 220 of the 1982 UN Convention on the Law of the Sea. Such right is also granted to a coastal state if significant damage is caused because of the pollution of marine ecological systems during the passage of a vessel through the territorial sea and the economic zone (para. 5, Art. 220 of the 1982 Convention).

It should be noted that control over the prevention of pollution of marine ecological systems in the economic zones of coastal states expresses itself only in the right of the coastal state to require the violating vessel to give relevant information regarding the identification of the vessel, its port of registry, and other information required to establish whether a violation has occurred. National control is an effective means of strict compliance with international ecological rules. It should be distinguished from international control. National control is exercised by states, first and foremost, with regard to all its bodies, including warships. Its application to foreign vessels having no immunity is possible in the case of pollution of the territorial waters and economic zone of the coastal state. In particular, the jurisdiction of the port state, according to Art. 218 of the UN Convention on the Law of the Sea, can be exercised with regard to a foreign vessel that is voluntarily within a port or at an off-shore terminal of such state.

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[5]*The UN Convention on the Law of the Sea with a Subject Index and the Final Act of the Third UN Conference on the Law of the Sea.* United Nations Organization. New York, 1984.

And the legal grounds for the port state to exercise its jurisdiction will be the discharge of harmful substances by a foreign vessel beyond the limits of the internal waters, the territorial sea, or the economic zone of such state in violation of international rules and standards.

One of the tasks of national control is the enforcement of relevant international agreements concerning the protection of marine ecological systems from pollution. In compliance with the Statute on the Protection of the Economic Zone of the USSR confirmed by the Resolution of the Council of Ministers of the USSR on 30 January 1985,[6] the bodies effecting the protection of the economic zone of the USSR have the right to inspect vessels, artificial islands, installations and structures, as well as shipping and navigational documents, documents concerning crew, passengers, and cargo and other relevant documents, and to inspect working premises and storage space, equipment and technical devices, and everything harvested in the economic zone of the USSR. The inspection of foreign vessels in connection with violation of the established regulations concerning prevention, reduction, and control of marine pollution from vessels in the economic zone of the USSR is limited, as a rule and in accordance with the Statute, to inspecting the vessel's shipping and navigational documents, as well as documents concerning its crew, passengers, and cargo. The further inspection of such vessel can be effected only after the inspection of the above-mentioned documents, and when there are good reasons to believe that the condition of the vessel or of its equipment does not correspond to such documents, or the content of such document is insufficient for confirmation or verification of the alleged violation, or the vessel does not possess such relevant documents. During the inspection, samples of substances or their mixtures aboard the vessel or on the artificial island can be taken in order to identify the source of pollution.

The Resolution also establishes the conditions under which the officials of the border guards and public inspectors of the fishery protection bodies and the bodies regulating the utilization and protection of the economic zone have the right to stop and inspect vessels navigating in the economic zone of the USSR. If vessels in the economic zone of the USSR violate the regulations concerning the prevention, reduction, and control of marine environment pollution, they can be asked for information needed to establish whether the

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[6] *Collection of Resolutions of the Government of the USSR*. Section II, 1985, No. 1, art. 2.

violation has occurred. Besides, such vessel can be detained and inspected in connection with this violation only when the latter resulted in significant dumping of polluting substances that brought about substantial pollution of the marine environment or the treatment thereof, when the vessel refused to provide the requested information, or when such information contradicts the evident facts.

In my opinion, life itself extends the sphere of international control in the field of marine environmental protection from pollution, at both local and universal levels. To this end it is expedient to establish, under the auspices of the United Nations, a special international control body on a universal basis, to stipulate the agreed provisions on enhancing the effectiveness of international control within a relevant international control inspectorate. And, while establishing an international inspectorate with the purpose of ensuring ecological security, it is necessary to settle a number of various important questions. First of all, within what body should such inspectorate function? For example, within the UN Secretariat, IMO, IAEA, UNEP, etc. Which of them should have priority in studying specific problems of monitoring ecological security? How can the "junction" in the work of such bodies be ensured? Are joint activities possible? Which of the bodies will be the coordinator of such activities, or should such coordination be vested upon the Secretary-General of the United Nations? What legislative activities are possible within such bodies? Etcetera.

Irrespective of which UN body will house the international inspectorate, the main accent should be on summarizing the international legal experience in this field, regulating in detail the monitoring activities on a systematic basis (both by means of international control and through national means), and holding special international conferences concerning the questions of control over compliance with international legal ecological rules. These conferences should work out enforcement measures, generally acceptable for all states, with regard to ecological security. Measures should be provided for the orchestration of international control through national means and of national control over enforcement of the ecological balance in the world ocean. The question of scientific substantiation of these problems in contemporary legal doctrine should also be studied.

International legislation activities in this field could also be intensified by the adoption of relevant international agreements (in particular, the Agreement concerning the principles of ecological security for mankind) and rule-establishing resolutions aimed to enhance the effectiveness of international control both in the field of

disarmament and environmental protection, exploration and exploitation of the outer space and the world ocean, etc.

*R. F. Sorokin:* I am from the All Union Institute of Oceanography and Fisheries, and I would like to add a few words to what was said by Dr. Kirilenko and others from Leningrad who spoke about very important global issues of ecology. Indeed, the world today faces danger, not only nuclear danger but ecological danger as well. We scientists and lawyers of all countries, developed and developing, can help to morally educate people and bring them to an understanding of these dangers. If this system is to be effective, a great deal of work is required to gather and transmit information before practical results are achieved. These results may take longer to achieve in some regions. Certain countries may have zero possibilities in that field, and one has to help those countries to receive this new understanding, since that information has already been received at another level by other countries.

Information must be carried to and accepted by all states. Only then will it be easier to implement the norms that we are discussing now and future norms that will provide approaches to global issues of ecology. Ecology is health for people, it is food, fish, and many other benefits. Then we will be able to reduce the dual dangers, nuclear and ecological.

We might use resources from nonproductive or harmful spheres to resolve issues of ecology to improve people's health and to increase the volume of agricultural and fisheries production. We can make our contribution if we publish our materials and exchange them with underdeveloped countries, which have very limited resources to resolve these issues at various levels.

Technically speaking, one could use the FAO system to insure a more serious attitude toward ecology. FAO could hold seminars and symposia to explain ecological problems and make recommendations that could be implemented by states. The INMARSAT system could be used. If ecology is introduced as one of the aspects of that system, scientists could receive information on pollution, on protection of the environment, and on other serious problems which constantly appear in various regions of the world ocean.

# CLOSING CEREMONIES

## CLOSING CEREMONIES

*Anatoly Kolodkin:* Distinguished colleagues, ladies and gentlemen, comrades, today we have the concluding session. I recognize the Vice President of the Association of Soviet Lawyers, Chairman of the International Law Department, Patrice Lumumba Friendship University, Professor Blishchenko.

*Igor P. Blishchenko:* On behalf of the Association of Soviet Lawyers and its president, the General Procurator of the USSR, may I congratulate you on the successful outcome of the first Soviet-American Symposium on the Law of the Sea. I must say that this symposium is a special event, because there has been much mutual understanding here and desire for joint efforts towards the solution of very important global issues facing mankind today.

Another important feature of this symposium is that from the very beginning it has acquired an interdisciplinary character, that is, a character that calls today for joint efforts by representatives of different sciences. This interdisciplinary approach especially applies, of course, to the world ocean, and has made possible, in my view, the successful outcome of this symposium. From the beginning the discussions have taken a specific direction, and all the participants have tried to contribute to the solution of particular problems.

We have paid much attention to the interrelation between the Convention provisions and national legislation, and this is important, too. I agree with many who said that national legislation stands in need of rethinking. In some instances, national legislation stands in the way of fulfilling national obligations under the Convention. This cannot be tolerated, because the Convention reflects the use of everyone; it has a universal character, and no one has the right to undermine it.

As regards these issues, we are arriving at the following question: What should we do with those states that are not parties to the Convention? The Convention is vastly universal because it reflects the interests of mankind as a whole. Meanwhile, a small group of states does not want to take into account these human interests. Can we say that they are free from following the provisions of the Convention? Yes, in the past, classical theory was quite clear in that point; they were free to do what they wanted. But I believe that today we should look at this problem from a different angle. A number of global problems have emerged, and with them, efforts to find and establish new international regimes to solve such problems. I believe, therefore, that such global, international agreements have a binding force on

everyone, including the states that are not parties to the Convention. This is my own view. There are different views on that score, but there is a general tendency along the lines of my view, which applies to space research, ecological problems, disarmament problems, too.

The Association of Soviet Lawyers has always maintained close contacts with the Soviet Maritime Law Association. We are active participants in their initiatives because we believe they help promote the new international order in a nuclear-free world.

Today, the primacy of international law is all-important, specifically within the field of law of the sea. This accent on the primacy of international law over any politics, both in international relations and on the domestic scene today, is a determining factor. Our task as scientists is to do everything to insure the effectiveness of international provisions within national boundaries, because international law is only effective when it is followed within them. Otherwise nothing is viable. Therefore, we should do our best to oppose internal legislation that runs counter to international law. We should see to it that there is primacy of international law over national legislation.

Dear friends, today legality and law and order in the world are vital necessities for all of us. Therefore, we can only support the efforts of your symposium of international lawyers and its conclusions. I am happy to see that this is not an exclusively Soviet-American affair but an international event. We attach great importance to cooperation with lawyers in all countries, but we are especially keen on the cooperation with our counterparts in the United States. We are aware of the commonality of our interests, the commonality of our tasks as regards the establishment of law, order, and justice. I wish you everything good in your work and in your lives.

***Anatoly Kolodkin:*** Now I give the floor to Deputy Chairman of the Public Commission of Peace for the Oceans, Dr. Barabolya, member of the Soviet Peace Committee.

***Piotr Barabolya:*** We are coming to the end of a very important international forum, the first Soviet-American Symposium on the Law of the Sea. It has proved that scientists from two major maritime powers can cooperate. In fact, they must cooperate. The symposium has shown that on many issues, the interest of our two countries coincide. There are many common problems that we can tackle jointly. The symposium at the same time has demonstrated our ability to work on the basis of mutual understanding, on the basis of agreement and

profound explanation of the position of each of the two sides. In this lies the great importance of this symposium.

We scientists in the law of the sea have achieved a breakthrough in the same way as has been done in other fields. I have in mind particularly the elimination of IMF forces. The Soviet Public Commission of Peace for the Oceans has authorized me to present our colleagues with this souvenir. These are small fragments of the intermediate force missiles that were destroyed this summer in this country, and the course of destruction was watched over by American experts. Now, these are, in fact, relics of the past. Perhaps, in the future, these will be exhibited in museums and people will look at them with great interest. Perhaps we will live long enough to see household goods made of the bodies of all the missiles in the world. I am sure that this will help promote survival of mankind and the future development of human civilization on earth.

*Anatoly Kolodkin*: Now I give the floor to our distinguished co-chairman, President of the Law of the Sea Institute of the United States, Professor Clingan.

*Thomas Clingan*: To summarize what I perceive we have achieved here in these last few days, I would first like to explain the framework in which I make these comments.

The Law of the Sea Institute has a very limited role to play in this kind of symposium and in our own work. The charter we adopted many years ago has limited our role to providing a forum where people of many disciplines and many different views can come together and exchange views. The Institute takes no position and makes no resolutions with regard to the discussions; it is left to the individual participants to draw their own conclusions from the discussions. We are also limited in that we are not a research institution. We do not conduct any institutionalized research nor do we issue grants for such research. But again, an individual member is free to engage in any research project he or she may wish to engage in under his or her own name, but not under the name of the Institute. I just explain this to you once again so that you will understand that I am reaching no substantive conclusion with regard to the work of the last few days, but I would like to describe what I think has been accomplished, and I would like to talk a little bit about the process that we have seen emerging here.

While we have taken up three different subjects -- navigation, fishing, and marine scientific research -- I think there has been a

common thread running through and across our discussions on all three topics. That common thread from my perspective is our mutual concern for the stability of the rule of law in the oceans. All of us here have expressed this concern in one way or another, and I think it is a helpful focus on the work that we have done.

I think that it has been very good to limit our discussions to three topics. They have proven to be of great interest, and we were able to have a very thorough and good discussion on each one of those topics.

Another thing that emerged here during these days of discussion was that there are some stresses on the stability of rule of law in the oceans. I identify two kinds of stresses. One is the problem of the interpretation of the provisions of the Convention. I think we can see that varying interpretations of provisions of the Convention, if put into action, lead to anomalies in state practice. Another stress arises out of the incompleteness of certain provisions of the Convention. We noted that certain provisions of the Convention have gaps; they don't go far enough in clearly defining what the actions of parties should be. Both of these stresses lead to instability, which is a matter of great concern because it tempts other parties to the Convention to engage in excesses which only further erode its stability.

In our discussion on navigation, we saw some very interesting problems arise, and we had a chance to thoroughly discuss them. We saw emerging the first kind of stress, arising from varying interpretations of the provisions. I refer specifically to the question of innocent passage of warships. The illumination of those differing points of views was good in the sense that it clarified the various positions, it clarified the varying interpretations, and gave us a better understanding of the nature of the problem that we have to address to eliminate the stress from the stability of international law.

Another issue that was discussed in an overall navigational context was the stabilization of the Law of the Sea Treaty itself. We had a chance to discuss the importance of the treaty to the stabilization of global international law of the sea and what happens if there is no treaty. We had a chance to discuss how we might proceed to achieve a universally accepted global agreement in the sense that we discussed what would be an appropriate forum to seek whatever changes would be necessary. We had a chance to discuss the mechanisms by which any agreements that might flow from that forum could be put into effect. But it was necessary for us to discuss the interrelationship between the treaty and customary international law, for example, because if there isn't any global agreement, we are going to have to face that question.

We also had the opportunity to discuss the question of the legality of missile test sites. We saw varying points of view with regard to the effect of and the legality of temporary closures for the purposes of testing missiles.

In the fisheries discussions I think we saw the other kind of stress, the gap in the straddling stocks article, for example. It doesn't clearly say how you deal with this problem that the United States and the Soviet Union have in the north Pacific, for example. I think we saw clearly that if we just focus on a narrow area, such as that one, the states involved might be tempted to solve that problem in an inappropriate way that would destabilize rather than stabilize international law, though one speaker did very well to draw our focus away from the single problem in suggesting possible alternatives that would deal with it on a global basis. Again, it was a discussion away from coastal, unilateral solutions to a more widely accepted, even a globally accepted solution to the problem.

In marine scientific research we also had some very useful discussions. We raised the question of what the status of the law is at this present time. Does the 1958 regime apply? Does the 1982 regime, which is quite different, apply? Or are the rules that are actually being used by researching states a combination of these two regimes? The presentation on PICES raised the entire issue of the role of institutions in the acquisition and dissemination of information of a purely scientific nature or of information that might be of value to those who must make management decisions with regard to marine resources. Clearly it showed the need for continued and increased cooperation in this area.

I would like to take this opportunity, Dr. Kolodkin, on behalf of the Law of the Sea Institute and, I am sure, of all the non-Soviet participants to express our appreciation for the way that you have planned and executed this very fine meeting. I think you can be very pleased with the success that this symposium has achieved. In addition, I would like to thank you for the hospitality of the host institutions. You have not only given us fine intellectual fare but excellent cultural and gastronomic fare as well.

***Anatoly Kolodkin:*** Thank you, Professor Clingan. Now I give the floor to the director of the Law of the Sea Institute in Honolulu, Dr. Craven.

***John Craven:*** I would like to reiterate, in a different framework, some of those remarks that were made by Professor Clingan, to express my

deep pleasure and gratitude to the organizers of this symposium for the results that have been obtained.

The director of the Law of the Sea Institute takes his instructions entirely from the Executive Board of the Law of the Sea Institute. These instructions are explicit in terms of policy, and, if I might be facetious, the chief instruction is that the director shall have no independent value judgments of his own with respect to the preferred law of the sea. Our instructions are to do the staff work that is required to insure that all viewpoints are presented at fora which are sponsored in whole or in part by the Law of the Sea Institute. To that end we have used whatever sources we can, use working in cooperation with our host to insure the widest spectrum of attendance and widest spectrum of viewpoints at symposium. We have been very successful in this regard. As you indicated, this has been truly an international symposium, and with respect to the three issues we have seen the full panoply of views that are relevant for future discussion.

I'm further instructed to communicate to all the participants at these seminars their own responsibility. Each of you has made presentations in your private capacity, but each of you has an official responsibility either as an academic or as a policy maker in a given institution. It is my hope that each one of you will have drawn his or her own individual conclusions as to the significance and meaning of this workshop. Once you leave here, those of you who are academics will reflect your individual results in the papers that you prepare. We fully expect that each of you, in your own capacity, will take the conclusions and suggestions of this symposium to heart in order to achieve a better and more stable and more secure international law of the sea. But as for the director, I will carry my own conclusions and recommendations home with me in my heart, because I must and will continue to assure you that the Law of the Sea Institute has no preferred direction, or no preferred position, or no particular law that it favors. It will continue to provide fora for a full, free, and objective discussion of the law of the sea in the direction that consensus should properly lead.

I do want to thank you, Mr. Chairman, for providing a very successful forum in this regard. I also want to thank you for the excellent hospitality that has been afforded. I particularly thank you for the opportunity for myself and my colleagues to share the culture and the society and the thoughts of this great nation.

*Anatoly Kolodkin*: I give the floor to the President of the American Maritime Law Association, Mr. Palmer.

*Richard Palmer*: This symposium has indeed been a historic occasion. It has brought together, as the distinguished Vice President of Soviet Lawyers has said, a remarkable interdisciplinary group to discuss problems of special consequence, not only in science but in law. I was particularly impressed with the comments of Professor Blishchenko about his reactions to what has taken place in the last few days, because I found myself thinking about the importance of bringing technical knowledge and scientific research into the framework of the law. So many times, legal meetings and legal writings become extraordinarily dry in their logic and unreality. But it has become apparent to me that this field of the law of the sea, which is fairly new to many of us on the private international law side, is of vital necessity for cooperation among nations.

The discussion of international law's precedence over domestic law has been provocative. This is a constitutional concept in the United States; when the U.S. signs a treaty, it becomes domestic law. We therefore see great benefit from this struggle to achieve a treaty and a consensus among nations, because it will indeed become international law if we succeed in reaching agreement and thereafter ratify the treaty.

The interesting concept of what happens to nonsigners has provoked much thought in many of us. It almost seems that the nonsigner is bound, not because he is a nonsigner, but because in the extraordinary development of this field, one is establishing customary international law which is indeed binding itself through another course or precedent. In the United States we're impressed by the concept that the other nations, especially those who haven't signed, are not bound by virtue of the treaty itself but are bound by the virtue of the practical importance of many of the rules of conduct, which are accepted by many nations because the issue or provision becomes customary international law. This will lead us closer to a recognition of the importance of this treaty, which has been so vigorously studied by the distinguished institutes in our country, such as the Law of the Sea Institute of the University of Hawaii, the University of Miami, and others. I take a great deal of pride as an American citizen in noting on this particular occasion the high degree of scholarship in these institutes, as well as in the organizations that we see from other nations.

Mr. O'Brien and I are very honored and privileged to have been able to participate in this symposium, to watch the deliberations in an area of law that needs much greater consideration. We repeat what our colleagues have said, that the hospitality has been outstanding, very

pleasant and most agreeable personally. Many of us will look for the first opportunity to return to the Soviet Union, and we extend to you an invitation to visit us in the United States. I have deliberately left my address, telephone, and telefax numbers around and I hope you will make good use of them.

***Anatoly Kolodkin:*** I give the floor with great pleasure to Professor Butler from Great Britain.

***William Butler:*** I presume to ask permission to speak for three reasons. The first is that I, together with a small number of others present, are here through the courtesy of the Law of the Sea Institute at your own initiative and invitation and we, too, want to echo our thanks to you for that invitation and say how much we've enjoyed and profited from the opportunity to be present here.

But secondly, and more important, for one amongst the western scholars present who understands the Russian language, there has been a dimension to this conference that I want to underline to my own colleagues because it may have escaped them in some measure. And that is the importance of your own remarks, Professor Kolodkin, on the first day, and especially of those of Professor Blishchenko a few minutes ago about the primacy of international law.

You will have seen from the remarks made by my own colleagues that they have understood the dimension of this question as the relationship between international law and national law in the constitutional sense. What I want to direct to their attention is that this question goes far beyond that simple relationship. Simple in one sense, complex in another.

What's happening here is that the issue of the primacy of international law has taken on a dimension of its own as part of *perestroika.* In the Soviet Union, you are debating the so-called rule of law state, the *pravovoe gosudarstvo*, and you and your colleagues are raising the issue, quite properly, of a rule of law state also being subject to the rule of law under international law. The importance of this is, as I suggested, something much more than merely the relationship between the two legal systems. What Professor Blishchenko was raising is the relationship of law to policy, the extent to which all government policy must be in accordance with international law. Now that is an issue we have not seen in Soviet international legal doctrine in the past seventy years.

Let me also say, quite frankly, as an Anglo-American in Europe, that in our perception, the past ten years or so in the United States

have been very dismal years for the discipline of international law. In some measure, it is our hope that by raising this question as part of your own legal experience at the moment, you will strike a response in all of us in the West who also need to reexamine the relationship between international law and national law in every sense of the word -- in its relationship to government policy in general, and in its relationship in the more strict legal sense to community law, to national law, and to the international legal system. This is not a question that has a yes or no answer; nobody knows for certain where the precise balance lies or where it should lie. But in the dialogue that we trust will accompany this issue in the forthcoming years, we may have an issue before us that represents enormous positive implications for the healthy development of East-West relations. Moreover, this issue lies in a framework, within a context, that neither side has simply had available to it before. It is an issue that will prompt Americans in particular to look back to some of the early values of the post-World War II period that accompanied the United Nations, that accompanied our own notion of the rule of law. It will cause us to reexamine, I think, relationships with Europe and with the rest of the world. This needs to happen for our own purposes as well as for yours.

*Anatoly Kolodkin*: I give the floor to Professor Gold from Canada.

*Edgar Gold*: One of our Soviet colleagues expressed the hope that this type of meeting might be even more fruitful if it were really international rather than bilateral. In fact, due to the international obligations of the Law of the Sea Institute, as expressed by Dr. Craven and Professor Clingan, and the foresight and generosity of the Soviet Maritime Law Association and the USSR Academy of Sciences, we have, indeed, had an international forum.

As we know, in addition to the host state and the United States, there were participants here from ten other states. Some of us are, of course, present and past members of the Executive Board of the Law of the Sea Institute and some are not. But all, I think, are from countries with specific interests in the oceans and all are directly affected by the actions of the two superpowers whose flags we have before us. Thus the first Soviet-U.S. Symposium of the Law of the Sea has had truly international ramifications in recognition of the point made by so many speakers on international cooperation and goodwill. Only the widest possible participation can achieve the peace and prosperity we all seek on the seas.

I personally would like to associate myself with the views just so eloquently expressed by Professor Butler, because I also felt the electricity and significance of some of the remarks made by our Soviet colleagues. Furthermore, as already expressed by Professor Butler and Professor Clingan, on behalf of the international group of participants allow me to thank you, Soviet friends, for your warmth, generosity and hospitality and for allowing us to participate in this historic forum.

*Anatoly Kolodkin*: I give the floor to Deputy Minister of the Merchant Marine of the Soviet Union, chairman of the Soviet commission in the IMO, candidate of juridical science, Boris Alexeevich Yunitsin.

*B. A. Yunitsin*: I would like, on behalf of the Ministry of the Merchant Marine, to welcome you here in Moscow and to express our gratitude to you for finding it possible to come together here and tackle urgent problems of the law of the sea. I believe that if you had come earlier, the Law of the Sea Convention would have been adopted much sooner. For us seamen, not only in this country but elsewhere, your symposium and its consideration of issues is highly important in practical terms.

Up to now, the oceans have been used mostly for navigation. Navigation, as you know, is international in its nature. Therefore, without commonly accepted laws, navigation would have been difficult. Navigation has its history, its traditions, and in this respect, much has been done. Yet, even working within the framework of such an international organization as IMO which has a juridical section, and even when considering technical issues, we cannot do without law of the sea lawyers. Today the oceans are beginning to play another economic role; they have become the source of mineral resources. For many countries this is quite serious, and they will pay priority attention to this source in the future. But without international management of some of these issues, it would be impossible to put the situation in this field in order. There would be anarchy.

Concern was also sounded about the living resources of the oceans. Even the adoption of the 200-mile economic zone does not guarantee control over them, because there are so many outstanding issues. You are confronting a very important and difficult task, which calls for lengthy discussion but excludes just such lengthy discussion, because the decisions must be made as soon as possible. I hope that you will agree with me that all these problems relating to the use of the oceans and seas can be solved only if we have peace on the high seas.

I would like once more to thank all of our guests who have found it possible to take part in the present symposium. As far as I understand, you are all satisfied with the discussions and their findings. I hope that in the future, too, you will have the possibility to come together on a regular basis. I wish you every success.

*Anatoly Kolodkin:* I understand we are coming to the end of our symposium and in conclusion I would like to make a few remarks, add something to the general appraisal. Mr. Yunitsin's remarks made me consider that some of us are seeing each other in person for the first time. Soviet participants, candidates of law, sometimes ask me about the Maritime Law Association in the United States. What does it look like? Is it the same as our own? For the first time, we have learned from Richard Palmer that Maritime Law Associations mostly deal with issues on a commercial basis, though Thomas Clingan has told us that scientists dealing with international public law are also involved.

I would agree that the general approach to the symposium has been the establishment of a stable law and order on the seas. Moreover, all our American colleagues, despite the fact that the United States did not sign the Convention, have expressed their interest in making the Convention universal, just as was emphasized by our Soviet colleagues. The Convention is, as it were, hanging in the air, dependent upon whether the Soviet Union ratifies it, whether it is supported by Great Britain, the United States, and the other nonmember countries.

It is not necessary to dwell on the shortcomings of the Convention. Our task was to show what privileges are provided by the Convention or, rather, what nonparticipants are losing if they do not participate in the Convention. This is important so that we can prompt departments, ministries, and government agencies into taking more specific actions, so that we can show them that it is not only a matter of money in Part XI, but rather that the Convention is the constitution of the law of the sea. It is the basic international maritime law today, it is in keeping with the interests of coastal states, of socialist countries, of developing countries, of developed capitalist countries.

Now, concerning details. We found in the symposium that both the Soviet Union and the United States are interested in establishing the twelve-mile zone. We knew in April that the United States was about to adopt pertinent provisions relating to transit through straits, especially in regard to free overflight and transit through straits by surface craft and submarines in the surface position. This is something new. We are also interested in the economic zone, because it is here that our common interests are shown most graphically. On the one

hand, we recognize sovereign rights to natural resources. On the other hand, we are interested in maintaining free overflight, the laying of cables and pipelines, and other international uses of these waters as outlined in Article 58, specifically the transfer of information to communication satellites via the vessel in the strait.

Finally, we have much in common as far as the security of navigation is concerned. We have not touched upon this, but the Convention does contain many new provisions in this respect, too. It does not just repeat what was said in the 1958 Convention. Articles 94 and 95 are separated there, and for the first time specific obligations of the flag state are mentioned as far as the security of navigation is concerned.

I would like to say also that we have many common interests in marine research, specifically as regards Latin American coastal states. Here, the charter of the Intergovernmental Oceanographic Commission of UNESCO has additions which satisfy the interests of both groups of states, coastal states and those who want to conduct research in the economic zone and the continental shelf of other countries in the interests of coastal states. Insofar as participants have said that IOC should leave UNESCO, in my personal capacity I have already made this proposal here in the Soviet Union. Today you cannot speak about IOC in the same vein as when it was first created, because now much of its mandate is also touched upon in the Convention. Therefore, UNESCO has decided to provide functional autonomy to this commission. I will not dwell on detail, but in my view, and in speaking in my personal capacity, perhaps the fate of the IOC hinges on its turning into an organization, perhaps not a specialized United Nations agency, which would give rise to many difficulties, but an organization created not by UNESCO but by a United Nations decision, as was, for instance, the case with UNEP.

My final point is also very important. I believe that we should raise some questions and put them in writing, to exchange views and proposals on such subjects as the innocent passage of military craft, the regime of vessels in foreign ports (having in mind the draft convention that was submitted by the Soviet Union to the IOC), cooperation in fishing and marine research, and such systems as ODAS, Ocean Data Acquisition System. I also support Professor Moisseev's proposal, based on Professor Wooster's ideas for the establishment of a marine research council for the Pacific, or the exchange of papers and information suggested specifically by Professor Van Dyke, and other ideas about our future activities, workshops, seminars, and our subsequent meetings.

I also agree with what Mr. Palmer said about the historical nature of the present symposium and what Dr. Barabolya said about its being a breakthrough. We tried to have as many people involved in the discussion as possible, and we are always happy when our young scientists make their own contributions.

I believe that what we are planning for innocent passage by warships is also very important. Perhaps, we should also give thought to the following proposal, since confrontation usually takes place between the Soviet Union and the United States. We have had two recent instances of unnecessary friction; therefore, perhaps we should give thought to having regions on the coastline of the United States and the Soviet Union and see to it that warships of the two countries do not enter such regions. I'm making this proposal here, but an idea to this effect has already been voiced, and I do not want to seem to be its author. Let's give more thought to it. Professor Oxman, Professor Tunkin, and I had a chat with our Canadian colleagues at a recent conference and Professor Oxman asked what would happen if U.S. men of war approached the military base in Sevastopol. I said that it might happen in that case that the officer in command of the navy in the Black Sea would invite the officer in command of the U.S. man of war to have a drink of vodka. We are doing something in this respect in fact.

I understand the primacy of international law that was mentioned, but perhaps, in keeping with international law, we should advance some practical proposals in order to resolve outstanding problems, and we have quite a lot of these problems. I understand that we are all striving for stable law and order in the seas.

In conclusion, I would like to thank, from the bottom of my heart, our foreign guests. My special gratitude goes to Professor Craven of the Law of the Sea Institute for his patience and for the great work that he has done in his country; to cochairman Professor Clingan, to Mr. Palmer, president of the American Maritime Law Association, to all the participants in the American group, and to the representatives of other countries who took part in this first Soviet-American symposium, which has through their participation become indeed an international event. I would also like to express our gratitude to all the contributors, both foreign and Soviet, and to all those who provided necessary explanations. We welcome this plurality of opinions based on *glasnost*. I would like to express my gratitude to the secretariat of the Soyuzmorniiproekt for the great work that was done by them; the kind words we heard about that organization are largely due to their

excellent work. I would like to express gratitude to translators for the work they have done and to the hosts of this beautiful center.

Dear foreign guests, we are always happy to see you here in the Soviet Union, and we hope that our cooperation will continue to bear fruit for the benefit of peace on the seas.

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# Сберечь океан для потомков

2 декабря в Москве завершился первый советско-американский симпозиум по международному морскому праву. Председатель Советской ассоциации морского права, организовавшей эту встречу совместно с Советским фондом мира и рядом американских организаций, профессор А. Л. Колодкин рассказывает об итогах симпозиума:

— Главный из них — искренняя убежденность участников в том, что правопорядок в Мировом океане должен быть основан на всеобъемлющей Конвенции ООН по морскому праву от 1982 года. На симпозиуме, в котором участвовали не только советские и американские ученые, но и коллеги из Великобритании, Канады, ФРГ, Индонезии, Болгарии, Польши ГДР, Новой Зеландии, выявилось их общее стремление к тому, чтобы этот документ был универсально приемлем для всех государств. С пониманием были встречены зарубежными участниками наши высказывания, связанные с инициативами М. С. Горбачева, направленными на обеспечение мира и безопасности на морях и океанах. (ТАСС).

## SAVE THE OCEAN FOR OUR DESCENDENTS

The first Soviet-American symposium on international maritime law was completed on December 2 in Moscow. The president of the Soviet Maritime Law Association, Professor A. L. Kolodkin, who organised this meeting jointly with the Soviet Peace Fund and a number of American organizations, talked about the results of the symposium:

"Chief among them is the sincere conviction that the legal order of the world ocean must be based on the universal 1982 UN Convention on the Law of the Sea, in which not only Soviet and American scholars but colleagues from Great Britain, Canada, Federal Republic of Germany, Indonesia, Bulgaria, Poland, and New Zealand took part, they revealed their common aspiration that this document would be universally accepted by all governments. Our opinions relating to the initiative of M. S. Gorbachev, leading to the ensurance of peace and security on the seas and oceans, were met with understanding by foreign participants."

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